





THE CIVIL COURT MANUAL  
(IMPERIAL ACTS)



THE  
CIVIL COURT MANUAL  
(IMPERIAL ACTS)

[BROUGHT UP TO END OF MAY, 1946]

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## [VOLUME II]

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154. Conversion of private company into public company.

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APPENDIX II.

THE INDIAN COMPANIES ACT (VII OF 1913).<sup>1</sup>

[27th March, 1913.

*An Act to consolidate and amend the law relating to Trading Companies and other Associations.*

Whereas it is expedient to consolidate and amend the law relating to Trading Companies and other Associations;

It is hereby enacted as follows :—

## PART I.

## PRELIMINARY.

Short title, commencement and extent.

I. (1) This Act may be called THE INDIAN COMPANIES ACT, 1913.

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1912, Pt. V, p. 151; for Report of the Select Committee, see *ibid.*, 1913, Pt. V, p. 45; and for Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 586, and *ibid.*, 1913, Pt. VI, pp. 6, 106 and 300.

SEC. 1: APPLICATION OF ACT (see Ss. 250-252).—Act does not create new rights, but only regulates rights under the Common Law. 1928 M.W.N. 442=111 I.C. 225=1928 M. 571. Procedure prescribed in Act should be strictly followed. 6 P. 132=1927 P. 182. As Act is copied from the English Act, it should be given the same meaning as in the parent Act. 97 I.C. 783=1926 L. 624=8 L. 549. It is common knowledge that the company legislation in India has been based on English statutes. The Courts in India, are, therefore, bound to follow the principles the English Courts have laid down on the subject. 49 C.W.N. 502.

CONSTRUCTION.—English precedents and decisions must be given great respect and weight in construction of Act. 7 R. 514=1930 R. 20. Where a Life Insurance Company is registered under this Act it is subject to the provisions of this Act, although it may also be subjected to the Life Insurance Companies Act. 37 C.W.N. 1159=1934 C. 63.

ENGLISH LAW.—The Legislature has adopted the English Act as the model for drafting the Amending Act of 1936, and decisions of the Superior Courts or the provisions of the English Companies Act, though not binding decisions in Indian Courts, are yet decisions that demand great weight and respectful consideration in construing analogous provisions of the Indian Companies Act. 1930 Rang. 20=7 Rang. 514.

DECISIONS ON REPEALED PROVISIONS OF THE ACT, HOW FAR GUIDE IN CONSTRUCTION OF THE ACT.—The Indian Companies (Amendment) Act of 1936 effects large changes in the Law as it stood before the Amendment. A number of new sections are added, several sections have been wholly repealed. Numerous and important alterations have been made in the existing sections. To consider how far the provisions of and decisions under the older law would afford any guidance for the interpretation of the amended or consolidating Act, the rule laid down by Lord Herschell in *Bank of England v. Vagliano*, (1891) A.C. 107, 144, may well be followed. His Lordship speaking with reference to the Bills of Exchange Act, 1882, (which consolidated the law relating to bills of exchange), said: "I think the proper course is, in the first instance, to examine the language of the statute, and to ask, what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground." See also per Chitty, L.J. in *Thomas Conservators v. Smeed, Dean & Co.*, (1897) 2 Q.B. 334, 346 (C.A.).

Applying this principle to the amending Act of 1936, which has to a very great extent retained the wording of the earlier Act of 1913, it is obvious that there is and must be ample scope for reference to the deci-



- (2) It shall come into force on the first day of April, 1914; and  
 (3) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

Definitions. <sup>1</sup>[2. (1).] In this Act, unless there is anything repugnant in the subject or context,—

(1) “articles” means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in <sup>2</sup>Table B in the Schedule annexed to Act No. XIX of 1857 or in <sup>3</sup>Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act :

(2) “company” means a company formed and registered under this Act or an existing company :

(3) “the court” means the Court having jurisdiction under this Act.

(4) “debenture” includes debenture stock :

(5) “director” includes any person occupying the position of a director by whatever name called :

(6) “District Court” means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction :

(7) “existing company” means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :

(8) “Insurance company” means a company that carries on the business of insurance either solely or in common with any other business or businesses :

<sup>5</sup>[ (9) “manager” means a person who subject to the control and direction

#### LEG. REF.

<sup>1</sup> This section was re-numbered by S. 2 of Act XXII of 1936.

<sup>2</sup> See Appendix I, *infra*.

<sup>3</sup> See Appendix II, *infra*.

<sup>4</sup> Repealed by Act VI of 1883, which was in turn repealed by this Act.

<sup>5</sup> These clauses were substituted by S. 2 of Act XXII of 1936.

sions on those Acts, and the right thus to refer is well settled.

Thus in the *Mersey Dock case*, 11 H.L. 443, Blackburn, J., on p. 480, in delivering the opinion of the majority of the Judges, said:—“Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act, in *pari materia*, uses the same words, there is a presumption that the Legislature uses these words intending to express the meaning which it knew has been put upon the same words before; and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise.”

Hence it may be taken that in retaining the provisions of the earlier Companies Act, the Legislature has not disturbed the decided cases bearing on those provisions, and that those decided cases are still to be treated as relevant and available for the interpretation of the new Act, in so far as

any questions as to its meaning may arise in the future. It by no means follows, however, that the new Act is to be taken to adopt and affirm a construction erroneously placed on the former Acts. *Colonial Bank v. Whinney*, (1885) 30 Ch.D. 261, furnishes a good illustration.

The application of a decision may however be excluded by a change in the language of the new Act. *Thomas v. United Butter Cos. of France*, (1909) 2 Ch. 484.

PROCEDURE.—Where a special provision is made in a special statute, that special provision would exclude the operation of a general provision in the general law. 1943 Sind 89= I.L.R. (1942) Kar. 504.

SEC. 2, CL. (9): ‘MANAGER’—AMENDMENT BY ACT XXII OF 1936.—The reason for the amendment was stated as follows:—“The existence of many special provisions applying to managing agents (introduced by the Amending Act of 1936), renders it advisable that the terms ‘manager’ and ‘managing agents’ should be separately defined. We have evolved definitions intended to differentiate ‘managing agents’ from ‘managers,’ instead of merely including the former in the definition of the latter.” (See *Report of the Select Committee*, *Notes on Cl. 2.*)

Person who is not in charge of the entire business of company but who is entrusted with the business of a branch is not a manager. 47 P.B. 1917 (Cr.)=43 I.C. 791=19 Cr.L.J. 215.



of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not :

(9-A) "managing agent" means a person, firm, or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called :

*Explanation.*—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act.]

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act :

(11) "officer" includes any director, <sup>1</sup>[managing agent,] manager or secretary but, save in sections 235, 236 and 237, does not include an auditor :

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act, prescribed by the [Central Government] :

<sup>2</sup>[ (13) "private company" means a company which by its articles—

(a) restricts the right to transfer the shares, if any ; and

(b) limits the number of its members to fifty not including persons who are in the employment of the company ; and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member :]

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 2 of Act XXII of 1936.

<sup>2</sup> This clause was substituted, *ibid*.

SEC. 2, CL. (9-A): 'MANAGING AGENTS' AMENDMENT BY ACT XXII OF 1936.—As by the Amending Act a series of new sections dealing with managing agents has been added to the Act, it was thought necessary to define the 'term' separately with a view to differentiate the same from the term 'managers'. The idea that managing agents are to be under the control of the directors generally has been brought out specifically in this definition. Now, except to the extent to which the directors might themselves delegate their functions to the agents, the agents would be under their control and direction. (*See also* Notes under 'manager' *supra*).

SEC. 2, CL. (11).—As to the position of auditor, *see* 1929 A. 826=121 I.C. 693. Auditor's liability for deliberately passing over accounts. 1929 A. 826. Qualifications of an auditor. 140 I.C. 128. As to the position of a broker, *see* (1937) 2 M.L.J. 820=1938 M. 154=I.L.R. (1938) M. 192.

SEC. 2, CL. (13): AMENDMENT BY ACT XXII OF 1936.—The present definition has been substituted for the old one, following the definition contained in S. 26 of the English Act, with some slight alterations. In

respect of the alterations from the English Act effected by this definition the Select Committee states in its Report as follows:—"We consider it unnecessary to provide for the inclusion among the members of a private company of persons who have left the employment of the company, and consider that such a provision might enable the number of members to be undesirably enlarged. The other amendment takes into consideration the fact that some private companies have no share capital."

SEC. 2 (1) (13), (c).—Where it is found that certain prize bonds, issued by a private company and bearing the company's seal, contain an acknowledgment of a debt and a promise to return it, and form a series bearing consecutive numbers, and it is also clear that all the holders get an equal chance to partake in the annual distribution of prizes out of the net interest realised by the company, it must be held that such bonds are debentures within the meaning of S. 2 (1), (13) (c). The fact that the bonds are not styled debentures would not make them anything other than debentures. It is not necessary that the debentures should create a charge. A charge, though usual, is not an essential requisite of a debenture. There may be a mortgage debentures or a simple debenture which does not create any charge on the assets of the company. 47 Bom.L.R. 660.

<sup>1</sup>[ (13-A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act, repealed thereby, which is not a private company :]

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company <sup>2</sup>[but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed :]

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies : and

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied :

<sup>3</sup>[ (17) "trading corporation" means a trading corporation within the meaning of item 33 in List I in the Seventh Schedule to the Government of India Act, 1935.]

<sup>4</sup>[ (2) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company, or

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose on pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression "subsidiary company" in this Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company :

Provided that where a company the ordinary business of which includes the

#### LEG. REF.

<sup>1</sup> This clause was inserted by Act XXII of 1936.

<sup>2</sup> These words were added, *ibid.*

<sup>3</sup> This paragraph was inserted by A.O., 1937.

<sup>4</sup> This sub-section was added by S. 2 of Act XXII of 1936.

SEC. 2, CL. (13-A): "PUBLIC COMPANY".—This sub-section has been newly introduced by the Amending Act (1936). All associations which come under the definition of 'company' in this Act, and which are not 'private companies' as defined in this Act, are denoted by the term 'public company'.

SEC. 2, CL. (14): "PROSPECTUS".—The amendment of 1936 excludes from the scope of the term, any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed. This amendment was necessitated by the decision in 52 C. 440=29 C.W.N. 523=1925 C. 714, where a director was convicted for not filing with the Registrar a copy of an advertisement intimating that a prospectus has been issued and filed, and that shares could be had on the basis thereof. It was never the intention of the legislature to place such an advertisement in the same category as a 'pros-

pectus', and the same has been rendered clear in the amending Act, by specifically excepting such publications from the scope of the definition.

SEC. 2, CL. (16): "SHARE".—The word 'share' denotes a right to receive a certain proportion of the profits of a company and of the capital of the company when it is wound up, and the total amount of the shares constitutes the capital of the company. Unlike debentures, which do not constitute any part of the capital of the company, shares cannot be issued at a discount, except under the circumstances and conditions mentioned in S. 105-A of this Act. Shares may be of different classes, *viz.*, (i) Preference shares, (ii) Ordinary shares, and (iii) Deferred shares. (See Companies Act, M.L.J. Ed., pp. 9-10).

"STOCK".—"Stock" is the aggregate of fully paid-up shares legally consolidated and portions of which aggregate may be transferred and split up into fractions of any amount, without regard to the original amount of the shares. *Morris v. Aymer*, (1875) L.R. 7 H.L. 717.

"UNDERWRITE SHARE," MEANING OF.—36 L.W. 590=1932 P.C. 212=62 M.L.J. 533 (P.C.). As to the effect of informal transfer of shares, *see* 31 I.C. 365.

lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held.]

<sup>1</sup>[2-A. Notwithstanding anything in the last preceding section, a company which was immediately before the separation of Burma and Aden from India a company as defined by the said section, being a company the registered office whereof is in Burma or Aden,—

Provisions as to companies registered in Burma or Aden before separation from India.

(a) shall be deemed for the purposes of this Act to be a company registered and incorporated outside British India, and

(b) shall not, unless the subject matter or context so requires, be included in the expressions 'company,' 'existing company,' 'public company,' and 'private company':

Provided that—

(i) for the purposes of section 277 of this Act such a company shall, for a period of six months from the separation, be deemed to be a company incorporated and registered in British India;

(ii) the separation of Burma and Aden from India shall not render valid any mortgage or charge which, immediately before that date, was void against the liquidator or creditors of such a company.]

3. (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company, is situate:

Provided that the <sup>2</sup>[Central Government] may, by notification in the Official Gazette, and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

#### LEG. REF.

<sup>1</sup> This section was inserted by A.O., 1937.

<sup>2</sup> These words were substituted for the words "Local Government," *ibid.*

SEC. 3: INTERFERENCE BY COURT.—Court will not generally interfere with the internal management of the affairs of a company. If majority of the shareholders consider that a particular contract of employment should be terminated, Court would not as a rule consider the matter at the instance of the minority of the shareholders. 36 Bom.L.R. 907=1934 B. 427. Where an action is brought by shareholders, plaintiff should distinctly allege not only the illegality of the act complained of but also the impossibility of getting the company itself to impeach its validity. Mere irregularities committed by the directors cannot give a cause of action to shareholders, and they should appeal to the company. The supremacy of the majority of shareholders is subject, however to certain exceptions, *vis.*, (a) where the act complained of is *ultra vires* the company, (b) where the act is a *fraud* on the minority, and (c) where there

is absolute necessity to waive the rule in order that there may not be a denial of justice. 36 Bom.L.R. 483=151 I.C. 1082=1934 B. 243. *See also* 47 Bom.L.R. 916. Where the main point involved is the interpretation of a certain clause in the memorandum relating to the application of the assets of the company, it is not a matter of mere internal management. A single member can therefore maintain a suit against the company for a declaration as to the true construction of the article in question, and the company cannot be excused from being impleaded in such an action. 160 I.C. 24=1935 L. 792.

HIGH COURT.—The expression 'High Court' in this Act includes both the Original and the Appellate Sides of that Court. 29 C.W.N. 404=86 I.C. 910=1925 C. 606. Applications under this Act relating to companies doing business in the mufassil should be made to the Original Side of the High Court. 29 C.W.N. 404; 29 C.W.N. 403=86 I.C. 833=52 C. 586. As to applicability of High Court Fees Rules, *see* 57 L.W. 154=(1944) 1 M.L.J. 199.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

## PART II.

### CONSTITUTION AND INCORPORATION.

4. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other <sup>1</sup>[Indian law] or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other <sup>1</sup>[Indian law] or of Royal Charter or Letters Patent.

### LEG. REF.

<sup>1</sup> These words were substituted for the words "Act of the Governor-General in Council" by the A.O., 1937.

**DISTRICT JUDGE, JURISDICTION AND POWERS.**—The District Judge, empowered under this section, has jurisdiction to order payment of arrears of calls under S. 186, and to adjudicate on disputes under S. 216, in respect of companies situated within his jurisdiction, even if some of the contributories reside outside British India. 15 L. 302=147 I.C. 739=1934 L. 362. The District Court, while exercising jurisdiction under this Act is in the capacity only of a District Court and not of a High Court, and as such, it is subordinate and subject to the revisional jurisdiction of the High Court, under S. 115, C. P. Code. 57 A. 810=1935 A.L.J. 527=1935 A. 310.

The existing jurisdiction of the District Courts over cases which began before the commencement of the new Act of 1913 is preserved by S. 284. 20 P.R. 1915=29 I. C. 272.

**JURISDICTION, WHEN OBJECTED TO AT BEGINNING.**—S. 3 (3) has not the effect of validating proceedings taken in the District Court to enforce orders passed by the High Court of that Province, if the objection as to jurisdiction of the District Court was taken at the very commencement and at the proper time. 53 M. 147=1930 M. 74=57 M.L.J. 723; 6 P. 132=1927 P. 182.

**SEC. 4: COMPANIES AUTHORISED TO REGISTER.**—As to companies capable of being registered under this Act, see Part VIII, S. 253 of the Act.

**SEC. 4, CL. (2): APPLICABILITY.**—For S. 4 (2) of the Act to apply it is necessary that, (1) there should be either a company, association or partnership consisting of more than twenty persons; (2) such company, association or partnership must be formed for the purpose of carrying on business other than the business of bank-

ing; (3) that business must have for its object the acquisition of gain either to the company, association or partnership, or to the individual members thereof. 38 Bom. L.R. 408. See also (1942) 1 M.L.J. 280.

**ASSOCIATION OF PARTNERSHIP.**—An association contemplated by this section can only carry on business either by a trustee or by an agent or officers or directors. Where the business is carried by each of the members of a pool entirely in an independent manner, there is neither an association nor a partnership, notwithstanding that there is a provision for sharing the profits. Such an arrangement cannot be rendered illegal on the ground that it is not registered under the Companies Act. The members of the pool might constitute a trade association formed, no doubt, with the ultimate object of gain to the members; but it cannot be said to be an association formed for the purpose of carrying on business. 38 Bom.L.R. 408. There can be no partnership where there is no common business, common to all the members of an association or a so-called partnership. In the absence of community of business, a mere provision for sharing profits would not constitute a partnership. 38 Bom.L.R. 408.

**"PERSON".**—The term denotes generally individuals and does not include unregistered body of individuals. 50 M. 175=51 M. L.J. 667=1927 M. 123. See also 10 N.L.R. 98=26 I.C. 613. The word has not been defined in this Act. The question whether a syndicate of ten persons was really composed of more than 20 persons is a question of fact to be decided on the evidence and not on a mere allegation. 32 Bom.L.R. 389=126 I.C. 305=1930 B. 431. Where the total number of persons constituting a partnership of four unregistered firms, carrying on business, consisted of 22 persons, it was held that such a partnership was illegal. 34 C.W. N. 1107=59 M.L.J. 435=1930 P.C. 300 (P.C.); 10 N.L.R. 98=26 I.C. 613. Even in the case of joint Hindu families if the

various individual members of one or more of such joint families form an agreement of partnership among themselves, then each individual member must be reckoned 'a person' for the purposes of this section. But, if there has been no agreement of partnership but merely a family partnership created by the operation of law, so that the individual members are governed by the principles of the Hindu Law and not by the Contract Act, then the individual members are merely sub-partners in any agreement made on behalf of the family, and the joint family consisting of these persons should be reckoned as only one person for the purposes of this section. 30 N.L.R. 219=1934 N. 45; 46 A. 509=22 A.L.J. 487=1924 A. 414. See now new subsection (3) added by Act XXII of 1936. A trading association to be within S. 4, must be one formed on the basis of contract between its members. A joint family business concern, however, which by its nature descends from father to son, in which interests are acquired by the succeeding generations not by an act of party but by the law of inheritance, is not an association of persons in this sense, and does not, therefore, come within the scope of that section. 1939 O. 187=I.L.R. (1938) 2 Cal. 368. Share certificates are not negotiable instruments, so as to make the person in whose name they stand the sole owner of the shares; when the shares are held by a joint Hindu family, it cannot be said that the members other than the member in whose name they stand have no right or interest in them. 16 Mys. L.J. 115=43 Mys.H.C.R. 58. Sub-partners are not members of a firm or a company, and the existence of sub-partners would not affect the number of members of a firm for purposes of S. 4 of the Companies Act. 38 Bom.L.R. 486=1936 B. 246.

"BUSINESS", WHAT IS.—The word "business" is wider than the term "trade", and must be construed in a reasonable manner so as to effectuate the intention of the legislature. The words 'any other business' show that what is contemplated by the Act is something which must be business in the same sense in which banking is, although impliedly described as business. The test of business is continuity and repetition of acts. But whether a repetition of acts amounts to business or not must depend upon the nature of the acts; and the act itself, if done singly, must be such as to be called business. If the act when done singly cannot amount to business, then merely because twenty persons or more than twenty persons are repeating the same act, it can hardly be said that they are carrying on business. 38 Bom.L.R. 408.

"CARRYING ON BUSINESS".—The expression "carrying on business" is an elastic one and is not capable of being clearly defined. 18 B. 294=21 I.A. 13 (P.C.). This may

be said to exist only where there is a joint relation of persons for the common purpose of performing jointly a succession of acts, and not where the relation exists for the purpose which is to be completed by the performance of one act. (Halsbury, Vol. V, 101). In a case of a partnership agreement between a larger firm consisting of 16 persons and 3 other firms of 8 persons forming an association or syndicate for the purchase and sale of bales of yarn in different lots and for the division of the profits or losses arising out of the proceeds of such sales, it was held that it constituted a contract of *partnership business* consisting of more than 20 members and not merely a single venture, and that consequently it required registration under this section. 36 Bom.L.R. 786=152 I.C. 580=1934 B. 361.

But a pool arrangement formed between the owners of ginning factories of a particular place under which they agreed that each one of them should contribute his earning to the common pool for the purpose of stifling competition and distribute the same in certain shares among them, each member of the pool being allowed to carry on his business in an unrestricted manner and being responsible to the pool whether his constituent paid or not, is not an association formed for the purpose of carrying any business as contemplated by S. 4 of the Act. Such an arrangement is a mere scheme for collecting the earnings of all the members for the purpose of distribution among them. It is not an agreement of partnership, and even if it were held to be an association, does not fall within the prohibition of S. 4, even when the members of the pool number more than twenty. 38 Bom.L.R. 408. The term 'carrying on business' implies some continuous control of the business by the association. Where an agreement does not provide for any control by the association, as such, and all that it does is to impose certain restrictions on the business to be carried on by each partner in consideration of his getting a share in the profits and the agreement makes no provision for the sharing of losses the parties to it are in the relationship of debtor and creditor and do not come under this section. 16 L. 574=1934 L. 882; 65 I.C. 368=1922 N. 67.

Where an association was formed of 100 persons, and each member was to pay Rs. 10 as subscription, and the amount subscribed was to be paid to one of the members by drawing lots until all the members had their turn, and the association had to remain in existence for 100 months, it was held that it was doubtful whether such association required registration and whether a claim for refund of subscriptions would have been legally maintainable against the secretary and treasurer. 143 I.C. 530=1933 L. 121.

"TRADE ASSOCIATION".—A Trade Asso-

ciation cannot be said to be unlawful, merely because it has not been registered in conformity with the provisions of this Act. 53 A. 316=1931 A.L.J. 84=1931 A. 83.

**PARTNERSHIP.**—Creditors paid by share of profits having no right in the management and having no agreement *inter se* are not partners. 65 I.C. 368.

**FOREIGN CORPORATIONS.**—Foreign Corporations, though they have more than 20 members, do not come under this section, *Bateman v. Service*, (1881) 6 A.C. 386.

**"CHIT FUND"**.—A chit fund does not create any legal relation involving joint and mutual rights and obligations between the subscribers *inter se* but only as between the manager and the subscriber. In such a case, although the number of subscribers may be more than twenty in number, no registration is required for the chit fund under this section, and the manager can sue and be sued. 11 Bur.L.T. 255=50 I.C. 513; 20 M. 68=7 M.L.J. 26; 29 M. 477=16 M. L.J. 385. But if there is a joint relation between the subscribers giving rise to rights and obligations *inter se* among them, then it will fall under this section if there were more than 20 subscribers. 1 M.L.T. 106.

**COMPANY FORMED IN NATIVE STATE.**—NOT GOVERNED BY ACT.—Where a business is conducted in a Native State, and it is not shown that the company formed for the purpose of carrying on business would be illegal according to the law prevailing in that State, the company or the members forming it do not commit an illegal act. 53 B. 652=31 Bom.L.R. 1187=1930 B. 5.

**OBJECT, HOW DETERMINED.**—The object of the association is to be determined with reference to the primary and original object of the association, and no regard should be paid to the circumstances that may have developed later on. Hence, if a perfectly legal association has been formed, and if later on, some of the members of the association should commit a breach of trust, this fact would not render the original association an illegal one. 52 A. 325=1930 A.L.J. 337=1930 A. 186.

**"GAIN."**—The word "gain" does not mean an ultimate pecuniary gain by the company. It refers to all cases where the business started brings in profits. A company may be formed for several objects and if one of the objects be the acquisition of gain, the mere fact that the members of the company either singly or jointly, proposes to dispose of the gain on some charitable object, will not exclude the company from falling within the purview of this section. 52 A. 325=1930 A.L.J. 337=1930 A. 186; 10 R. 490=1932 R. 167. An unregistered society of 124 members was formed with the primary object of aiding the Chinese who may be indigent and under temporary financial embarrassments. Every earning member was required to pay a monthly subscription

of one rupee. Subsequently by a resolution of the Society, it was required that its members should pay one or more annas per day and form a fund out of which any Chinese person could get a loan at 2 per cent. per mensem in his difficulty, that such contribution was to continue for three years after which period the amount contributed was to be returned to the members, and the interest accrued thereon by lending was to be spent in charity. The object of this Society was held to amount to acquisition of gain by individual members thereof, and that it therefore fell under this section. 10 R. 490=140 I.C. 467=1932 R. 167. It is not necessary that the gain should be for the company. It is sufficient if the gain is intended for the individual members thereof. Mutual insurance companies, mutual loan societies and building societies fall under this section since the object of such societies is the acquisition of gain by the individual members thereof. *Re Padstow Total Loss and Collision Assurance Association*, (1882) 20 Ch.D. 137 C.A.; *Greenberg v. Cooperstein*, (1926) Ch. 657; *Re Ilfracombe Permanent Mutual Benefit Building Society*, (1901) 1 Ch. 102.

**"UNLESS IT IS REGISTERED AS A COMPANY UNDER THIS ACT"**.—EFFECT OF NON-REGISTRATION.—Where an association which is required to be registered under this section is not registered, it can have no legal recognition as a jural unit and it cannot sue or be sued as a corporate body nor can it enter into a contract as such. 53 A. 316=1931 A.L.J. 84=1931 A. 83; I.L.R. (1938) 2 Cal. 368. S. 4 on its true construction governs not only the first formation of the company, association or partnership, but also its continuance. An association formed for trading may be perfectly legal at its formation, if the original members be not more than ten in number, in the case of a banking business and twenty in other businesses, but if the number increases later on and exceeds the maximum allowable, the association becomes an illegal one, if no registration is effected. I.L.R. (1938) 2 Cal. 368. The members of a partnership or company or association hit by S. 4, can have beneficial interest in property. I.L.R. (1938) 2 Cal. 368. In order to constitute an association within the meaning of S. 4, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. (29 Mad. 477, Rel. on.). But where the object is to form a company it does not and there is no need to show the existence of a legal relation between the persons forming the company. Where a person starting an unregistered company for carrying on business having acquisition of gain as its object collects money from its subscribers who number more than twenty, then the moment money is collected the bargain is



<sup>1</sup>[(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

#### LEG. REF.

<sup>1</sup> These sub-sections were added by S. 3, Act (XXII of 1936).

clinched and turned into an actual contract by acceptance and the subscribers become shareholders as such because they must be deemed to have paid the money for the very object of the company and the mere fact that share certificates are not issued does not make them any less shareholders and hence the case comes under sub-S. (2) of S. 4. 40 Cr.L. J. 799=1939 Rang. 273.

**SUBSEQUENT REGISTRATION AND SUBSEQUENT REDUCTION OF MEMBERS.**—Where an association is illegal by reason of the fact that, though it consists of more than 20 members, it is not registered, its character of illegality cannot be cured by subsequent reduction in number. It retains that character until registration or dissolution. But subsequent registration may cure the previous omission to register. 7 R. 540=120 I.C. 902=1930 R. 21.

**SUIT BY OR AGAINST ILLEGAL COMPANY BY THIRD PARTIES.**—A suit by an association which is an illegal one by reason of the fact of non-registration, is not maintainable. See also 1931 All. 83; I.L.R. (1938) 2 Cal. 368. The illegality of a company affords no reason why it should not be sued. No doubt, it cannot be sued by a person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the Company. But the illegality of a company does not *per se* afford any answer to a demand against it arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the company is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he was dealing or illegally associated in company. 53 B. 652=31 Bom.L.R. 1187=1930 B. 5; 16 L. 574=1934 L. 882. Where a firm consisting of less than twenty partners is subsequently converted into a joint-stock company with additional partners so as to consist of more than twenty partners, it must be registered under the Companies Act; if it is not so registered, no suit can be maintained in

respect of that partnership. But when a person who was a partner in the firm and was, as such, entitled to a share of the profits when the membership of the firm was below twenty, is not allotted any share in the newly formed company, he being totally unaware of the increase in the members and of the conversion, he cannot be made to lose his right to a share of the profits because the number of partners had increased beyond twenty without his knowledge. A suit by him for a declaration that there has been a dissolution of the partnership, and for accounts cannot be dismissed on the ground of non-registration under S. 4 (2) of the Companies Act. 1937 M. W. N. 1189=1938 Mad. 151.

**RIGHTS OF SUBSCRIBERS TO AN ILLEGAL COMPANY.**—The subscribers to an illegal company, i.e., a company which should have been registered under S. 4 (2) of the Act and which has not been so registered, and formed for a lawful purpose are not entitled to claim an account of the dealings and transactions of the company and of the profits made thereby. But still, they have a right to have their subscriptions returned and can maintain a suit for enforcing the same. This right is not lost even though the monies subscribed have been laid out in the purchase of lands and other things for the purpose of the company. In such a case, the subscribers are entitled to have those lands and things reconverted into money and to have it applied as far as it would go in payment of the debts and liabilities of the company, and then in repayment of the subscriptions. In such cases no illegal contract is sought to be enforced, but on the contrary, the continuance of what is illegal is sought to be prevented. But where the *purpose* of the company itself is illegal or where any claim is made for sharing the profits of, or for partition of the existing assets of a company which is illegal for want of registration, no Court of law or equity will lend its assistance. 1930 R. 21=7 R. 540=120 I.C. 902. In the case of an unregistered association of more than 20 members, where a member sues for dissolution, for taking accounts and for partition, none of the reliefs could be granted, but he may be granted a declaration that the association is illegal. 48 A. 735=24 A.L.J. 777=1926 A. 591; 49 A. 318=25 A.L.J. 146=1927 A. 487; 92 I.C. 640=1926 N. 241.

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees.]

*Memorandum of Association.*

5. Any seven or more persons (or, where the company, to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

**UNREGISTERED COMPANY—CLAIM OF INCOME-TAX AGAINST.**—A company carrying on business without complying with the provisions of the law as to the mode of its constitution cannot plead its illegal constitution against a claim for income-tax made on it. The fact that in S. 3 of the Income-tax Act, the legislature drew a distinction between a company and a firm and other associations of individuals clearly shows that the provisions of the Companies Act do not prevent an association formed for the purpose of doing business from being made liable to income-tax on its profits even if it has not been registered in accordance with the law relating to the incorporation of companies. 32 P.L.R. 335=1931 L. 376.

**LIMITATION.**—Where an association consists of more than 20 persons but it is not registered, and the members bring a suit for the return of subscription money paid to the promoter after conversion of the property of the association into cash into which the said money was changed, such suit is governed by Art. 120 of the Limitation Act, and not by Art. 62. 7 R. 540=1930 R. 21. In a suit for declaration by the heirs of one of the members that the partnership was illegal under this section, and for the recovery of capital contributed by their ancestor, it was held that the cause of action accrued as soon as the money was paid and that there was no continuing cause of action in plaintiff's favour. 19 A.L.J. 836=64 I.C. 447.

**SEC. 4 (5).**—Where a company consisting of more than 20 persons formed in 1922-1923 is unregistered, the members thereof can be punished for continuing to be members of such company, under S. 4 (5) which was introduced by the Amending Act XXII of 1936, although they cannot be punished for originally forming themselves into such a company. 1942 Comp. C. 86=A. I. R. 1942 Mad. 283=(1942) 1 M.L.J. 230.

**SECS. 4 (5) AND 283.**—Offences under—Case sent up by Police after investigation—Jurisdiction of Magistrate. 1939 Rang. 273.

**SEC. 5: CONSTRUCTION OF MEMORANDUM.**—A memorandum of association, like any other document, must be read fairly and its import derived from a reasonable inter-

pretation of the language which it employs. There is no specially rigid canon of construction to be applied to it. The purpose of the memorandum is to enable shareholders, creditors and those who dealt with the company to know what its permitted range of enterprise is, and for this information they are entitled to rely on the constituent documents of the company. But the intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it, and not from the antecedent transactions of the company to which the shareholders, creditors and others have no access and which they have no means of knowing. 1931 A.L.J. 565=62 M. L. J. 163=1931 P.C. 182 (P.C.). Except in respect of matters as must, by statute, be provided for by the memorandum, it should be read in conjunction with the articles of the association; and, at all events, so far as may be necessary to explain any ambiguity appearing in the terms of memorandum or to supplement it upon any matter as to which it is silent. 38 L.W. 957=65 M. L. J. 785=1935 P.C. 89 (P.C.). The memorandum of association does not constitute a contract between the company and a third party who may be named therein. 36 Bom. L.R. 907=1934 B. 427.

**LAWFUL PURPOSE.**—If, as expressed on the face of the instrument of incorporation, the purpose for which the corporation is formed is not necessarily unlawful, it will be presumed that it was for a purpose for which companies might lawfully be formed. The formation of companies is not permitted where the real purpose of the incorporation is to cloak an illegal object or an unlawful business; but in such a case the fiction of the existence of a corporation or company will be disregarded by a Court of justice when the question arises in a proper proceeding, and the acts of the real parties will be dealt with as though no such corporation had been formed; and the same is true for stronger reasons where an illegal purpose is expressed in the articles. Where the proprietors of a zamindari who were numerous and whose interests were minute



(i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares) ; or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee) ; or

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

Memorandum of company limited by shares.

6. In the case of a company limited by shares—

(i) the memorandum shall state—

(i) the name of the company, with “ Limited ” as the last word in its name ;

(ii) the province in which the registered office of the company is to be situate ;

(iii) the objects of the company, <sup>1</sup>[and, except in the case of trading corporations, the territories to which they extend] ;

#### LEG. REF.

<sup>1</sup> These words were inserted by the A.O., 1937.

formed themselves into a company for the management of the property, and where the means adopted therefor were beneficial, it, was held that the purpose was not unlawful. 16 C.W.N. 297=13 I.C. 673.

“OTHERWISE”.—This word denotes that the signing by two persons in the case of private companies and of 7 persons in the case of other companies is as much a preliminary condition of registration as any other requirements of the Act. 16 C. W. N. 947=23 M. L. J. 215=39 I. A. 237 (P.O.).

“UNDERTAKE TO CONTRIBUTE TO THE ASSETS OF THE COMPANY.”—The undertaking in the memorandum limits the liability. *Re Bangor and North Wales, etc., Association*, (1899) 2 Ch. 593; *Pedlar v. Road Block Gold Mines*, (1905), 2 Ch. 427; *Re Kingsbury Collieries*, (1907) 2 Ch. 259.

“SEVEN OR MORE PERSONS”.—“ONE MAN COMPANY.”—The Act enacts nothing as to the extent or degree of interest, which may be held by each of the seven, or as to the proportion of interest or influence, possessed by one or the majority of the shareholders over others. It is not necessary that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, or that there should be anything like a balance of power in the constitution of the company. All the signatories may be the nominees of one person. A frequent practice is for an individual desiring to turn his business into a company having a limited liability to get a sufficient number of dummies—persons who are under his control and who

have no individual responsibility—to unite with him, and thus to furnish the requisite number of signatures to the instrument of association. It seems that such a concern is to be regarded as a company, and that a man may thus turn himself into a company, by committing a plain fraud on the law, so as to defeat his unsecured creditors. *Saloman v. Saloman and Co.*, (1897) A.C. 22=66 L.J. Ch. 25; *Commissioners of Inland Revenue v. Sanson*, (1921) 2 K.B. 429=90 L.J.K.B. 627; 51 B. 372=102 I.C. 49=1927 B. 371.

“PERSONS”.—“Persons” includes ‘company’. So one limited company may take shares in another. *Re Barneld’s Banking Co.*, (1867) L.R. 3 Ch. 105=37 O.L. Ch. 81; *Royal Bank of India’s case*, L.R. 4 Ch. 252. The term includes infant, *Re Nassau Phosphate Co.*, (1876) 2 Ch.D. 610=45 L. J. Ch. 584; *Re Lawton & Co.*, (1892) 3 Ch. 555=61 L.J. 667. As to incorporation of foreigners, see *Beuses (Princess of) v. Bos*, (1871) 5 H.L. 176=40 O.L.J. Ch. 655.

EFFECT OF ORDER TERMINATING EXISTENCE OF COMPANY.—Where a company has ceased to exist by an act of the country by whose acts and under whose laws it was made a juristic entity, it must be treated as non-existent by all Courts administering English law. 54 L.W. 610=196 I.C. 414=1941 P.C. 88 (P.O.).

SEC. 6.—Detailed powers are not required to be and ought not to be specified in the memorandum. In the case of a trading company, the memorandum should only define the trade and not the various acts which it should be within the power of the company to do in carrying on the trade. *Cotman v. Brougham*, (1918) A.O. 514. So, where the memorandum of a company stated it to be one of its objects that it should carry on the business of manufacturers of and dealers in salt, soda, soda, etc., and that it may do

- (iv) that the liability of the members is limited ;
- (v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount :
- (2) no subscriber of the memorandum shall take less than one share ;
- (3) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of company limited by guarantee.

7. In the case of a company limited by guarantee—

- (1) the memorandum shall state—
  - (i) the name of the company with “ Limited ” as the last word in its name ;
  - (ii) the province in which the registered office of the company is to be situate ;
  - (iii) the objects of the company, <sup>1</sup>[and, except in the case of trading corporations, the territories to which they extend] ;
  - (iv) that the liability of the members is limited ;
  - (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount :
- (2) if the company has a share capital—
  - (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount ;
  - (ii) no subscriber of the memorandum shall take less than one share ;
  - (iii) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of unlimited company.

8. In the case of an unlimited company—

- (1) the memorandum shall state—
  - (i) the name of the company ;
  - (ii) the province in which the registered office of the company is to be situate ;
  - (iii) the objects of the company, <sup>1</sup>[and, except in the case of trading corporations, the territories to which they extend] :
- (2) if the company has a share capital—
  - (i) no subscriber of the memorandum shall take less than one share ;

LEG. REF.

<sup>1</sup> These words were inserted by the A.O., 1937.

so in any part of the world, it was held, that the business included in ordinary mercantile parlance, the sale of salt to purchasers abroad, even without any express mention of exportation. 1931 A.L.J. 561=62 M.L.J. 163=1931 P.O. 182 (P.O.). Where among the objects for which a company was established, it was provided that it could “raise money, by the issue of shares, debentures, bonds and other securities and to invest monies so raised, or any part thereof, upon the investments specified in this memorandum,” a restrictive meaning, cannot be put upon the clause so as to make it read as if the company was restricted to be raising of debentures *only to invest* and not otherwise. The clause should be read as an enabling and not

a limiting clause; and the real meaning is that the company was empowered to raise money by issue of debentures, and that, if it so desired, to invest the money so raised or any part of it, i.e., the company has an option to invest the money so raised by debentures either wholly or in part or not at all. 57 C. 328=1930 C. 536. See also 160 I.C. 24=1935 L. 792. The alteration of the memorandum is not so easy as the alteration of the articles. Therefore the convenient statement in the memorandum with reference to the capital will be in the following terms: “The shares forming the capital (original or increased) of the company shall be divided into such classes, with such preferential and other rights, privilege and conditions; and shall be held in such terms as may be prescribed by the articles of association of the company for the time being.” 64 M.L.J. 277=1933 A.L.J. 405=(1933) P.O. 39 (P.O.).

(ii) each subscriber shall write opposite to his name the number of shares he takes.

Printing and signature of memorandum.

1[9. The memorandum shall—

- (a) be printed,
- (b) be divided into paragraphs numbered consecutively, and
- (c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature.]

Restriction on alteration of memorandum.

10. A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act :

<sup>1</sup>[Provided that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be such condition.]

11. (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the Course of being dissolved and signifies its consent in such manner as the registrar requires.

(2) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

<sup>2</sup>[(3) Except with the previous consent in writing of the Central Government, no company shall be registered by a name which—

#### LEG. REF.

1 This section was substituted by S. 4 of Act XXII of 1936.

2 This proviso was added by S. 5, *ibid.*

3 This sub-section was substituted by S. 6, *ibid.*

SEC. 10: "CONDITIONS".—The conditions referred to in this section are not confined to those which are essential to be stated in the memorandum under this Act. Even such conditions which are not required by this Act to be inserted in the memorandum, cannot be altered except in the cases and in the mode and to the extent for which express provision is made in the Act. *Ashbury v. Watson*, (1885) 30 Ch.D. 376 C.A. Where, however, when a clause in the memorandum only empowered the company to enter into a contract of agency with a particular firm, and did not form a vital part or condition of the constitution of the company, it was held that it did not come under the word "condition" within the meaning of this section. 59 B. 218=36 Bom.L.R. 907=156 I.C. 80=1934 B. 427. As to "conditions", see also 18 L.W. 804=1923 M.W.N. 568=74 I.C. 966. To vary the conditional rights and privileges given to various classes of shares by following strictly the procedure laid down in the articles and the memoran-

dum, does not amount to an alteration of the conditions contained in the memorandum; where one of the conditions in the memorandum itself is that the rights and privileges are subject to variation. To hold otherwise would be to ignore the condition in the memorandum providing for such terms. To determine the rights attaching to such particular class of shares, the memorandum must be read and given effect to as a whole, unless any particular provision of the same violates an express provision of the Act, in which case that particular provision will be treated as invalid. 57 A. 810=1935 A.L.J. 527=1935 A. 310. With reference to the circumstances under and the extent to which variation of shareholder's rights could be effected, provision has been made now in S. 66-A inserted by the Amending Act XXII of 1936.

SECS. 10 AND 12.—The appointment of a managing agent is merely a detail of management for the purpose of carrying on the business of the company, and a company is entitled to regulate that detail in such manner as it likes without going to a Court for its sanction. 45 Bom.L.R. 1075=A.I.R. 1944 Bom. 76.

SEC. 11.—The present sub-section (3) has been substituted in place of the previous one. The alterations made have been suggested by the wording of S. 17 of the English Act.

(a) contains any of the following words, namely, 'Crown,' 'Emperor,' 'Empire,' 'Empress,' 'Federal,' 'Imperial,' 'King,' 'Queen,' 'Royal,' 'State,' 'Reserve Bank,' 'Bank of Bengal,' 'Bank of Madras,' 'Bank of Bombay,' or any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; or

(b) contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter:

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.]

(4) Any company may, by special resolution and subject to the approval of the [Central Government] signified in writing, \* \* \* \* \*, change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate the change of name shall be complete.

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

12. (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup> The words "under the hand of one of the Secretaries to such Government" were omitted, *ibid.*

This amendment prohibits the use of some name, *vis.*, "Federal", "State" or any other word suggesting patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; and "Municipal" or "Chartered" or any other word which suggests or is calculated to suggest connection with any Municipality or local authority or with any society or body incorporated by Royal Charter.

SEC. 12: AMENDMENT BY ACT XXII OF 1936.—Two new clauses (f) and (g) have been added to sub-S. (1) of this section. In certain decisions it was doubted whether in the absence of express provision in the memorandum a company was competent to alter its objects so as to enable it to sell or dispose of the whole or any part of the undertaking of the company, or to amalgamate with any other company. Express provision for these purposes is contained in S. 5 of the English Act, and the same has been adopted by the present amendment.

SEC. 12, CL. 1: "OBJECTS OF THE COMPANY".—Revoking the appointment of an agent is not one relating to the objects of the company. 18 L.W. 304=1923 M.W.N. 562=74 I.C. 966. As to alteration of memo-

randum by addition of new clauses, *see* 52 C. 586; by changing place of registered office, *see* 96 I.C. 753=1926 A. 649; by modification of preferential rights, *see* 110 I.C. 649=30 Bom.L.R. 598. A general meeting is not a condition precedent to make a proposal to alter the memorandum or articles of a company. *See* 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80. It is not necessary for the company to take proceedings to alter the memorandum or articles, before the Court can sanction a scheme involving the alteration thereof. *See* 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80. A memorandum of association can be altered only by a special resolution of the company. 33 M. 36=1 I.C. 803. There is a very clear distinction between the relation of a shareholder to a company in regard to his shares and his rights against the company in regard to other contracts. Although the regulations contained in a company's Articles of Association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the Articles, and a company cannot break its contracts by altering its Articles. When dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his share, care must be taken not to assume that the contract involves as one of its terms an Article which is not to be altered. If the Court sees that a contract involves as one of its terms that an article is not to be altered, then the company is not at liberty

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum;

<sup>1</sup>[or

(f) to sell or dispose of the whole or any part of the undertaking of the company; or

(g) to amalgamate with any other company or body of persons.]

(2) The alterations shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

13. The Court may make an order confirming the alteration either wholly

Power of Court when confirming alteration.

or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

14. The Court shall, in exercising its discretion under sections 12 and 13,

Exercise of discretion by Court.

have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase.

15. (1) A certified copy of the order confirming the alteration, together with

Procedure on confirmation of the alteration. a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed, by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

#### LEG. REF.

<sup>1</sup> This word and cls. (f) and (g) were added by S. 7 of the Act XXII of 1936.

to alter that Article so as to break that contract. 43 Mys. H.C.R. 396=16 Mys.L.J. 448. The appointment of managing agent is only a detail of management of the business of the company. 45 Bom.L.R. 1075=1944 Bom. 76.

PRACTICE.—Application for alteration must be made on the original side of the High

Court, and not on the appellate side. 41 C.L.J. 191=29 O.W.N. 403.

SEC. 13: "Court's Powers".—The Court has power to confirm the resolution regarding the alteration of the memorandum of association, only where such alterations relate to matters referred to in sub-section (1) of this section. 18 L.W. 304=74 I.O. 966=1924 M. 126.

SEC. 14.—Court is not always bound to confirm alteration. 18 L.W. 304=74 I.O. 966.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper.

16. No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions

Effect of failure to register within three months.

of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void.

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

#### *Articles of Association.*

17. (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule, <sup>1</sup>[and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81 and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115 and 116 contained in that Table :

Provided that <sup>2</sup>[regulations 78, 79, 80, 81 and 82] shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company :

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.]

#### LEG. REF.

<sup>1</sup> These words and figures were added by S. 8 of Act XXII of 1936.

<sup>2</sup> These words and figures were substituted for the word and figure "regulation 78" by S. 2 of Act II of 1938.

SEC. 17: AMENDMENT BY ACT XXII OF 1936.—This amendment has substituted the present sub-section for the old one. Previously it was left to the option of the companies to adopt or not all or any of the provisions of the regulations contained in Table A of I Schedule of the Act. It was thought desirable to make generally applicable certain provisions usually made by the articles of properly managed companies as to polls, absence of restrictions on form of

proxies, retirement of directors by rotation, inspection of accounts, details shown in profit and loss accounts restriction as to the amount of dividend that may be declared by the company, and the giving of notice to members. This amendment makes the adoption of the model regulations on these subjects contained in Table A compulsory. See however, 49 C.W.N. 502.

SEC. 17, CL. (2): "DIRECTOR'S LIABILITY".—It was held in 154 I.C. 33=1934 A. 855 that there was nothing in the Act to prevent such a clause being inserted in the articles of association as would seriously limit the liability of a director or officer of the company. But it may no longer be possible in view of S. 86-C which has been introduced by the amending Act of 1936.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

18. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A, in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Form and signature of articles.

19. Articles shall—

(a) be printed ;  
 (b) be divided into paragraphs numbered consecutively ; and  
 (c) be signed by each subscriber of the memorandum <sup>1</sup> [ (who shall add his address and description) ] of association in the presence of at least one witness who must attest the signature.

20. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and <sup>2</sup>Act No. VII of 1860 or either of them extend to altering any provisions in Table B<sup>3</sup> annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

#### LEG. REF.

<sup>1</sup> These brackets and words were inserted by S. 9 of Act XXII of 1936.

<sup>2</sup> This Act was repealed by Act X of 1866, which again was repealed by Act VI of 1882, which was also repealed by this Act.

<sup>3</sup> For Table B of Act XIX of 1857, see Appendix I to this Act.

SEC. 19: AMENDMENT BY ACT XXII OF 1936.—In cl. (c) after the word 'memorandum' the words "who shall add his address and description", have been added by the amendment. This amendment merely provides for what is generally done in practice. A similar addition has been made in S. 9 by the Amending Act (1936).

Sec. 20.—It is not for the Court to decide whether the alteration or addition is for the benefit of the company as a whole but it is to be determined by the shareholders acting *bona fide*. *Shuttleworth v. Cox Brothers*, (1927) 2 K.B. 9. As to what amounts to alteration of articles, see 1930 A. 661. Necessity for special Resolution for alteration. 13 M. 36. See also 52 C. 239. Alteration of terms of debentures.

1927 P.O. 62=101 I.C. 897. Alteration of director's qualifications. 105 I.C. 541=1927 B. 609=29 Bom.L.R. 1362. An Association which is registered as a company under the Companies Act has power to alter then articles of association in good faith for the benefit of the association as a whole. I.L.R. (1945) Nag. 599=1945 N.L.J. 249=1945 Nag. 187. An article of association of a company provided that until otherwise determined by a general meeting the number of directors should be not less than three or more than seven. *Held*, that a resolution at a general meeting that the number of directors should be increased to more than seven was valid and no special resolution was necessary. 190 I.C. 551=1940 Sind 87. Where a company amends the articles of association under S. 20 by a special resolution without mentioning in the notice under S. 81 that the question of amendment of articles was to come up for decision in the meeting, the irregularity is fatal to the proceedings and makes the amendment invalid *and ultra vires*. 190 I.C. 819=1940 Lah. 243. There is nothing in the Companies Act which requires that articles of association must be rigid and may not in themselves provide for varying



<sup>1</sup>[20A. Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company :

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby.]

*General Provisions.*

21. (1) The memorandum and articles shall, when registered, bind the com-

**LEG. REF.**

<sup>1</sup> This section was inserted by S. 10 of Act XXII of 1936.

sets of circumstances. 190 I.C. 551=1940 Sind 87. Where the passing of the Insurance Act of 1938 necessitated the amendment of the Articles of such an Association, and the Association at the meetings of their members passed resolutions making the necessary amendments, such amendments are binding upon their members who had notice of the meetings and who have nothing to say against the regularity of the resolution passed. I.L.R. (1945) Nag. 599=(1945) Comp.C. 142=1945 N. L. J. 249=A.I.R. 1945 Nag. 187.

**SECS. 20 AND 20-A: ALTERATION OF ARTICLES—LIABILITY OF MEMBER—LIMITS.**—S. 20 of the Companies Act empowers a company to alter or add to its articles, and when altered the new article is as valid as if it had found place in the original article. S. 20-A of the Act, in so far as it provides that a member is not bound by an alteration made in the articles after the date on which he became a member unless he has agreed in writing to be bound thereby, is limited to two things, (1) where the alteration requires him to take or subscribe for more shares than the number held by him at the date of the alteration, and (2) where it increases his liability to contribute to the share capital of, or otherwise to pay money to, the company. 1946 N.L.J. 128.

**SECS. 20 AND 21:** Art. 109 of the articles of association of a company provided that the number of directors shall be not less than three nor more than four. There was no qualifying words like "until otherwise determined by a general meeting." Art. 126 provided that the company in a general meeting may, from time to time, increase or reduce the number of directors. A question arose as to the power of the company to increase the number beyond the permitted maximum by an ordinary resolution. *Held*, Per *Derbyshire, C.J.*—The two articles in question must be read together, and they must be read and operated in such a way as not to contravene the provisions of S. 20 of the Companies Act. Reading the two articles together the company may in general meeting

from time to time increase the number of its directors from three to four or reduce the number of its directors from four to three by an ordinary resolution. But if it is desired to increase the number of directors beyond four then that is an alteration of the articles and must be done by a special resolution. An ordinary resolution increasing the number of directors beyond four is contrary to the provisions of Ss. 20 and 21 of the Companies Act and therefore is invalid.

Per *Gentle, J.*:—Art. 126 does not relate to an increase in the maximum number of directors but to an increase in the actual number within the permitted maximum and that article has not to be read with Art. 109. Assuming the words in Art. 126 are read with those in Art. 109, they do not empower the company to alter the maximum number of directors by an ordinary resolution, but a special resolution, pursuant to S. 20 (1) of the Companies Act, is required for that purpose. 50 O.W.N. 310.

**SEC. 20-A: AMENDMENT BY ACT XXII OF 1936.**—This section has been newly inserted by the amending Act. This section limits, on the lines of S. 22 of the English Act, the liability of a member of a company under alterations made in the memorandum after he has become a member of the company. This is a salutary provision meant for the protection of the minority against the oppression by the majority. Alteration in the Articles effected after the resolution of expulsion of a member could not in any way be binding upon him if notice of the meeting at which the alteration was made was withheld from him. 52 L. W. 741=1941 Mad. 354=(1940) 2 M.L.J. 721. Unless a construction of the articles of a company leads to the conclusion that there was an intention to supersede the ordinary rule, it must be held that, where no quorum has in fact been fixed, the acts of a major part of the Directors for the time being are valid. 1942 Comp. C. 10=44 P.L.R. 15=A.I.R. 1942 Lah. 68=I.L.R. (1943) Lah. 123.

**SEC. 21, CL. (1): ARTICLES ARE CONTRACTS.**—Although the articles of association can neither constitute a contract between the company and an outsider, nor give any individual member special contractual rights



Effect of memorandum and articles. pany and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum, and of the articles, subject to the provisions of this Act.

beyond those of the members generally, yet they do in fact constitute a contract between the company and its members in respect of their ordinary rights as members. 52 B. 477=30 Bom.L.R. 549=1928 B. 252. See I. L.R. (1943) Lah. 28. According to S. 21, the articles of association are binding on the company as well as on the members thereof. The articles constitute a contract *inter se* amongst the shareholders and where the articles have been acted upon by the company and the members, the articles constitute an implied contract between the members and the company. Therefore, where in pursuance of certain articles acted upon by the company, a member was appointed Managing Director of the Bank and acted for eleven years in that capacity, the articles constitute an implied contract between the member and the company; a suit for performance of which lies in a Civil Court. 190 I.C. 819=1940 Lah. 243. See also 1942 Cal. 47=199 I.C. 667.

*Per Gentile, J.*—The articles of association of a company constitute a contract between each member with the other members to observe the provisions in the articles. It follows that when some members of a company, it may be the majority of members, do not carry out the terms of that agreement, which each has made with all other members, to observe and carry out of the provisions in the articles but they act contrary to the articles, one or more of the other members has or have the right to come to the Court and ask for the agreement to be enforced against those members who have violated their obligations. In a suit by the minority shareholders concerning the affairs of the company, the company properly can, and indeed should, be a plaintiff. 50 C. W. N. 310. Though the memorandum and articles of association of a company do not constitute a contract, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association. 43 P.L.R. 619=1941 Com.C. 301. Where the articles of association required that the Board of managing directors should consist of a certain number, but as a matter of fact a lesser number only is appointed, they are not entitled to exercise the functions of the Board of managing directors and any resolutions passed by them are not valid. 1939 A.L.J. 950=1939 All. 739. A contractual right of inspection does not of itself imply a right to take copies any more than a statutory right would do. In the case of a statutory right of inspection the Court will not imply a right to take copies unless the statutory right would otherwise be of no avail, or practically useless. The Court is

bound by a stricter rule when a question of implying a term in a contract arises than in the case of a statute. S. 21 of the Companies Act merely converts the Articles of Association into a contract between the company and its members. If the Articles give to its members a right to inspect the minutes and there is nothing to show that the intention was to give a right to take copies of the minutes, the Articles must be construed to mean that the members, though given a right to inspect the minutes, could only take copies of them if that were permissible under their common law rights. If the interests of members are sufficiently protected by the common law, there is no necessity for implying any greater rights in their contract. The members are not entitled under their common law right to take copies of the minutes if their interest is not different from that of their fellow members, and if they have no special object of their own. 42 C.W.N. 161=1938 Cal. 89. Where one of the Articles of Association of a banking company provides that the office of a director shall be vacated. "If he resigns or for any other reason becomes incapable of acting as a director," it cannot be held that, under that clause, default by him in repaying a loan to the bank and indebtedness to the bank incapacitates him from acting as a director. Loans to directors of a bank are contemplated as part of its business and therefore default in repayment of a loan cannot be a disqualification. There must be some incapacity such as illness, long absence, imprisonment or insanity, etc. *Albuquerque v. Catholic Bank, Ltd., Mangalore*. 1942 Com.C. 213=A.I. R. 1942 Mad. 737 (1)=55 L.W. 532 (1)=(1942) 2 M.L.J. 307=I.L.R. (1943) Mad. 291. The respondent which was a shipping company incorporated under the Indian Companies Act had as its objects, "to acquire and deal with the following property, the business property and liabilities of any company, firm, etc., lands, buildings, etc., plant, machinery, personal estates and effects, . . . and to perform or do all or any of the following operations, acts or things . . . . The company out of its funds laid out 25 lacs of rupees in the purchase of bullion and deposited it at a bank for safe custody. In a suit for a declaration that the transaction was *ultra vires* and illegal and void in law.

*Held*, that the transaction was not *ultra vires*, but within the powers of the company and covered by the memorandum of association, as it amounted to acquisition of "personal estate and effects," which were comprehensive words.

*Per Kania, J. (Stone, C.J., contra).*—That the word "invest" in the memorandum

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

22. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the

Registration of memorandum  
and articles.

company is stated by the memorandum to be situate and he shall retain and register them.

of association was wide enough to cover the transaction in question. I.L.R. (1944) Bom. 247=46 Bom.L.R. 145=A.I.R. 1944 Bom. 131. One of the articles of association of a company provided that "the shares shall be under the control of the directors who may allot or otherwise dispose of the same only among existing members but shall not, without the consent of the company in general meeting, allot or otherwise dispose of them to outsiders." Two persons applied for shares in the company which then consisted of only six members all of whom were directors. Each of them was allotted two shares at a meeting of five out of the six directors of the company. Their names were duly entered in the register of members. About 8 months later, the directors resolved to cancel the allotments on the ground that the allotments were invalid for want of consent of the company in general meeting as required by the Articles of Association, and removed the names of the two newly added members from the register of members. In an application by those members to rectify the register by re-inserting their names *Held*, that the allotments must, under the circumstances, be regarded as valid and binding on the company. The applicants for shares, though deemed to have contracted on the footing of the Articles of Association, could not be held bound to inquire into the regularity of the internal management or the "indoor management", and they were entitled to assume that the sanction of the company in general meeting as required by the Articles of Association had, in fact, been obtained. As they were persons who had agreed to become members of the company under S. 30 of the Act, the addition of their names to the register of members constituted them members and their names could not be removed except by rectification of the register as required by law. I.L.R. (1945) Mad. 728=58 L.W. 578=1945 Comp.C. 148=(1945) 2 M.L.J. 432. Where a shareholder of an Insurance Company is also a policy-holder, his rights and liabilities as a shareholder are quite separate and distinct from those which accrue to him in his capacity as a policy-holder. The first are governed by the Company's articles of association, the application for allotment, the share certificate and so forth, and the second, by the insurance policy. So far as the insurance aspect of the shareholder's rights are concerned, one cannot travel beyond the terms of the policy. Similarly the policy is irrelevant when considering his position as a shareholder in the company except in so far as it may be

permissible to look to it for the purpose of resolving ambiguities, if any, in the prospectus, articles or share certificate. 1946 N.L.J. 128.

SEC. 21, CL. (2): "DEBT DUE".—A person owing money to a registered company, when he becomes a shareholder and bound by the articles of association, becomes also bound by the provision (if it exists) in the articles by which any debt due by the shareholder to the company is made a first charge on the share. 7 L.W. 114=43 I.C. 508. The liability of the shareholders in respect of the balance due on their shares is undoubtedly a debt due from them to the company; and this liability commences from the time when they first take up their shares. But this liability is not enforceable against the shareholders until a valid call has been made in accordance with the provisions of the articles of association and of the Act. 59 C. 1186=36 C.W.N. 589=1932 C. 716. The mere passing of a resolution by the directors cannot be regarded as a valid call, and service of notice is necessary for its validity unless dispensed with by the articles. So, in the absence of a valid call, the mortgagee purchaser of the rights of a company cannot enforce by suit the liability of the shareholders for the unpaid portion of their shares and a mere demand by him after his auction-purchase cannot take the place of a valid call. 59 C. 1186. Though money becomes a debt when it is due under the articles of association and memorandum, it does not become due simply because the signatories to the articles and memorandum of association have undertaken to purchase certain number of shares and pay for them. It is only money which is presently due that can be described as a debt. 1939 A.L.J. 950=1939 All. 739.

STATUTORY RIGHT OF AMALGAMATION.—See 26 Bom.L.R. 987=90 I.C. 580=1925 B. 49.

SEC. 22.—The discretion of Registrar can be exercised even in the matter of the registration of special and extraordinary resolutions under S. 82 of the Act, altering articles of association. 36 L.W. 942=63 M. L.J. 917=1933 M. 129. All persons dealing with the company must take the articles of association to be such as appear at the office of the Registrar of Companies, to be in force. 45 C.L.J. 96=100 I.C. 575=1927 C. 299. So, if the directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution, for such a resolution, if passed, would be registered. 1927 C. 299.

23. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

24. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

25. (1) Every company shall send to every member, <sup>1</sup>[at his request and within fourteen days thereof] on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "at his request, and" by S. 11 of Act XXII of 1936.

SEC. 23: REGISTRATION.—As to discretion of registrar, see 63 M.L.J. 917 (*Illegal articles*).

EFFECT OF REGISTRATION.—A registered corporate body is a legal entity distinct from its members. A 'firm' though it can sue and be sued is not such a legal entity. 33 Bom.L.R. 111=130 I.C. 598=1931 B. 178. Where a duty is imposed upon a company in such a way that a breach thereof amounts to a disobedience of the law, then, where there is nothing in the statute expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company. 11 R. 162=145 I.C. 710=1933 R. 70. Where a company is convicted under the Companies Act, an appeal against the conviction should be preferred by the company through a properly authorized agent. An individual such as a managing director of the company cannot as such file the appeal. 37 C.W.N. 1159=147 I.C. 848=1934 C. 63. Effect of registration on persons dealing with the company. See 45 C.L.J. 96=100 I.C. 875.

LIABILITY OF MEMBERS FOR COMPANY'S DEBTS.—The effect of incorporation of an association is to make that body corporate a separate legal entity or "*persona*" and if a man trusts a corporation, he trusts that legal *persona* and must look to its assets for pay-

ment. He can call on individual members to contribute *only in cases where the Charter or Act has so provided*. Neither under this Act nor under the Co-operative Societies Act is there any statutory provision which in any way entitles the creditor of a company to proceed direct against a member for the debts of the society, whether the society is of limited or unlimited liability. The question of the liability of the company being limited or unlimited can only affect the members when they come to contribute to the liabilities of the society in the winding up. Not until there is a winding up can the creditor come face to face with the individual member. 11 P. 174=12 Pat.L.T. 619=1931 P. 321 (F.B.).

SEC. 24: "CONCLUSIVE EVIDENCE".—A certificate of incorporation is conclusive as to the fact of incorporation and as to the observance of all the previous requisites of the Act in respect of signing, registration, etc. 40 C. 1=16 O.W.N. 937=39 I.A. 237=23 M.L.J. 215 (P.C.). And no evidence to the contrary is admissible. 26 A.L.J. 347=108 I.C. 451. Under S. 30, a person shall be deemed to have agreed to become a member of the company on his subscribing to the memorandum, and on its registration is properly entered as a member. He cannot plead that he subscribed to the memorandum subject to any reservation. (*Ibid.*).

SEC. 25: AMENDMENT BY ACT XXII OF 1936.—In sub-section (1), the words "*and within 14 days thereof*" have been added

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees.

Alteration of memorandum or articles to be noted in every copy. <sup>1</sup>[25 A. (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.]

*Associations not for Profit.*

26. (1) Where it is proved to the satisfaction of the <sup>2</sup>[Central Government] that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, <sup>3</sup>[religion], charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the <sup>2</sup>[Central Government] may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the <sup>2</sup>[Central Government] under this section may be granted on such conditions and subject to such regulations as the <sup>2</sup>[Central Government] thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the <sup>2</sup>[Central Government] so directs be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, <sup>4</sup>[and of sending lists of members to the registrar.]

(4) A license under this section may at any time be revoked by the <sup>2</sup>[Central Government], and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section :

Provided that, before a license is so revoked, the <sup>2</sup>[Central Government]

**LEG. REF.**

<sup>1</sup> This section was inserted by S. 12 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>3</sup> This word was inserted by S. 2 of Act XXXIII of 1926.

<sup>4</sup> These words were substituted for the words "and of filing lists of members and directors and managers with the registrar" by S. 13 of Act XXII of 1936.

with a view to provide for a time limit for compliance with the request. A power to regulate a right cannot be used to abrogate it. If a member has under the Articles of Association a contractual right of inspection of the minutes of the committee of the association, the right cannot be reduced by the power given under the Articles to the committee to make rules, into a mere right to claim inspection subject to the committee's approval. No matter how limited the grounds for refusing inspection might be, making the right of inspection a matter of discretion of the committee, fundamentally

alters the Articles for, a contractual right of inspection, just as a statutory right of inspection, can be exercised whatever the motive or interest of the member may be. 42 O.W.N. 161—1938 Cal. 89. See also 1936 A.L.J. 748.

SEC. 25-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly added; and it makes it obligatory for all companies to keep the memorandum and articles up to date by inserting therein all alterations which may be made from time to time. This follows S. 24 of the English Act. Similar provision was contained in sub-sections (3) and (4) of S. 50, and sub-sections (2) and (3) of S. 71 of this Act, and consequent on the insertion of this S. 25-A, here, those sub-sections have been repealed by this Amending Act. The insertion of the words "*knowingly and wilfully*" has been made to ensure that an unintentional default is not to be penalised.

SEC. 26: AMENDMENT BY ACT XXII OF 1936.—The words in brackets have been substituted for the words "and of filing lists of members and directors and managers with

shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

*Companies limited by guarantee.*

27. (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

### PART III.

#### SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS.

*Distribution of share Capital.*

28. (1) The shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

the Registrar", by the amendment. This amendment follows S. 18 of the English Act.

SEC. 28: ALLOTMENT OF SHARES.—If a Secretary of a company makes fraudulent misrepresentations to induce persons to take shares in the company, the company would not be bound by them. The Secretary could not validly agree to any terms which were not contemplated by the Articles of Association or ran counter to them. 39 P.L.R. 293. A person who subscribes for shares in the memorandum of association of a company must, by S. 30 (1), be deemed to have agreed to become a member of the company, and on registration his name must be entered as a member in the register of members. But an express allotment of shares is necessary in order to give rise to a liability to pay up the value of the shares. The fact that the prospectus published and issued contains a statement that a certain number of shares of certain value have been subscribed for by the signatories to the memorandum is not sufficient to show that there was any "allotment" of shares, where there is no record in the Minutes Book of the Board of Directors of any resolution allotting shares. 49 L.W. 537=1939 Mad. 498=(1939) 1 M.L.J. 534. Where after an application is made for shares in a company and before the date of the allotment, the prospectus of the company is changed in material particulars, an applicant for shares is entitled to revoke his application. 1942 M.W.N. 475=55 L.W. 521=1942 Mad. 656=(1942)

2 M.L.J. 228=I.L.R. (1943) Mad. 133.

TRANSFER OF SHARE HOW MADE.—[See S. 34 *infra*.] Where the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Act and the Articles of Association may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance, and the transaction evidenced by the transfer can be regarded as an agreement to convey, capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then the transfer is inchoate and the transferee cannot claim priority over a Court auction-purchaser of the shares. 45 M. 537=42 M.L.J. 449=1923 M. 241. But *see contra* 31 B. 76. A share cannot be transferred without the sanction of the company. 101 I.C. 568=1927 L. 797. Until the name of the transferee is entered in the company's register, the transfer is incomplete, and such a transfer does not operate as a declaration of trust. 48 C. 986=66 I.C. 586. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books, and that the company could refuse to register a transfer without assigning reasons is one intended for the protection of the company, and it does not prevent the passing of title as between the transferor, and the transferee. 1924 L. 173=

29. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified.

30. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

71 I.C. 814. So far as the parties to the transfer are concerned, the transfer is complete on the day the deed is signed by both the parties. 1924 L. 173.

'RESTRICTION ON TRANSFER'.—Shares are *prima facie* transferable. While there is no bar which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to, a restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. 30 Bom.L.R. 1329 = 111 I.C. 337 = 1928 P.C. 291 (P.C.).

COURT SALE OF SHARES.—Directors of a company in a *bona fide* discretion vested in them under the Act and the Articles of Association can refuse to recognise the purchaser of the shares of the company in a Court auction, as a shareholder of the company. 45 M. 537 = 42 M.L.J. 449 = 1923 M. 241.

TRANSFER WHEN COMPLETE.—See 71 I.C. 814; 48 O. 986; 45 M. 537; 115 I.C. 616; 28 L.W. 932 = 1928 M. 571 (Execution sale). In the absence of anything in the Articles of Association forbidding the same, a sale by Court of shares held by a member has the effect of transferring the shares to the purchaser. If it is contended that on a sale by the Court the shares do not pass to the purchaser, the burden is on those who put forward such contention to establish the same by reference to some provision in the Memorandum of Articles of Association. 28 L.W. 932 = 1928 M. 571.

NECESSITY FOR REGISTRATION.—To say that the registration of the transferee's name is not a part of the contract between the transferor and the transferee, is not the same thing as saying that the sale can take place even without registration. 50 A. 695 = 26 A.L.J. 627 = 1928 A. 481.

SANCTION OF THE COMPANY.—1927 L. 797 = 101 I.C. 568. Agreement not to pay cash for shares. 201 P.L.R. 1914 = 25 I.C. 672. See also 36 B. 577; agreement to purchase shares on condition that shareholder need not pay unless the company made a profit. See 39 B. 557.

SEC. 30: MEMBERSHIP, WHEN ARISES.—A distinction is made by the section between the subscribers to the memorandum of the company, and persons who afterwards agree to become members. In the case of the former, by the mere fact of subscription to the memorandum, he becomes a member and as

soon as the company is incorporated by the Registrar an irrevocable agreement is created for him to take from the company the number of shares placed against his signature. 55 A. 417 = 1933 A.L.J. 238 = 1933 A. 344. See also 35 A. 538 = 21 I.C. 915. His name is to be automatically entered in the Register of members. His membership does not depend on his name being entered in the Register nor upon the allotment of any shares to him. 48 A. 580 = 95 I.C. 927 = 1926 A. 550. See also 1939 Mad. 498 = 49 L.W. 537 = (1939) 1 M.J.J. 534. Cited under S. 28 *supra*. Nor does the fact that he was not allotted any shares or that he has ceased to be treated as a member for a long time relieve him from his liability as member. 149 I.C. 869 = 1934 S. 39. See also (1945) 2 M.L.J. 432 = 58 L.W. 578.

AGREEMENT IMPLIED BY CONDUCT.—Where a person has been given shares, or shares have been transferred to him as qualification for a directorship, such a transfer makes the transferee a member of the company. And if such person holds out that he is a shareholder and member of the company, he is estopped from denying that he is a member or a shareholder, where the company goes into liquidation, on the ground that the transfer was a mere colourable transaction. 1936 L. 480.

SUITS BY MEMBERS.—The Court has jurisdiction to entertain a suit by shareholders in respect of an infringement of their individual rights as shareholders when the interests of justice so require. A single shareholder can maintain a suit regarding enforcement of his right to vote. 61 M.L.J. 724 = 34 L.W. 746 = 1932 M. 100. But where a shareholder brought a suit for a declaration that certain shares issued and allotted to others were void and hence they were not competent to act as shareholders, it was held that the suit was not maintainable under S. 42 of the Specific Relief Act. 36 O.W.N. 638 = 1932 O. 714.

'MINOR MEMBERS'.—There is nothing in this Act to prevent a minor from taking shares in a limited company. An agreement by him to take shares, is no doubt voidable at his choice when he attains majority. But a shareholder who was a minor at the time of allotment and who on attaining majority received dividends and raised no objection to his name being included in the Register of members is estopped from denying as between himself and the company's representative that he is a shareholder. 39 B. 331 = 27 I.C. 335 = 16 Bom.L.R. 730. Ss. 30



(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

Register of members.

31. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars :—

(i) the names and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member ;

(ii) the date at which each person was entered in the register as a member ;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

<sup>1</sup>[31-A. (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

(2) The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(3) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.]

32. (1) Every company having a share capital shall <sup>2</sup>[within eighteen months

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 14 of Act XXII of 1936.

<sup>2</sup> These words were inserted by S. 15, *ibid.*

and 184—Signatories to memorandum of association—Liability to be included in list of contributories—Actual entry in register of shares or actual allotment of shares not condition precedent. 32 S.L.R. 167=1938 Sind 187.

SEC. 30 (2): SCOPE—NON-COMPLIANCE—EFFECT OF.—Per Trial Judge, *Rupchand, A. J. C.*—S. 30 (2) merely lays down a rule of procedure and does not purport to declare that a failure to comply with its provisions shall relieve a signatory to the memorandum of association of his liability to pay for his shares, which according to S. 30 (1) he is deemed to have agreed to have purchased and to pay for. A director is bound to see if the allotment of shares is made. He cannot avoid his liability to pay for the shares by pleading his own default or negligence in making the allotment of shares to himself. 32 S.L.R. 167=1938 Sind 187.

SEC. 31: REGISTER OF MEMBERS—LOCALITY OF SHARES.—When transfer of shares in a company must be effected by a change in the register, the place where the register is to be kept according to law determines the locality of the shares. 59 M.L.J. 214=1930

#### P.C. 10 (P.C.).

ALLOTMENT OF SHARES—WHEN CONTRACT IS CONCLUDED.—It is not correct to state that there can be no concluded contract until after allotment in fact. There may be a valid executory contract for the allotment of shares constituted by offer and communicated acceptance before allotment is made. If, however, the only facts are that there is application for shares to a company and nothing further is done by the company but allotment, there is no concluded contract until the allotment is communicated to the applicant. 34 C.W. N. 865=1930 P.O. 134=59 M.L.J. 61 (P.C.). A company is bound to pay dividend to its members whose names are registered in its books. It cannot take notice of any private arrangement between the vendor and vendee of certain shares in regard to the apportionment as between them of the dividend thereon. I.L.R. (1945) All. 15=218 I.C. 495=18 R.A. 16=1944 A.L.J. 489=1944 A.L.W. 612=1944 O.W.N. (H.C.) 293=1945 A.W.R. (H.C.) 13=1945 O.A. (H.C.) 13=1945 Comp.C. 45=A.I.R. 1945 All. 47.

SEC. 31-A.—It follows S. 96 of the English Act. The words “*knowingly and wilfully*” have been inserted to ensure that an unintentional default is not to be penalised.

SEC. 32: AMENDMENT BY ACT XXII OF 1936.—The amendments made in this section

Annual list of members and summary.

from its incorporation and thereafter] once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list shall state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) the amount of the share capital of the company, and the number of the shares into which it is divided;
- (b) the number of shares taken from the commencement of the company to the date of the return;
- (c) the amount called up on each share;
- (d) the total amount of calls received;
- (e) the total amount of calls unpaid;
- (f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount <sup>1</sup>[in respect of any shares or debentures], since the date of the last return <sup>2</sup>[or so much thereof as has not been written off at the date of the return];
- (g) the total number of shares forfeited;
- (h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return;
- (i) the total amount of share-warrants issued and surrendered respectively since the date of the last return;

#### LEG. REF.

1 These words were substituted for the words "in respect of any debentures" by S. 15 of Act XXII of 1936.

2 These words were added, *ibid*.

are as follows:—

(i) The words "within 18 months from its incorporation and thereafter" have been inserted after the word "shall" in sub-S. (1). The section, as it previously stood, was not clear as to when the first statement was to be filed. Thus, if a company was incorporated towards the end of a year (*e.g.*, in Nov. 1934), it could be said under that section that the statement has got to be filed in 1934 itself. This amendment removes that uncertainty, and lays down a definite time limit for the submission of the first annual list, without making the same depend upon the date of the annual general meeting, the holding of which may for various reasons be delayed.

(ii) Cl. (f) of sub-section (2) has been amended so as to cause disclosure of the amount of discount allowed in respect of shares also; and particulars as to the amount of sums paid or allowed by way of commission or discount on debentures or shares, and which has not been written off at the date of the return. This amendment was introduced, having regard to the provision

made in this amending Act for the issue of shares also at a discount. (*Vide* S. 105-A.)

(iii) In Cl. (1) of sub-section (2), for the words "managers of the company" in the old Act the words "Managers or Managing Agents of the Company" have been substituted by this amendment.

(iv) In sub-section (3), the words "seven days" have been altered to "twenty-one days".

(v) Sub-section (4) of the old Act was renumbered by this amending Act as sub-section (5); and a new sub-section (4) has been introduced. This amendment provides for the inclusion of some additional items in the summary, and incorporates the provisions of S. 111 of the English Act relating to private companies.

SEC. 32 (2) (g).—The Companies Act sanctions forfeiture of shares generally, that is to say, forfeiture as a means to get rid of a member who is in default either in payment of calls or in observing or performing other rules and regulations of the company. S. 32 (2) (g) and Form E of Schedule III recognise forfeiture generally and not for non-payment of calls only. Regulations in table "A" in Sch. I to the Act are model regulations which may or may not be adopted by a company at its option, and they do not control the section or the form. 49 C. W.N. 502.



(k) the number of shares or amount of stock comprised in each share-warrant;

(l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are <sup>1</sup>[the managers or managing agents of the company and the changes in the personnel of the directors, managers and managing agents since the last return together with the dates on which they took place]; and

(m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within <sup>2</sup>[twenty-one days] after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid.

<sup>3</sup>[(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (b) of clause 13 of sub-section (1) of section 2 are not to be included in reckoning the number of fifty.]

<sup>4</sup>[(5)] If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "the managers of the company," by S. 15 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "seven days," *ibid*.

<sup>3</sup> This sub-section was inserted and the original sub-section (4) re-numbered (5) by *ibid*.

SEC. 32 (5): LIABILITY OF COMPANY AND OFFICER.—Any company which makes default in compliance with the provisions of this section *ipso facto*, renders itself liable to the penalties mentioned therein. The position is different as regards officers of the company, who are liable only in cases of knowing and wilful authorization or permission of the default. 37 C.W.N. 1159=147 I.C. 848=1934 C. 63. See also 54 L.W. 726=(1941) 2 M.L.J. 487=1942 Mad. 75.

"DEFAULT".—The fact that no meeting has been held during the year is no defence where the accused has been a party to the default, *Park v. Lawton*, (1911) 1 K.B. 588. Mere arithmetical mistake, if punishable. See 138 I.C. 317=35 L.W. 661.

"KNOWINGLY AND WILFULLY".—These words connote intentional default. Where the evidence disclosed that the default was due to mere inadvertence, the accused should

not be convicted under this section. 10 L. 521=1929 L. 836; 35 L.W. 661=1932 M. 497. Where in a case in which a general meeting of the company was not held during the year, the Managing Director is prosecuted under S. 32 for wilful default in submitting the information required by that section, it is necessary for the Magistrate to come to a finding that he was responsible for the default in connection with the failure to hold the meeting, assuming that he cannot put forward as a defence the impossibility of complying with the section if the failure to hold the meeting was due to his own default. It is doubtful if the accused could be convicted without the Magistrate coming to an independent finding that he was responsible for such default even if he had been previously convicted under S. 76 of the Act for such default. 45 C.W.N. 1130=74 C. L.J. 367. See also (1941) 2 M.L.J. 487.

"PERMITS THE DEFAULT".—To constitute the offence under this section, specific authorization by the officer is not necessary. If he is aware of non-compliance with the requirements of the section, and takes no steps to have them complied with, he can be safely held to have "permitted the default". The offence is complete if the officer concerned knew of the defaults and permitted them. In such a case, the fact

33. No notice of any trust, expressed, implied or constructive shall be entered on the register, or be receivable by the registrar.

Trusts not to be entered on register.

<sup>1</sup>[34. (1) An application for the registration of the transfer of shares in company may be made either by the transferor or the transferee, provided that where such application is made

Transfer of shares.

by the transferor no registration shall in the case of partly paid shares be effected unless the company gives notice of the application to the transferee and subject to the provisions of <sup>2</sup>[sub-section (7)] the company shall, unless objection is made by the transferee within two weeks from the date of receipt of the notice, enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee.

#### LEG. REF.

<sup>1</sup> This section was substituted by S. 16 of Act XXII of 1936.

<sup>2</sup> These words, brackets and figure were substituted for the word, brackets and figure "sub-section (4)" by S. 3 of Act (II of 1938).

that the officer was away from the office and that the company was in charge of others at the time the defaults occurred would not absolve him from liability. 39 C.W.N. 1152=162 I.C. 282=1936 C. 237.

SEC. 33: SCOPE AND APPLICABILITY OF SECTION.—Though the company may be precluded from recognizing a trust, that would not prevent the Court from considering the rights as between the parties and the propriety of the dealing by the company after notice given by the plaintiff of his interest in the shares. 33 Bom.L.R. 250=133 I.C. 241=1931 B. 269. Where the articles of association of a company provided that the company shall have a first charge on every share for all debts due from the holder thereof, the company cannot in respect of monies becoming due from the shareholders to the company after notice of the deposit of the shares by the shareholders with the mortgagee, claim priority over advances by the mortgagee made after such notice. The company is not protected by the provisions of S. 33, or other provisions in the articles of association to the same effect. 33 Bom. L.R. 184. Shares in a private limited company are capable of equitable assignment and can therefore be the subject of a trust. The right to vote which a shareholder has is a right of property annexed to the shares and transferable or assignable with the shares. Where a person purchases shares in a company and after receiving his vendor's share certificates and transfer forms applies for transfer of the shares in the share register of the company to the names of his nominees, but the directors of the company refuse to accept the transfer, the transferee is in the position of a trustee of the shares for the purchaser. The legal title to the shares is in the vendor but the beneficial interest is transferred to the purchaser; the transferor

whose name remains on the register is a trustee for the transferee and the transferor, under S. 94 of the Trusts Act, must comply with all reasonable directions that the transferee may give. Equity treats the purchaser as if he was the real owner and compels the registered holder to act as the agent of the beneficiary and the latter has a right to control the exercise by the trustee of the right to vote. As trustee of the shares the holder is also trustee of all property rights annexed to the shares, he is trustee not only of the corpus but also of the income; he is trustee of the dividends that he may receive and he must pay them to the beneficiary. As such trustee of the dividends he is also a trustee of the right to vote which is a right of property annexed to the shares and not a right personal to the shareholder. The purchaser is entitled to control the exercise of the right of vote by the vendor in such a way and to take such steps as to secure an alteration of the articles of association with a view to limit the discretion of the directors with the object of eventually becoming a registered shareholder. The purchaser is therefore entitled as against the vendor to a restrictive injunction restraining him from attending meetings of the company and to a mandatory injunction enjoining him to sign a proxy with regard to the shares to the transferee. 45 Bom.L.R. 46. Under the Companies Act, it is only the registered holder of a share who can be made liable in respect of anything unpaid on the share and it makes no difference whether he is the real owner of the share or a mere benamidar of another person. The whole scheme of the Act is that the company has got to proceed on the basis of its own register of members and it is neither obliged nor competent to enquire into the rights of other persons whose names are not entered in it. 47 C.W.N. 486=A.I.R. 1943 Cal. 440.

SEC. 34: AMENDMENT BY ACT XXII OF 1936.—The Act as it stood previously did not lay down the procedure for the transfer of shares, and the same was generally left to be provided for in the articles of the company. Undue restrictions upon transfers and undue delay in registering transfers were

(2) For the purposes of sub-section (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post.

(3) It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip :

Provided that, where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit.

not uncommon. This section, now introduced, while leaving a discretion with the directors to refuse to transfer, requires for transfer an application either by the transferor or the transferee, notice to the transferee in the case of an application by the transferor in respect of partly paid up shares, the use of the proper instrument of transfer, and the communication of the refusal to transfer to the parties. It also prescribes the time limit within which an objection by a transferee of partly paid up shares should be made, and the refusal by the company to register a transfer should be communicated to the transferor and the transferee. It also contains the procedure and presumption regarding the notice to be served on the transferee. [*Vide* sub-section (2).] It further makes it clear by sub-section (6) that there is no intention in anything contained in the section to affect the right of a company to refuse to register a transfer of shares, where that right exists by virtue of the articles. An applicant for transfer of shares in a company registered under the Companies Act must deliver to the company a proper instrument of transfer duly stamped as required by S. 34 (3). The presentation of a duly stamped transfer form is a condition precedent under S. 34 (3). I.L.R. (1945) Bom. 334=46 Bom.L.R. 782=A.I.R. 1935 Bom. 149.

“REFUSAL TO TRANSFER”.—Where the directors refuse to consent to the assignment by a shareholder of his shares to a transferee, they are not bound to state their reasons, and no presumption of bad faith can be drawn from that. 33 Bom.L.R. 184. *See also* 16 B. 80; 36 B. 334. In order to vitiate the exercise of their powers and in order to justify interference by the Court, it must be clearly made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. 33 B. L.R. 184. Where there is provision in the articles of association of a company enabling the directors to refuse to recognise any transfer without assigning any reasons for the same, and the directors in exercise of that power refuse to recognize a transfer and assign no reasons for their refusal, the

Courts would be powerless to grant any relief against the company, as there would be no materials for them to decide upon. It is only in cases where the articles lay down certain conditions under which a transfer may be refused to be recognized by the company, or where the directors, although empowered to refuse without assigning reasons, nevertheless assign their reasons in support of their refusal, it will be possible for the Court to scrutinise the conditions and the reasons alleged to exist, and if they appear to be non-existent or wrong, to direct registration of the transfer. In a suit for compelling registration of a transfer, the company pleaded justification for the refusal and relied on the articles of association which reserved to the company the right of refusing any transfer if it appeared to be against the interests of the company. It was held that the burden of proof in such matters was on the plaintiff and not on the defendant company. 69 M.L.J. 239=1935 M. 784. The articles of association of a company provided that the company was to have a first and paramount lien upon all the shares *other than fully paid up shares*, and that the Board could refuse to register any transfer of shares while the shareholder executing the transfer was indebted to the company. This was interpreted to mean that the Board was not empowered to refuse to register a transfer of *fully paid up shares* although the transferor was indebted to the company, and that their right to refuse could be exercised only where the shares were not fully paid up, and the transferor was indebted to the company. 57 M. 955=67 M.L.J. \*599=1934 M. 476. As to effect of transfer, *see* 71 I.C. 814=1924 L. 173. As to competition between prior private purchaser not conforming to the Act and the Articles of Association and subsequent auction-purchaser, *see* 45 M. 537=15 L. W. 470=42 M. L. J. 449. Where the articles of association empowered the Board to refuse to transfer shares in the register, only in cases where the same would be against the interest of the company and where certain shares were transferred by the owner and all

(4) If a company refuses to register the transfer of any shares or debentures, the company shall, within two months from the date on which the instrument of transfer was lodged with the company, send to the transferee and the transferor notice of the refusal.

(5) If default is made in complying with sub-section (4) of this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

(6) Nothing in sub-section (3) shall prejudice any power of the company to register as share-holder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares.]

necessary documents properly executed were presented to the company, the Board could not refuse registration of the transfer on a mere subsequent instruction from the transferor that he had been made to part with the shares by misrepresentation. The proper course for the Board would be to have the transfer registered and to ask the transferor to have a suit instituted for getting the transfer set aside. 152 I.C. 1005=1935 L. 123. Where a discretion is given to the Directors of a company by its Articles of Association, to refuse to register the transfer of shares to any person whom they think it undesirable to be admitted to membership of the company, it is certainly open to the directors to refuse to register a transfer on that ground without giving any further reasons. But if a shareholder challenges this undoubted right of the Directors to use their discretion in such a matter, the burden lies heavily on him to allege with particularity and to prove such *mala fides* on the part of the Directors as amounts to arbitrary and wanton conduct. The Directors are not to be exposed to suspicion of *mala fides* by reason merely of the fact that they have chosen to withhold their reasons which they are not bound to give. In such a matter the opinion of the shareholders is quite irrelevant so long as a Board of Directors exists and particular powers are vested in them by the articles, then they are entitled to exercise those powers without interference by other shareholders. If they are dissatisfied they can always remove the Directors. 1941 A.L.J. 483=1941 All 360. The transferee, in cases of transfers in blank of shares in a company, has the right to fill in the necessary particulars, including his own name as transferee and the date of the transfer, after the death of the original transferor. 45 C.W.N. 1109. Under S. 34 (3) it is not lawful to register a transfer of shares in the absence of a proper instrument of transfer duly stamped and executed by the transferor and the transferee, and an addition of an Article purporting to confer power on the directors to transfer shares in the absence of an instrument of transfer is *ultra vires* of S. 34 of the Companies Act. 52 L.W. 741=(1940) 2 M.L.J. 721. L,

who had some shares in the defendant Bank (a limited Company) died leaving a registered will by which it was provided that his son the plaintiff should get the bank shares transferred in his own name. Plaintiff applied to the defendant Bank for transfer of the shares in his name relying on the will enclosing with his application a registration copy of the will. The transfer was not effected and the plaintiff who had gone to Burma and the Federated Malay States wrote to the Bank asking for the transfer and return of the share certificates. Subsequently the plaintiff paid up to the Bank certain amounts demanded by the Bank as further call of Rs. 30 per share and also obtained a succession certificate. The defendant bank raised contentions and stated, (1) that the plaintiff, who was then in the Federated Malay States which had been overrun by Japan should send a letter expressly recognising the Bank's lien for amounts due by the deceased L and (2) consenting to be treated as a member of the Bank and to be entered in the register of its members as such that (3) the plaintiff was an alien enemy and that the succession certificate was not sufficient. *Held*, that (1) under S. 381 of the Succession Act the grantee of the certificate got a good title which afforded full indemnity to all persons dealing with the grantee; (2) that the Bank was not justified in insisting on the letter from the plaintiff who was then in enemy occupied territory expressly recognising a lien; (3) that the conduct of the Bank throughout was evasive and dilatory and raised suspicions about its *bona fides*; (4) that the plaintiff could not be treated as an alien enemy, and S. 83, C. P. Code, did not apply so as to render a suit by him incompetent; (5) that the Defence of India Act and Rules did not also apply; part 15 of the Rules made it clear that what was prohibited and rendered penal was any commercial, financial or other intercourse or dealings with, or for the benefit of, the enemy and the suit therefore was not barred; (6) that the plaintiff was entitled to have the shares transferred in his name and also to damages against the bank for the breach by it of its legal obligation. 1943 Comp. G.

35. A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

36. (1) The register of members, commencing from the date of the registration of the company <sup>1</sup>[and the index of members] shall be kept at the registered office of the company, and except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection. <sup>2</sup>[Any such member or other person may make extracts therefrom.]

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied <sup>3</sup>[and the company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer books of the company are closed, commencing on the day next after the day on which the requirement is received by the company.]

<sup>3</sup>[(3) If any inspection required under this section is refused or if any copy

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 17 of Act XXII of 1936.

<sup>2</sup> These words were added by S. 17, Act XII of 1936.

<sup>3</sup> This sub-section was substituted, *ibid.*

202=A.I.R. 1943 Mad. 743=(1943) 2 M. L.J. 201.

**NOMINAL TRANSFER.**—The company, and the liquidator of the company in liquidation, are not concerned with the person paying the consideration for a transfer of shares, but with the person who has signed the transfer form as purchaser of the shares and whose name is entered in the share register as owner of the shares. 37 Bom.L.R. 904=1936 B. 24. Even though a person entered as transferee happens to be a nominee of the transferor, if the company is not informed of it, and if the shares have been entered in his name with his knowledge and consent, *prima facie* the transferee is the contributory who is liable in respect of those shares unless the transferee proves that his name was entered in the register fraudulently or without sufficient cause. 37 Bom.L.R. 904.

**IRREGULARITY AND DELAY IN REGISTERING TRANSFER.**—Where the transferor and the transferee of shares had complied with all the requirements of the law to effect a valid transfer, and had applied to the company for the transfer being effected, any delay or irregularity in the registration of the same would not vitiate the transfer, when it was once acquiesced in by the parties. If

the company should go into liquidation thereafter, the transferee would be legally liable to the company as contributory in respect of the shares standing in his name in the Register. 37 Bom.L.R. 904=1936 B. 24. A slight delay in according sanction to a transfer of shares would not justify a payment of dividends to a person not yet entered as a member on the books of the company. Such a delay would not make the company liable to an action for damages on account of payment of the dividend to the transferor whose name appeared on the books of the company at the time. 159 I.C. 766=1936 L. 207.

**SEC. 36: AMENDMENTS BY ACT XXII OF 1936.**—(i) In sub-section (1) provision has been made for the keeping of 'the index of members' also at the registered office. This amendment was consequential on S. 81-A having been newly added to the Act.

(ii) Sub-section (2) has been amended, whereby a time-limit has been laid down, within which the requirement by a member must be complied with. This is in accordance with S. 98 (2) of the English Act.

(iii) Sub-section (3) provides a penalty for non-observance of the provisions of the section.

**INHERENT POWER OF COURT.**—The Court has inherent jurisdiction to direct a company to deliver a copy of the register of the members of the company to a shareholder of the company. 1936 A. 568=1936 A.L.J. 748. As to right of inspection, *see also* 42 O.W.N. 161=1938 Cal. 89.

required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal or default continues and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them.]

37. A company may, on giving <sup>1</sup>[seven days' previous] notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole <sup>2</sup>[forty-five] days in each year <sup>3</sup>[but not exceeding thirty days at a time.]

Power of Court to rectify register.

38. (1) If—

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 18, Act XII of 1936.

<sup>2</sup> This word was substituted for the word "thirty," by *ibid*.

<sup>3</sup> These words were added by *ibid*.

SEC. 37: AMENDMENT BY ACT XXII OF 1936.—The amendment extends the time during which the register of members may be closed from 30 to 45 days, to make more generous allowance for those cases in which it is closed at two separate times during the year.

SEC. 38: SCOPE AND APPLICABILITY OF SECTION.—This section does not confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable. Where under the articles of a company it had a right and a duty to recognize only the executors or administrators of the deceased member and a member died leaving behind him his heir who under Hindu Law claimed to represent the deceased by right of survivorship, it was held, that the company could rightly ask such claimant to produce a probate or a succession certificate and that the Court would not interfere under this section in such a matter. 1936 R. 52. This section does not exclude the jurisdiction of Civil Courts to decide questions falling under this section. 108 I.C. 192=1928 L. 234. A transferee of a share can apply under this section or institute a suit for rectification of the company's register and inclusion of his name therein. 28 L.W. 932=111 I.C. 225=1928 M. 571. In complicated cases involving serious question of title, the Court is not bound to decide the same on an application under this section. 1928 M. 571; 44 A. 151=19 A.L.J. 937=65 I.C. 291. See also 17 A.L.J. 783; 18 I.C. 481; 17 I.C. 640=14 Bom.L.R. 919. The striking out of the name of a shareholder from the register containing the names of the members amounts to an omission of his name from the register within the meaning of S. 38 (1) (a), and the shareholders whose name is so struck out can apply to the Court under S. 38 (1). 51 L.W. 741=(1941) 2 M. L. J. 721.

The Act does not contemplate the registration of the name of a firm as the holder of its shares, but only individuals or other legal entities. An application for such a purpose is not maintainable. 1944 O.W.N. 436=A.I. R. 1944 Oudh 318.

DISCRETIONARY JURISDICTION.—Power of Court to take summary action is discretionary. 110 P.L.R. 1915=29 I.C. 770; 18 I.C. 481; 12 Bur.L.T. 194=55 I.C. 751. The discretion of the Court under this section is unlimited and should be used according to the circumstances of each case. 47 C. 901=60 I.C. 946; 12 Bur.L.T. 194=55 I.C. 751. *The proviso to this section must be read with reference to all the clauses of the section.* 41 B. 76=18 Bom. L.R. 982=37 I.C. 666. See also 23 Bom. L.R. 1104. (Resolution by directors to allot unissued shares to some directors—Interested directors also voting—Effect). The register of the members of a company is a public document, and there is no provision in the Companies Act which permits the directors or officers of a company to make any alteration in the register except in accordance with law. If members' names have been improperly added to the register the remedy of the company is to apply to the Court under S. 38 of the Act for the rectification of the register and the company cannot take upon itself to alter the register. I.L.R. (1945) Mad. 728=58 L.W. 578=(1945) 2 M.L.J. 432. The jurisdiction of the Court under S. 38 of the Companies Act is a limited one. The only relief that can be granted under this section is the one concerning rectification of the register and in some cases payment by the company of damages sustained by any party aggrieved. The Court cannot grant any relief under this section regarding the management of the property of the company or for conducting the business of the company. It has, therefore, no jurisdiction to appoint a receiver to take over the management and business of the company and also take over possession of its property pending the decision of the application under the section. The provisions of O. 40, R. 1 read with S. 141, C.P. Code, cannot be applied to an application made under S. 38 of the Com-



(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company ; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company may apply, to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand ; and generally may decide any question necessary or expedient to be decided for rectification of the register :

Provided that the Court may direct an issue to be tried in which any question of law may be raised ; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code.

panies Act. It is, however, not possible to endorse the view that in no case under the Companies Act, except a debenture-holder's action, can a receiver be appointed to take up the business of the company and the management of its property and its affairs pending the decision of the Court in that litigation. Several cases can be visualised when a company judge may exercise such a power under the provisions of O. 41, R. 1, read with S. 141, C.P. Code, or *ex debito justitiæ*. 48 P.L.R. 1.

**RECTIFICATION OF REGISTER.**—The power to order the rectification of the register of a company, on an application under this section, is entirely a matter of discretion for the Court. The Court will refuse to exercise such power when the only object of the application is to save the expenses of taking out Letters of Administration and of legal transfer of the shares to the applicant's name 12 Bur.L.T. 194=55 I.C. 751. See also 11 Bur.L.T. 156=49 I.C. 281. An order for rectification of the company's register by putting the transferee's name therein cannot be passed in a proceeding under this section, when the transferor is not a party. 30 Bom.L.R. 1329=111 I.C. 337=1928 P.C. 291 (P.C.). Where a shareholder applies to have his name removed from the register the mortgagee of the uncalled share capital can oppose the application. 47 C. 901=60 I.C. 946. A mere delay in making an application for rectification of the register under S. 38 is no ground in itself why the Court should not exercise its jurisdiction under the section. 20 Pat.L.T. 703=1939 Pat. 603. S. 38 gives a wide discretion to the Court in the awarding of costs. 20 Pat.L.T. 703=1939 Pat. 603.

**PARTIES TO APPLICATION.**—As a matter of law the directors of a Company who are in charge of the management and business of the Company are not necessary or proper parties to an application made under S. 38

of the Companies Act. 48 P.L.R. 1.

**BURDEN OF PROOF.**—According to S. 40, the register of members is *prima facie* evidence of any matters directed or authorised by the Act to be inserted therein. Where the names of certain persons are entered in the register as shareholders it can be taken for granted that such persons are qualified shareholders. Where an application by a company for reduction of its capital is opposed by a shareholder on the ground that certain persons who have voted for the resolution for the reduction of the capital of the company were not duly qualified as shareholders so to vote, or vote at all, by reason of their names not having been properly entered in the register or by reason of their names not having been on the register for a length of time sufficient to entitle them to vote, but no steps have been taken by the shareholder to have the register altered or rectified under S. 38, the burden is on the shareholder opposing the petition to substantiate his allegations, and where he fails to do so the application should be allowed. 1936 C. 327=63 C. 703=40 C. W.N. 661.

**APPEAL.**—A direction by the lower Court of an issue for trial involving a question of law, and a decision actually arrived at on such issue are necessary for a right of appeal from such decision under this section. The appeal can be based on the grounds mentioned in S. 100, C. P. Code. 41 B. 76=18 Bom.L.R. 982=37 I.C. 646. Order involving point of law is appealable. 44 A. 151=65 I.C. 291=1922 A. 258.

**SEC. 39: AMENDMENT BY ACT XXII OF 1936.**—The amendment provides a time limit for a rectification of the register of members ordered by the Court. The use of the word "completion" instead of the word "making" has been made to provide for the

39. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar <sup>1</sup>[within a fortnight from the date of the completion of the order.]

Notice to registrar of rectification of register.

Register to be evidence.

40. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

Power for company to keep branch register in the United Kingdom.

41. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Regulations as to British register.

42. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished, from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles make such regulations as it may think fit respecting the keeping of a British register

#### LEG. REF.

<sup>1</sup> These words were added by S. 19 of Act XXII of 1936.

intermediate period which according to the practice in certain Courts elapse before the order made is really available to the company.

SEC. 40: EVIDENCE OF REGISTER AND BURDEN OF PROOF.—The register of shares of a company is not *absolutely* conclusive, but it is necessary not only from the point of view of the law, but as a matter of policy, to see that it is as conclusive as it can be made consistently with a proper interpretation of the Act. 37 Bom.L.R. 904=160 I.C. 638=1936 B. 24. See also 63 O. 703.

A person whose name is entered in the register of members is presumed to be a member and the *onus* of proving that he is not a member is shifted on him by such entry. 147 I.C. 575=1933 L. 1016. See also 33 P.L.R. 973. The burden of proving conditions and failure to send notice of allotment is on the propounder. 27 P.L.R. 842=1926 L. 414. The mere entry of shareholder's name in the company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares like any other offer must not only be accepted but must be communicated to the person making the offer. 56 M. 391=64 M. L.J. 130=1933 M. 320.



Application of sections 41 and 42 to Burma. <sup>1</sup>[42-A. (1) The provisions of sections 41 and 42 shall apply in relation to Burma as they apply in relation to the United Kingdom.

(2) In the application of the said provisions to Burma, references to a British register shall be construed as references to a Burma register.]

43. <sup>2</sup>[(1)] A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

<sup>3</sup>[(2) Nothing in this section shall apply to a private company.]

44. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

45. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

46. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

47. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely :—

- (i) the fact of the issue of the warrant ;
- (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number ; and
- (iii) the date of the issue of the warrant.

(2) If a company makes default in complying with the requirements of this section it shall be liable to fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty.

48. Until the warrant is surrendered, the above particulars shall be deemed

#### LEG. REF.

<sup>1</sup> This section was inserted by A.O., 1937.  
<sup>2</sup> S. 43 was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 20 of Act XXII of 1936.

SEC. 43: AMENDMENT BY ACT XXII OF 1936.—Sub-section (2) has been newly inserted. The amendment has been consequential on the substitution of S. 2 (1) (13) for the old section and the introduction of the new S. 2 (1) (13-A) by this amending Act. This issue of a bearer share-warrants is not compatible with the provision con-

tained therein, relating to restriction of shares in the case of private companies. Hence the application of this section has been limited expressly by the amendment to companies other than private companies.

SEC. 48: "SURRENDER".—Surrender is good if it amounts to a forfeiture: It is not open to a shareholder to surrender his shares at will. Nor is it open to the company to accept surrender of shares unless the act of the company can be brought within the rules relating to forfeiture of shares. 1928 L. 240=107 I.C. 594; 1924 M. 703. There can be no valid surrender of shares that are not

Surrender of share-warrant. to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

Power of company to arrange for different amounts being paid on shares.

49. A company, if so authorised by its articles, may do any one or more of the following things, namely :

(1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares ;

(2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up ;

(3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

Power of company limited by shares to alter its share capital.

50. (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

fully paid up, except where the shares are forfeited as it involves a reduction of capital. Before this can be done the sanction of the Court must be obtained. 149 I.C. 869=1934 S. 39. A shareholder who surrenders his share does not cease to be a member, while a shareholder whose shares are forfeited ceases to be so. 107 I.C. 594=1928 L. 240.

**SURRENDER OF SHARES—VALIDITY—CONDITIONS.**—Per *Rupchand, A. J. C.*—There can be no valid surrender of shares in a limited company which are not fully paid up, so as to exonerate a subscriber from his liability to pay for the shares agreed to be purchased by him in accordance with the memorandum, except where shares are forfeited, as it involves a reduction of capital; before this can be done the sanction of the Court must be obtained. A surrender which has the effect of releasing a shareholder from further liability in respect of his shares is equivalent to a purchase of the shares of the company and is illegal, and null and void. Such a surrender can only be supported under circumstances which would justify a forfeiture of the share. 32 S.L.R. 167=1938 Sind 187.

**SHARES—FORFEITURE OF—STRICT FULFILMENT OF CONDITIONS—NECESSITY FOR.**—In the matter of the forfeiture of shares technicalities must be strictly observed. And it is not merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a company. The creditors are therefore entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen, the Articles of Association usually contain provisions as to the

sending of notice and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due. 1938 P.C. 284=43 C.W.N. 205=(1939) 1 M.L.J. 98 (P.C.). See also 1940 M.W.N. 553=1940 Mad. 873. No forfeiture of shares could be made unless every condition precedent had been strictly and literally complied with. 45 C.W.N. 1075.

SEC. 49.—The powers given under this sub-section must be exercised with discretion. *Galloway v. Halle Concerts Society*, (1915) 2 Ch. 233.

SEC. 50: AMENDMENTS BY ACT XXII OF 1936.—(i) Under the Act as it stood before the amendment, alteration of capital could be effected by the directors, and it was only an alteration involving sub-division of shares that had to be made in general meeting one consequence was that in the former case of any alteration of capital by directors, the Registrar's Office had no record of the same. According to S. 50 of the English Act, all these powers could be exercised only by the company in a general meeting. The amendments in this sub-section (2) have followed the English law, in the matter.

(ii) Sub-sections (3) and (4) of the old Act have been omitted in view of the new S. 25-A introduced by this amending Act.

(iii) New sub-section (4) has been inserted with a view that notice shall be given at an early date to the Registrar of any change in the memorandum relating to the sub-division or cancellation of shares.

(a) increase its share capital by the issue of new shares of such amount as it thinks expedient ;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;

(c) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination ;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section <sup>1</sup>[\* \* \* \* \*] must be exercised <sup>2</sup>[by the company in general meeting.]

<sup>3</sup>[(3) ] A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

<sup>3</sup>[(4) The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof.]

51. (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing share or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with the registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

52. Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock ; and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

53. (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing, <sup>4</sup>[\* \* \* \* \*] of the resolution authorising the increase, and in the case

#### LEG. REF.

<sup>1</sup> The words "with respect to sub-division of shares" were omitted by sec. 21 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "by special resolution", *ibid.*

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<sup>3</sup> Original sub-sec. (3) and (4) were omitted and sub-sec. (5) was re-numbered (3) and sub-sec. (4) was added, *ibid.*

<sup>4</sup> The words "or in the case of a special resolution the confirmation" were omitted by sec. 22, *ibid.*

of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

<sup>1</sup>[ (2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued.]

<sup>1</sup>[ (3) ] If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

54. (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes :

Reorganization of share capital.  
Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class <sup>2</sup>[\* \* \* \* \*] and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section, a certified copy thereof shall be filed with the registrar within twenty-one days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

#### *Reduction of Share Capital.*

<sup>3</sup>[54-A. (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 55 to 66.

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company :

#### **LEG. REF.**

<sup>1</sup> Sub-sec. (2) was inserted and the original sub-sec. (2) re-numbered (3) by sec. 22 of Act XXII of 1936.

<sup>2</sup> The words "and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed" were omitted by sec. 23, *ibid.*

<sup>3</sup> This section was inserted by sec. 24, *ibid.*

SEC. 54.—This section is omitted by the Amending Act XVII of 1942. The following extract from the Statement of Objects and Reasons shows the reason for the amendment:

"Sec. 54 of the Indian Companies Act, 1913, provides that if the conditions contained in the memorandum of a company are to be modified so as to reorganise its share capital, whether by consolidation of shares of different classes or by division of its shares into shares of different classes, no preference or special privilege attached to any class of shares shall be interfered with ex-

cept by resolution passed by a majority of shareholders of that class holding three-fourth of the share capital of that class. The well-nigh prohibitive majority required by the section has made it extremely difficult, in practice, to put through any scheme for consolidation or sub-division of share capital in the case of companies in which the rights and privileges attached to the different classes of shares are set out in the memorandum. With the passing of the Indian Companies (Amendment) Act XXII of 1936, an anomaly has resulted—that while under the new sec. 153-A, added by that Act, it is now possible for a company to carry out a scheme for the transfer of the whole of its assets and undertaking and for dissolution by proceedings under sec. 153, which requires a far less stringent majority than is required by sec. 54, the relatively less important matter of consolidation or sub-division of the capital of a company can only be effected through the machinery of the latter section. This amendment is intended to remedy what

Provided that nothing in this section shall be taken to prohibit, where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 105-B.] (Omitted by Act XVII of 1942.)

was left undone by the Indian Companies (Amendment) Act XXII of 1936, by deletion of sec. 54 and amendment of sec. 153.

Sec. 54-A: AMENDMENT BY ACT XXII OF 1936.—This section introduces the provision contained in sub-sec. (1) of sec. 55 of the Act, in a considerably modified form. The utilization of the funds of a company in the purchase of its own shares has the result of reducing its capital and was prohibited by sub-sec. (1) of sec. 55 in the old Act. This prohibition was circumvented in some cases by advancing money out of the company's funds to their nominees who acquired the shares; and there was no provision in the old Act to effectively prevent abuse. Hence, this section has been inserted, and it follows sec. 45 of the English Act. The subterfuge mentioned above is no longer possible.

INCREASE OF SHARE CAPITAL—FRAUD UPON THE MINORITY—ACTS *ultra vires*—RIGHT OF SUIT, PRINCIPLES GOVERNING.—There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts *ultra vires* and suits to restrain acts notwithstanding that they have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of *ultra vires* acts, because it is not an act within the constitution. In the other class of cases the Court interferes upon a different basis. They have been referred to generally as cases of "fraud upon the minority". These cases, however, are only special examples of an action by the company for what is in theory regarded as a wrong done to the company; a special form of the suit being adopted as a matter of machinery to obtain relief under special and peculiar circumstances. If the wrongdoer has the balance of power, and therefore the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and the better course, where the wrongful act is supported by the majority, is for the minority shareholders to sue in their own name or, as a matter of convenience, for a shareholder to sue on behalf of himself and all the other shareholders. If, however, the wrongdoers are also shareholders, these shareholders as a matter of course must be excluded from the category of the plaintiffs. In a suit so brought, it is not sufficient to plead simply

the dominance of the majority of the shareholders or what may be called the secondary fraud. The primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance. It is not sufficient to allege fraud against the company generally. The wrongdoers must be specified and made party defendants to the action. It may be sufficient to make them parties *qua* shareholders, although if the primary wrong is that of the directors, it is right and proper they should be sued *qua* directors. Where a decision of the directors is attacked on the ground that it is injurious to the company, the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties. The directors may be assailed if it is established first that the increase of capital is for the purpose of power and secondly that the passing of the company resolution confirming the increase was procured by their own power, by the power of their dependents or by any kind of device. I.L.R. (1941) 1 Cal. 30=72 O.L.J. 458=1941 Cal. 174.

SECS. 54-A AND 55.—Forfeiture of shares otherwise than for non-payment of calls—Legality. The exercise of the power of forfeiture of shares otherwise than for non-payment of calls, does not bring about any illegal reduction of capital in contravention of sec. 55 especially when all the shares are fully paid up. Nor does it amount to a buying by the company of its own share so as to offend against sec. 54-A. 49 C.W.N. 502. The shares of a company are subject to its Articles of Association and all the incidents thereof. If under the Articles they are liable to forfeiture, it is an inherent vice or defect to which the right of a member is subject. Creditors of the member can have no higher right. The company can, therefore, exercise its power of forfeiture of the shares for its own benefit and to the prejudice of the rights which a creditor has, prior to the exercise of the power, acquired by obtaining a charge on such shares or by attaching them. 49 C.W.N. 502. It is an established rule of law and equity that no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with. Even a small inaccuracy will be fatal. 57 L.W. 69=(1944) 1 M.L.J. 107. A limited com-

55. <sup>1</sup>[ (1) ] Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

#### LEG. REF.

<sup>1</sup>Original sub-sec. (1) of sec. 55 was omitted and sub-Ss. (2) and (3) were re-numbered as (1) and (2) respectively by S. 25 of Act XXII of 1936.

pany forfeited the shares of a shareholder on the ground that he did not pay for the shares subscribed by him. A clause in the Articles of Association stated that the notice to a shareholder shall name a day (not being less than 14 days from the date of the notice) and a place or places on and at which the call or instalment and interest and expenses were to be paid. The notice issued to the shareholder in the case did not state where the payment should be made and did not correctly state the dates on which the calls were to be met: *Held*, that the notice was bad and therefore the forfeiture was invalid. 1944 M.W.N. 73=57 L.W. 69=1944 Comp.C. 63=A.L.R. 1944 Mad. 322=(1944) 1 M.L.J. 107.

SEC. 55: PROPOSAL RELATING TO REDUCTION OF SHARE CAPITAL—SANCTION TO PRINCIPLES APPLICABLE.—Where an application under sec. 55 is presented to the Court by a company for its sanction to a proposal relating to a reduction of the share capital of the company, the following principles are the principles applicable: (1) That a company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. (2) Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. (3) The company is to determine the extent, the mode and incidence of the reduction. (4) The company may reduce the share capital of all its shareholders *pro rata* or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. (5) That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. (6) That in doing so the Court should keep in view the consideration that the decision has been arrived at by businessmen who are fully cognizant of their necessities and are the best

custodians of their interests and should therefore be slow to interfere. 177 L.C. 368=1938 Pesh. 41. *See also* 1939 Bang. 417.

REDUCTION OF CAPITAL, WHEN INVALID.—No action resulting in the reduction of the capital of a company with limited liability should be permitted unless the reduction is effected under statutory authority or by forfeiture in strict accordance with the procedure, if any, laid down in that behalf in the Articles of Association. Any reduction of capital contrary to this principle is illegal and *ultra vires*. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. The mere fact that the articles of association authorized the Board of Directors to accept surrender of shares cannot validate the surrender if it did not take place in circumstances which would have justified a forfeiture. 110 L.C. 421; 1928 L. 240; 1924 M. 703=20 L.W. 74=83 L.C. 94. Where by the articles of association, a limited company enabled persons who had subscribed for shares of Rs. 100 to sever all connections with the company on payment of Rs. 84, it was held that the article was *ultra vires*, and as it involved the reduction of share capital the assent of the Court was required for it. 52 M. 915=57 M.L.J. 814=1929 M. 773. A limited company, not in liquidation, cannot make any payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. 60 M.L.J. 320=1930 P.C. 302 (P.C.).

POWER OF COURT.—It is not always essential or necessary for the Court on a petition for reducing capital to satisfy itself that there has been a loss of the capital. The only serious question with which the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital be reduced. Where, however, the reduction of the capital is based on the ground that capital has been lost and unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. Where the person opposing the petition accepts the statement of the company that there has

<sup>1</sup>[ (2) ] A special resolution under this section is in this Act called a resolution for reducing share capital.

56. Where a company has passed <sup>2</sup>[\* \*] a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

57. On and from the <sup>3</sup>[passing] by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital then on and from <sup>4</sup>[the making of the order confirming the reduction], the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company :

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."

58. (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their

#### LEG. REF.

<sup>1</sup> See footnote 1 at p. 1436.

<sup>2</sup> The words "and confirmed" were omitted by S. 26 of Act XXII of 1936.

<sup>3</sup> This word was substituted for the word "confirmation" by S. 27, Act XXII of 1936.

<sup>4</sup> These words were substituted for the words "the presentation of the petition for confirming the reduction," *ibid.*

been a loss of capital, the Court should act upon the assumption that there is evidence of loss of capital. 63 C. 703=165 I.C. 408=1936 C. 327.

SEC. 56: AMENDMENT BY ACT XXII OF 1936.—The words "and confirmed" in the old section have been omitted herein, since confirmation of special resolution has been abolished by the Amending Act. [*Vide* S. 81 (2).] This is a mere consequential amendment.

REDUCTION OF SHARE CAPITAL—CONFIRMATION—CONSIDERATIONS FOR COURT.—It is an elementary principle of law relating to joint stock company that the Court will not interfere with the internal management of a company acting within its own rights and in fact as no jurisdiction to do so. In an application under S. 56 the Court is only

concerned to confirm the proposed reduction and not the resolution passed by the company. The validity of the resolution cannot therefore be questioned in such application. The only questions to be considered by the Court are: (1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? (2) Is the reduction fair and equitable as between different classes of shareholders? Where the reduction is shared by all and is designed to work justly and equitably and where it does not involve diminution of any liability in respect of the unpaid capital or payment to any shareholder of any paid up capital and there is evidence regarding the loss of capital and non-representation of available assets, there is nothing to prevent the Court from confirming such reduction. 1939 Rang. 417. *See also* 177 I.C. 368=1938 Pesh. 41.

SEC. 57: AMENDMENT BY ACT XXII OF 1936.—For the word "confirmation" the word "passing" has been substituted, consequent on the amendment of S. 81 (2) which dispenses with the necessity for the confirmation of any special resolution.



debts, or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

59. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say),—

(i) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim ;

(ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, than an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

60. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

61. (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

62. (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

63. (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute :

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceed-



ings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration ; and

(ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

64. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully mis-

Penalty on concealment of name of creditor.

represents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine or with both.

65. In any case of reduction of share capital, the Court may require the

Publication of reasons for reduction.

Company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

66. A company limited by guarantee and registered after the commencement

Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

#### <sup>1</sup> [Variation of Shareholders' Rights.]

<sup>1</sup>[66-A. (1) If in the case of a company, the share capital of which is divided

Rights of holders of special classes of shares.

into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

#### LEG. REF.

<sup>1</sup> This heading and S. 66-A were inserted by S. 28, Act XXII of 1936.

SEC. 66-A: AMENDMENT BY ACT XXII OF 1936.—This section is new and adopts S. 61 of the English Act, with modification as to

the period fixed for the application, and as to the commencement of the period within which copy has to be forwarded to the registrar. Also the words "knowingly and wilfully" have been inserted in this amendment with a view to ensure that an unintentional default is not to be penalised.

(2) An application under this section must be made within fourteen days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of the order to the registrar, and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression 'variation' in this section includes 'abrogation' and the expression 'varied' shall be construed accordingly.]

*Registration of Unlimited Company as Limited.*

67. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

68. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely :—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up ;

(b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

*Reserve Liability of Limited Company.*

69. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

*Unlimited Liability of Directors.*

70. (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

Special resolution of limited company making liability of directors unlimited.

71. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the <sup>1</sup>[passing] of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum.

2[\* \* \* \* \* \* \* \* \* \*]

#### PART IV.

##### MANAGEMENT AND ADMINISTRATION.

##### *Office and Name.*

<sup>3</sup>[72. (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same.

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.]

##### LEG. REF.

1 This word was substituted for the word "confirmation" by S. 29, Act XXII of 1936.

2 Certain words in sub-S. (2) and sub-S. (3) of S. 71 were omitted, *ibid.*

3 This section was substituted by S. 30, *ibid.*

SEC. 71: AMENDMENT BY ACT XXII OF 1936.—Instead of the word "confirmation" in the old section, the word "passing" has been substituted. This was consequential on the amendment of S. 81 (2), by which confirmation of any special resolution is rendered unnecessary. The words in the old Act, after "memorandum", *viz.*, that "a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution", and also the old sub-ec (3) which provided a penalty for default, have been

omitted by the amendment, as being no longer necessary in view of the insertion of new S. 25-A in the Act.

SEC. 72: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old one, as it was defective in that it did not lay down any time within which the registered office was to be set up or notice of its situation or any change of its situation was to be given. This newly substituted section makes provision for the same, and adopts S. 92 of the English Act. S. 72 is merely permissive and not imperative; it only provides one of several methods whereby a communication or notice may be served on a company. 1941 Bang. 339 (S. B.)=198 I.O. 180.

REGISTERED OFFICE.—The object of requiring a company to have a registered office is to provide some definite place at which notices and other communications may be served on it. *See* S. 148, *infra*, which lays

Publication of name by  
limited company.

73. Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ;

(b) shall have its name engraven in legible characters on its seal ;

(c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

74. (1) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

down that a document may be served on a company by leaving it at, or sending it by post to the registered office of the company. There are also other various provisions in the act in relation to the registered office of the company, such as provisions relating to the keeping of the registers of members, of directors, and of mortgages, accounts, minutes of proceedings, copies of registered documents, etc. as also provisions relating to the exercise of the right of inspection by members of certain books and documents kept at the registered office. Further, the situation of the registered office also fixes the domicile and also the *prima facie*, nationality of the company. It is further useful with reference to the income-tax matters. For the change to take effect it is necessary that the notification should be given to the Registrar. It is not sufficient that there is a resolution to change the registered office of the company. 58 C. 716 = 133 I.C. 321 = 1931 C. 622.

Sec. 73.—S. 73 (a) is a penal provision and has to be construed strictly. The sec-

tion has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The words "outside the office" cannot be construed as outside the premises or outside the compound, where the office is in a building with a compound. The requirements of the section would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building. The fact that the company owns the whole premises makes no difference. Where an office is situated within a compound the law does not require the name of the company to be painted or affixed outside the compound as well as outside the office. I.L.R. (1941) Bom. 186 = 43 Bom.L.R. 105 = 1941 Bom. 97. As to the liability of company on a promissory note executed by a secretary signing it in his own name on a paper printed with the name of the company and bearing a stamp impression of the company, see 1923 B. 29 = 24 Bom.L.R. 355 = 67 I.C. 941.

75. (1) Where any notice, advertisement or other official publication of

Publication of authorised as well as subscribed and paid-up capital.

a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up.

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

#### *Meetings and Proceedings.*

<sup>1</sup>[76. (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter

Annual general meeting.

once at least in every calendar year and not more than fifteen months after the holding of the last preceding

general meeting.

(2) If default is made in holding a meeting in accordance with the pro-

#### LEG. REF.

<sup>1</sup> This section was substituted by S. 31 of Act XXII of 1936.

SEC. 76: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old one, so as to adopt the language of S. 112 of the English Act. Further, with a view to make provision in respect of companies which may be incorporated towards the end of a year, a definite time limit has been fixed for the first annual meeting, as in the case of the annual list and summary. [*Vide* S. 32 (1), *supra*.] S. 76 (1) demands that there shall be a general meeting held once at least in every year, i.e., one separate and distinct meeting every year. It does not mean that the same meeting can go on for several years being held once in each year. Where a meeting called and held on a day in one year is adjourned to a date in the next year and held on that date, the meeting held on the latter date is not a different meeting from that which began on the former date; it is the same meeting and does not satisfy the requirements of S. 76. 47 L.W. 635=1938 Mad. 640=(1938) 1 M.L.J. 856.

OBJECT OF GENERAL MEETING.—A general meeting should be held once at least in every year. Rules relating to the proceedings of general meeting and as regards voting are contained in Rr. 49 to 67 of Table A of Sch. I of the Act. The members of a company or corporation, public or private, can do no corporate act of a constituent character, such as must be done at a general meeting of all the members or of a quorum of them, unless the meeting is duly assembled, in conformity with the law of its organization. It has been well-said that the act of a majority of the corporation does not bind the minority if it has not been expressed in the form pointed out by law, and accordingly that the act of a majority, expressed elsewhere than at a meeting of

the shareholders, is not binding on the company, as where the assent of each one is given separately and at different times. The reason is that each member has the right of consultation with the others, and that the minority have the right to be heard. In the line of authority establishing the foregoing principles, no break has been discovered, although it should be added that an election or other proceeding had at a meeting irregularly assembled may be valid if all attend and act or assent. Sub-section (3) enables the member of a company where there has been default in summoning a general meeting, to apply to the Court to direct the calling of the meeting. The order made by the Court, has, however, not the effect of excusing the persons liable for default in summoning a general meeting. 61 C. 408=151 I.C. 693=1934 C. 624. *See also* S. 79 (3) introduced by the Amending Act XXII of 1936.

“GENERAL MEETING”.—Where according to a requisition of certain shareholders an extraordinary meeting was held, it was held that such a meeting cannot be a “general meeting” within the meaning of this section 25 Bom.L.R. 224=72 I.C. 349=1923 B. 194. But *see* 54 I.C. 494=21 Cr.L.J. 94.

“KNOWINGLY AND WILFULLY”.—*See* notes under S. 32, *supra*; *see also* 21 C.W.N. 840=38 I.C. 437. The petitioner who was one of the managing directors of a company was charged and convicted under S. 76 (2). The evidence did not justify the conclusion that he was knowingly and wilfully a party to the default under S. 76 (1). *Held*, that he could not be convicted under S. 76 (2). 53 L.W. 680=(1941) 1 M.L.J. 702. Before an ordinary director of a company can be convicted of an offence under S. 76 (2) there must be evidence to show that he was knowingly and wilfully a party to the default under S. 76 (2). 1941 M.W.N. 959.

Ss. 76 (2) AND 131—SCOPE—DELAY IN

visions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.]

<sup>1</sup>[77. (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a

Annual general meeting.

period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted ;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid ;

(c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares ;

(d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any, and secretary of the company and the changes, if any, which have occurred since the date of the incorporation ;

#### LEG. REF.

1 This section was substituted by 3. 32 of Act XXII of 1936.

HOLDING GENERAL BODY MEETING AND LAYING BALANCE SHEET—CONDONATION BY REGISTRAR.—Where the Registrar of joint stock companies condones the delay on the part of the directors of a company in holding a general body meeting, and thereby condones the delay in filing a balance sheet before the general body at its meeting, the directors cannot be convicted under Ss. 76 (2) and 131. *Quære*, whether the Registrar can condone the delay in holding a general meeting. 53 L.W. 660=1941 Mad. 504= (1941) 1 M.L.J. 419. *Quære*.—It is very doubtful if a meeting valid under the substantive law could be invalidated by an article of association. 190 I.C. 551=1940 Sind 87. In case of calling of a meeting on requisition, there is no presumption in law that the requisition is received on the date it bears. 190 I.C. 551=1940 Sind 87.

SEC. 77: AMENDMENT BY ACT XXII OF 1936.—The present section has been substi-

tuted in the place of the old one. Under the old section, the obligation to hold a statutory general meeting was only upon the company limited by shares, and the present section imposes the obligation also upon "companies limited by guarantee and having a share capital". In sub-S. (6) of the old section no provisions was made for penalty in respect of a company not holding the statutory general meeting in time. This was possibly due to an inadvertent omission. All these defects have been remedied by the present section. Further, additional requirements to what were contained in the old Act have been provided for in clauses (c), (d), (f) and (g), to sub-S. (3) of the present section. Provision has also been introduced in this section, authorising certification of the report by the Chairman of the Directors. This section has adopted the law in S. 113 of the English Act, with some modifications as to the times and periods fixed therein.

"KNOWINGLY AND WILFULLY"—"PERMITS THE DEFAULT".—(See notes under S. 32, *supra*). An offence punishable under the

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification ;

(f) the extent to which underwriting contracts, if any, have been carried out ;

(f) the arrears, if any, due on calls from directors, managing agents and managers ; and

(g) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm or if the managing agent is a private company a director thereof.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares and to the receipts and payments of the company, be certified as correct by the auditors of the company.

(5) The directors shall cause a copy of the statutory report certified as required by this section to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.

(11) This section shall not apply to a private company.]

78. (1) Notwithstanding anything in the articles, the directors of a company

Calling of extraordinary  
general meeting on requisition.

which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

old Act but omitted to be so punished cannot be dealt with after the repeal of the Act. See 41 I.C. 1008=18 Cr.L.J. 896=31 P.R. 1917 (Cr.).

SEC. 78: AMENDMENT BY ACT XXIII OF 1936.—(i) Sub-S. (4) of the old Act has been omitted, consequential on the amendment of S. 81 (2), which has rendered the subsequent confirmation of any resolution unnecessary, and the old sub-section (5) has been re-numbered as sub-S. (4) in the present section. (ii) Sub-S. (5) has been

newly inserted, on the lines of S. 114 (1) of the English Act. There was no provision in the old Act, corresponding to this sub-section. It was considered unreasonable to make the requisitionists incur expenditure and for the directors to go free where they fail to convene the meeting. Suitable provision has been made in this sub-section both for recompensing the requisitionists and penalising the defaulting directors, without any loss to the company itself.



(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

<sup>1</sup>[(4) Any meeting called under this section by the requisitionists shall be called in the same manner as nearly as possible, as that in which meetings are to be called by directors.

<sup>1</sup>[(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

<sup>2</sup>[79. (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf :—

Provisions as to meetings and votes.

#### LEG. REF.

<sup>1</sup> Sub-S. (4) was omitted, original sub-S. (5) was re-numbered as (4) and sub-S. (5) added by S. 33 of Act XXII of 1936.

<sup>2</sup> This section was substituted by S. 34, *ibid.*

It is true that a shareholder is entitled to be given adequate information as to the business to be transacted, as S. 78 in fact requires; but, it cannot be held that unless the notice of the meeting recites all facts necessary to meet every technical objection which may be raised to its validity, the meeting held in pursuance of such notice must be invalid. 190 I.C. 551=1940 Sind 87. Notice of an extraordinary general meeting of the shareholders of a company must disclose all facts necessary to enable the shareholders to determine in his own interest whether or not he ought to attend the meeting. The pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose. 43 Mys. H.C.R. 396=16 Mys.L.J. 448. See also 52 L.W. 751=1941 Mad. 354=(1940) 2 M.L.J. 721. Order of Court for winding up based on opinion of majority of shareholders in the absence of any resolution is bad. 49 C. 399=69 I.C. 241.

Sno. 79: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old S. 79; and this is based on S. 115 of the English Act, with several substantial modifications. The procedure to be adopted at meetings of the shareholders of a company is generally laid down in the Articles of Association of the company, and the provisions of old S. 79 were applicable only in cases where there were no provisions in

the Articles regarding the same. This is also the English law, and S. 115 of the English Act allows of its provisions being overridden by the provisions made in the articles of the company. But in the present section, certain provisions such as those governing the notice to be given for special resolution, the manner of service of notices, the number of members entitled to demand a poll, and the form of proxy instruments have been made incapable of being varied by the articles of the company. Further, this section contains a specific provision that agenda must accompany the notice of a general meeting. There has been a practice not uncommon in the case of several companies to deny to shareholders duly brought on the register the full exercise of their rights as shareholders until after a specified period; and Cl. (e) of sub-S. (1) of this section puts an end to that practice.

SUIT TO EXERCISE VOTE.—Any shareholder is entitled to institute a suit to enforce his right to exercise his vote. 61 M.L.J. 724=1932 M. 100. No matter where the meeting is held or how defectively the members are notified, the proceedings will bind all who appear at the meeting and participate in it without dissent. But if a single member having the right to be present and vote, is not notified in the prescribed manner, and is absent or refuses to consent to the proceedings held at the meeting, its proceedings will be illegal and void. But a shareholder actually knowing about the business to be transacted at a meeting cannot complain of insufficiency of notice. 52 B. 571=55 M.L.J. 697=1928 P.C. 180=55 I.A. 274 (P.O.). The omission to mention any secret arrangement is a serious defect in the notice. But if any omission was due



(a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit;

(b) notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression 'Table A' means that table as for the time being in force; but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting;

(c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll: Provided that in the case of a private company if not more than seven members are personally present, one member, and if more than seven members are personally present, two members shall be entitled to demand a poll;

(d) an instrument appointing a proxy, if in the form set out in regulation 67 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles; and

(e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf:—

(a) two or more members holding not less than one-tenth of the total share capital paid up, or, if the company has not a share capital, not less than five per cent. in number of the members of the company may call a meeting;

(b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum;

(c) any member elected by the members present at a meeting may be chairman thereof;

to a *bona fide*, mistake, Courts will take a liberal view of the matter and will not upset all the proceedings on that ground only. 26 Bom.L.R. 987=1925 B. 49.

Proxy.—The Court can under S. 153 settle a form of proxy, and any substantial failure to comply with the Courts' directions in that respect would invalidate the proxy. 30 Bom.L.R. 197=1928 B. 80. Unstamped proxies, proxies given by the company in favour of its director, and proxies given by persons who were debtors to the company are invalid. 1928 B. 80. But undated proxies, proxy signed by the shareholder within time, although he has signed another proxy out of time, and voting made by proxy in the presence of the member entitled to vote are void. 1928 B. 80. Where votes on the amendments proposed were given in person, while the votes on the substantive proposition were given by proxies in a meeting of the company held for changing its memorandum, it was held that such votes were valid. 1928 B. 80.

Where an amendment to a resolution, moved at an ordinary meeting of the company, is

wrongly ruled out of order by the Chairman of the meeting, and the original resolution without amendment is lost, the proper course is to treat all the proceedings subsequent to the moving of the resolution as invalid and to direct a general meeting to be convened for the purpose of considering the resolution afresh. The refusal by the chairman to put the amendment to the meeting invalidates the proceedings. 47 Bom.L.R. 428=A.I.R. 1945 Bom. 475. Amendments to a resolution moved at a meeting must, as a general rule, be germane to the subject-matter of the proposition, and secondly, they must not, in substance, be a direct negative of the proposition moved. Where, at an ordinary meeting of a company, a motion is submitted that the report of the committee and the accounts be received and adopted, an amendment to the effect that the report and accounts be received but not adopted and that a committee be appointed to look into them and report cannot be said to be a direct negative of the resolution moved, and must be held to be in order. 47 Bom.L.R. 28=1945 Bom. 475.

(d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in any other case every member shall have one vote ;

(e) on a poll votes may be given either personally or by proxy ;

(f) the instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing, or if the appointer is a corporation, either under seal or under the hand of an officer or an attorney, duly authorised ; and

(g) a proxy must be a member of the company.

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.]

80. A company which is a member of another company may, by resolution

Representation of companies at meetings of other companies of which they are members.

of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an

individual shareholder of that other company.

81. (1) A resolution shall be an extraordinary resolution when it has been

Extraordinary and special resolutions.

passed by a majority of not less than three fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general

meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

SEC. 81: AMENDMENT BY ACT XXII OF 1936.—Old sub-S. (2) has been replaced by the present sub-S. (2); and some consequential amendments in sub-Ss. (3. and (4) have been introduced. By virtue of this change, it is no longer necessary that any special resolution should be confirmed by a second general meeting, while it requires 21 days' notice to be given of the meeting at which the special resolution is passed. The provision as to demand of a poll in sub-S. (4) previously has been omitted in the present Act, as the same has been provided for by the amended S. 79 of the Act. The amendment of this section has been made on the lines of S. 117 of the English Act.

CHAIRMAN'S DECLARATION AS TO VOTES.—At any meeting either for extraordinary or for special resolution, the declaration by the chairman on a show of hands that the resolution has been carried is conclusive evidence as to the passing of the resolution. The minutes of the meeting are inadmissible in evidence to show that the declaration of the chairman was not warranted. 30 Bom.L.R. 598=1929 B. 38. But see

I.L.R. (1938) 1 Cal. 90=41 C.W.N. 1137=1937 Cal. 645. Amendment of articles of association—Failure to mention question of amendment in notice under S. 81 is fatal to the proceedings. 1940 Lah. 243. Resolution relating to question of reduction of capital—Validity—Amendment of section after adjournment of meeting—Effect on procedure. 1938 Pesh. 41=177 I.C. 368.

"POLL".—The taking of a poll is not a meeting of the company in the strict sense but is a mere continuation in law, of a meeting at which a poll was directed to be taken. If a meeting has been adjourned to another date for the taking of poll, the original meeting continues until the poll is taken. 61 M.L.J. 724=1932 M. 100.

PROXY.—Proxy must be qualified not only when he is appointed but also when he acts. 29 B. 126 (P.C.). Vote by proxy even in the presence of the person entitled to vote is valid. 30 Bom.L.R. 197=1928 B. 80.

Undated proxy is valid but not unstamped proxy, where law requires a stamp. 1928 B. 80. As to proxies given by directors of company, see 1928 B. 80. Second proxy, if revokes the previous one, see 1928 B. 80.

<sup>1</sup>[(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given :

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.]

(3) At any meeting at which an extraordinary resolution <sup>2</sup>[or a special resolution is submitted to be passed] a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution <sup>2</sup>[or a special resolution is submitted to be passed] a poll may be demanded <sup>3</sup>[\* \* \* \* \*]

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct it may, if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by the articles of the company, <sup>4</sup>[or under this Act.]

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given at the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, <sup>4</sup>[or under this Act].

82. (1) A copy of every special and extraordinary resolution shall, within fifteen days from <sup>5</sup>[the passing thereof] be printed

Registration and copies of special and extraordinary resolutions.

or type written <sup>6</sup>[and duly certified under the signature of an officer of the company] and filed with the registrar who shall record the same.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

#### LEG. REF.

<sup>1</sup> This sub-section was substituted by S. 35 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "is submitted to be passed or a special resolution is submitted to be passed or confirmed," *ibid.*

<sup>3</sup> Certain words were omitted, *ibid.*

<sup>4</sup> These words were added by *ibid.*

<sup>5</sup> These words were substituted for the words "the confirmation of the special resolution or from the passing of the extraordinary resolution as the case may be," by S. 36, *ibid.*

<sup>6</sup> These words were inserted, *ibid.*

SEC. 82: AMENDMENT BY ACT XXII OF 1936.—For the words "the confirmation of the special resolution or the passing of the extraordinary resolution as the case may be", the words "the passing thereof" have

been substituted in sub-S. (1). This is a consequential change necessitated by the abolition of confirmation of extraordinary resolutions. After the words "type written" the words "and duly certified under the signature of an officer of the company" have been added with the object of securing the correctness of the records preserved in the Registrar's office. Discretion of Registrar in refusing to record special resolution of company altering articles of association, *see* 63 M.L.J. 917. There is nothing in the Act which prohibits the Registrar from refusing to file amendments made in the articles of a company with a view to changing its nature (converting it from a private to a public company or from a public to a private company). On the contrary by reason of S. 82 the Registrar is bound to file them. 23 Pat. 204=24 P.L.T. 226=A.I. R. 1943 Pat. 278.

(4) If a company makes default in so filling with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

Minutes of proceedings of general meetings and of its directors.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

<sup>1</sup>[(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.]

<sup>1</sup>[(5) Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words.]

<sup>1</sup>[(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to <sup>2</sup>[a further fine not exceeding twenty-five rupees] for every day during which the default continues.]

<sup>1</sup>[(7) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.]

<sup>3</sup>[Directors.

Directors obligatory.

83-A. <sup>4</sup>[(1) Every company shall have at least three directors.]

#### LEG. REF.

<sup>1</sup> These sub-sections were added by S. 37 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "a further fine to twenty-five rupees" by S. 2 and Sch. I of Act XXXIV of 1939.

<sup>3</sup> This heading and Ss. 83-A and 83-B were inserted by S. 2 of Act XI of 1914.

<sup>4</sup> This sub-section was substituted by S. 38 of Act XXII of 1936.

introduced by the amendment; and it has been done with a view to bring the law in accordance with S. 121 of the English Act. A period of 7 days from the meeting for the preparation of the minutes has been provided for in this section, since this task is sometimes entrusted to solicitors or others and is not always completed without some delay. The words "knowingly and wilfully" have been inserted to ensure that unintentional default is not to be penalised.

SEC. 83: AMENDMENT BY ACT XXII OF 1936.—Sub-Ss. (4) to (7) have been newly

SEC. 83-A: AMENDMENT BY ACT XXII OF 1936.—(i) The amendment increases the

(2) This section shall not apply to a private company <sup>1</sup>[except a private company being a subsidiary company of a public company.]

<sup>2</sup>[83-B. (1)] In default of and subject to any regulations in the articles of a company other than a private company—

(i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed ;

(ii) the directors of the company shall be appointed by the members in general meeting ; and

(iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.]

<sup>3</sup>[(2) Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation :

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section.]

#### LEG. REF.

<sup>1</sup> These words were added by S. 38 of Act XXII of 1936.

<sup>2</sup> S. 83-B was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 39, *ibid.*

<sup>3</sup> S. 83-B was re-numbered as sub-S. (1) of that section and sub-S. (2) was added *ibid.*

minimum number of directors from two to three in the case of companies registered after the amendment comes into operation.

(ii) The amendment of sub-S. (3) deprives the benefit of the exception in the case of private companies which are subsidiary companies of a public company. The amending Act of 1936 introduces a distinction between 'private companies' and 'private companies which are subsidiaries of public companies'; and the exemption accorded to the former by certain provisions of the Act, *e.g.*, Ss. 83-A, 86-D, 87-C, 87-D, 91-B (3), 91-D and sub-Ss. 141 (1) and 144 (5), is made not applicable to the case of the latter class of companies. A director or a managing director is in no way a servant of the company; he is the agent of the company for carrying on its business. 43 P.L.R. 619=1941 Comp.C. 301.

SEC. 83-B: AMENDMENT BY ACT XXII OF 1936.—Sub-S. (2) has been newly inserted by the amending Act, with a view to secure greater independence to the directors. It lays down that not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation. There is a proviso with reference to companies incorporated before the commencement of this

amending Act. This section is to be read in conjunction with the amended S. 17 (2) which by making the provisions of Art. 78 of Table A applicable to all companies secures that all first directors of a company must retire at the first ordinary meeting of the company.

SEC. 83-B, CL. (1).—Casual vacancy in this section means any vacancy occurring by death, resignation of bankruptcy, and not by efflux of time. 61 M.L.J. 724=34 L. W. 746=1932 M. 100. Articles of Association—Provision for automatic re-election of directors—Construction—Applicability to co-opted directors. *See* I.L.R. (1940) 1 Cal. 560. The articles of association of a company provided that a person elected by the directors as a director can hold office till the next general meeting and that the person elected at the general meeting can hold office for three years. A candidate failed to get himself elected at the general meeting. It was held that it did not in any way detract from the authority of the directors to co-opt that failed candidate for the limited time which would expire on the date of the next general meeting. 55 A. 399=1933 A. J. 290=1933 A. 344. One of the articles of association of a company provided as follows: "The directors shall have power at any time, and from time to time, to appoint any other qualified person to be a director, either to fill a vacancy or as an addition to the Board, but so that the total number of directors shall not at any time exceed the maximum number fixed by Art. 98, and any person so appointed shall retain his office only until the next following ordinary meeting, and shall then be eligible for re-election". *Held*, that the ordinary power of the company in general meeting

84. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(i) signed and filed with the registrar a consent in writing to act as such director; and

(ii) save in the case of <sup>1</sup>[companies] not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) <sup>2</sup>[or taken from the company and paid or agreed to pay for his qualification shares] or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) <sup>3</sup>[or made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name.]

(2) On the application for registration of the memorandum and articles <sup>4</sup>[, if any,] of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company <sup>4</sup>[or a company which was a private company before coming a public company] not to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

85. (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

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<sup>5</sup>[ (2) ] If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

86. The acts of a director shall be valid notwithstanding any defect that

#### LEG. REF.

<sup>1</sup> This word was substituted for the words "a company limited by guarantee and" by S. 40 of Act XXII of 1936.

<sup>2</sup> These words were inserted, *ibid.*

<sup>3</sup> These words were added, *ibid.*

<sup>4</sup> These words were inserted, *ibid.*

<sup>5</sup> The original sub-S. (2) of S. 85 was omitted and sub-S. (3) was re-numbered (2) by S. 41, *ibid.*

to appoint additional directors had not been excluded by the articles of association. 190 I.C. 551—1940 Sind 87.

SEC. 84: AMENDMENTS BY ACT XXII OF 1936.—(4) These changes made by Act XXII of 1936, slightly widen the application of the section. The exception contained therein has been made applicable not only to companies limited by guarantee and not having a share capital, but to all companies not having a share capital. The amendment brings

the provisions of S. 84 (1) into accord with S. 140 (1) of the English Act. (ii) In sub-section (2), after the word 'articles' the words 'if any' have been inserted, with a view to make it applicable to companies which have no separate articles of association of their own but adopt Table A. (iii) The amendment introduced in sub-section (3), *viz.*, the insertion of the words 'or a company. . . . public company' was for the purpose of making the section inapplicable to companies which began as private companies.

SEC. 85: AMENDMENT BY ACT XXII OF 1936.—The original sub-clause (2) in this section was omitted here, and the same has been inserted as cl. (a) of S. 86-I.

SEC. 86: ARTICLES OF ASSOCIATION.—A director invalidly appointed cannot bind the shareholders unless so provided in the articles of association. 1927 L. 70—109 I.C.

may afterwards be discovered in his appointment or qualification : Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

662. See also 36 A. 412=25 I.C. 210=12 A.L.J. 667.

KNOWLEDGE OF DIRECTORS, IF KNOWLEDGE OF COMPANY.—Though generally the knowledge of the directors is not necessarily the knowledge of the company, still if it is the duty of the director to disclose his knowledge to the company, then that knowledge may be attributed to the company. 33 Bom. L.R. 184.

BONA FIDE ACTS OF DIRECTORS.—As between a company and third persons the directors *de facto* are directors *de jure*. 13 Bom.L.R. 162=10 I.C. 748. Acts done *bona fide* by a manager or director as valid in spite of a defect in the appointment not only between the company and outsiders but also between the company and its members. 46 P.R. 1911=10 I.C. 515. The Board of management of a Company granted a gratuity to an ex-secretary, although the Gratuity Rules of the Company did not permit such a grant. The Board of Management, on exception being taken to the grant by the Deputy Registrar of Co-operative Societies, amended the by-laws so as to permit the grant, and they placed the matter before the General Body. The latter passed a resolution at a meeting sanctioning the payment of gratuity. *Held*, that the matter only related to the administration and internal management of the affairs of the company and so long as the General Body acted within the ambit of the Articles of Association, any act done by them in regard to the management of the Company would be *intra vires* and not *ultra vires*; (2) that though the Board of management was delegated the power to frame by-laws, that did not take away the power of the General Body to sanction any payment of gratuity in exceptional cases not provided for by the by-laws as framed by the Board of management. This power always vested in the General Body and could not be taken away by the mere fact of delegation. 52 L.W. 417=1940 Mad. 928=(1940) 2 M.L.J. 488. The assets of the company are entrusted to the directors to be applied to certain defined objects and they are responsible as for a breach of trust if they apply them to other objects. 168 I.C. 786=1937 Pat. 293. The assets of a company cannot be disposed of by a resolution of the Directors only. They can only be disposed of after the resolution of the shareholders passed at a special meeting called for the purpose of winding up the company and disposing of its assets. A resolution passed by the Board of Directors of a company, authorizing one of their members to sell the assets of the company

for satisfaction of its debts is *ultra vires* and a transfer of property effected in pursuance of such resolution is ineffectual to pass any title to the transferee, more so when the formalities in respect of the deed of transfer provided by the Articles of Association of the company have not been observed and the transfer has been effected not by the Director so authorized but by his agent whose authority to act for the company is not proved. 1938 Rang. 447; (1941) 1 M.L.J. 98 (P.C.). There is a contravention of S. 86 (d) when the Board of Directors of a company sanction a loan to a director; and if the attention of the directors is drawn to this it is their duty to see that the illegality is terminated. Failure to rectify the same is an offence. 55 L.W. 282=1942 M.W.N. 296=A.I.R. 1942 Mad. 452 (1)=(1942) 1 M.L.J. 520.

ACT OF DIRECTORS *ultra vires*—RATIFICATION BY SHAREHOLDERS—VALIDITY.—To render valid an act of the directors of a company which is *ultra vires* the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, *vis.*, the acquiescence of each and every member of the company. Of course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders. By knowledge of the transaction is clearly meant knowledge of the invalidity of the transaction. There can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. [(1869) 3 H.L. 171, Foll.; (1877) 2 A.C. 366 Rel. on.] 1938 P.C. 284 (P.C.).

ALLOTMENT OF SHARES.—Persons on whom no notice of allotment is served cannot be put on the list of contributories at the time of liquidation. 36 A. 412=25 I.C. 210=12 A.L.J. 667. But the first directors are bound to see if the allotment is made in their names, and they cannot avoid their liability to pay for the shares by pleading their own default or negligence in not making the allotment of shares to themselves. 149 I.C. 869=1934 S. 39.

FORFEITURE OF SHARES.—Where the directors had acted *intra vires* and *bona fide*, the official liquidator cannot take advantage of any irregularity in the procedure of the directors in forfeiting the shares. 109 I.C. 662=1929 L. 70. But where the memorandum of association gave no power to the directors to forfeit shares, a compromise by directors of unpaid calls under the guise of forfeiture would be *ultra vires* and invalid,



<sup>1</sup>[86-A. (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees.

Intelligibility of bankrupt to act as director.  
or to both.

#### LEG. REF.

<sup>1</sup>This section was inserted by S. 42 of Act XXII of 1936.

and the members of the company would not be bound by such acts, though beneficial to the company unless expressly ratified by all the shareholders. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. As to forfeiture of shares, *see also* 45 C.W.N. 1075; 1940 M.W.N. 553=1940 Mad. 873; 1938 P.C. 284=43 C.W.N. 205=(1939) 1 M.L.J. 98 (P.C.).

**SUIT FILED BY DE FACTO DIRECTOR.**—Although the appointment of a person as director was irregular from the outset, if he has continued to act as such in good faith, he is to be deemed a *de facto* director, and the signing by him of any plaint will be validated under S. 86 of the Act. In a suit instituted by him, the mere raising of a doubt as to the validity of his appointment is not enough to “show” in the words of the proviso to the section that his appointment was invalid. Where the question as to the validity of the appointment has been raised in proceedings before a Court, the appointment cannot be considered to be *shown* to be invalid until the Court has come to a definite decision on the subject. Where this question was remitted by the appellate Court for a finding, and the lower Court recorded a finding against the validity of the appointment, even then it cannot be said that it is “shown” to be invalid within the meaning of the proviso to S. 86; unless and until the appellate Court passes a definite decision on the point. Hence any act that may have been done by such a director since the raising of the question in any proceeding as to the invalidity of his appointment, and till the definite decision of the same by the Court, cannot be deemed to be invalid. 9 B. 56=134 I.C. 737=1931 R. 139. When the question of the competency of the director to sign and verify a plaint is raised in defence, the Court cannot shut out evidence of facts or questions in cross-examination which may throw light on the point as to whether the signing of the plaint in the suit was or was not made after the directors’ appointment had been shown to be invalid. 130 I.C. 843=1931 R. 54.

**LAW OF CLUBS AND ASSOCIATIONS—EXPULSION OF MEMBER BY STEWARDS—OBSERVANCE OF RULES OF NATURAL JUSTICE.**—In considering whether natural justice has been observed by a domestic tribunal in arriving at a decision one of the factors to be considered

is whether the body which decided the question were actuated by malice or some improper motives. In considering such a question the subsequent conduct of those concerned may be most material when there is a question of malice, everything relative to the matters in question even down to the very conduct of the defendant (the domestic tribunal) at the trial, may be material. Evidence of events subsequent to the decision of the domestic tribunal may be considered. 47 Bom.L.R. 916. Where the rules of racing framed by a Club do not prescribe any particular length of notice in regard to the investigation into a charge of misconduct on the part of a trainer, mere shortness of notice is not by itself fatal and would not vitiate the proceedings or make them contrary to natural justice. Nor would the mere absence of notice of the charge before the hearing, in itself, be incompatible with natural justice in a domestic tribunal. Where there is no rule expressly requiring any particular notice to be given to the party affected or to the tribunal, the party cannot be allowed to conduct his case, before a tribunal properly constituted, to its conclusion, and then, when he has been unsuccessful, to say that he ought to have had notice of the charge before the hearing began and particulars of the charge. 47 Bom.L.R. 916. To constitute “bias” in an arbitrator or a domestic tribunal, such as a committee of Stewards of a Race Club, there must be something tending to make the mind to go one way rather than another, and improperly tending to do so. In every Club, and even in every profession, the tribunal which decides the question of expulsion of a member is to a certain extent interested in the result of the proceedings. That is not however bias in itself for the purpose of invalidating their decision. 47 Bom.L.R. 916.

**SEC. 86-A: AMENDMENT BY ACT XXII OF 1936.**—Ss. 86-A to 86-I have been newly inserted by Amending Act XXII of 1936, with a view to provide for the control of directors. S. 86-A has been enacted on the lines of the English Act, S. 142. The word ‘bankrupt’ used in the English Act has been replaced in this section by the more familiar term ‘insolvent’; and while under the English Act ‘any person who acts as director or either directly or indirectly takes part in or is concerned in the management of a company’s is penalised, his section applies only to ‘directors or managing agent or manager’. Sub-sections (2) and (4) of the English Act have been omitted as being of no application to this country.



(2) In this section the expression 'company' includes a company incorporated outside British India which has an established place of business within British India.]

<sup>1</sup>[86-B. In the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company :

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the director are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section :

Provided always that any such alternate or substitute director shall *ipso facto* vacate office if and when the appointer returns to the district in which meetings of the directors are ordinarily held.

*Explanation.*—For the purposes of the provisions to this section, the presidency-towns of Calcutta and Madras shall be deemed to be part of the 24 Parganas and Chingleput Districts respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts.]

<sup>1</sup>[86-C. Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void :

Provided that—

(a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1936, this section shall have effect only on the expiration of a period of six months from that date, and

(b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and

(c) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 281 of this Act in which relief is granted to him by the Court.]

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 42 of Act XXII of 1936.

SEC. 86-B: AMENDMENTS BY ACT XXII OF 1936.—This section is new, and has been inserted by Act XXII of 1936 with a view to control the directors and to prevent them from sacrificing the interests of the company for their own benefit. It follows S. 151 of the English Act. The first proviso in this section is not contained in the English Act, and it has been inserted here to make it clear that temporary appointments of alternate or substitute directors do

not constitute an assignment of office, when made with the approval of the Board of Directors. The 2nd proviso provides for the absent director taking up his duties immediately on his return. The explanation has been added, in view of the close proximity of certain Districts to the Presidency Towns of Calcutta, Madras and Bombay.

SEC. 86-C: AMENDMENT BY ACT XXII OF 1936.—This section is newly added by Act XXII of 1936 and it follows S. 122 of the English Act. This makes it no longer possible for any director, manager or officer of the company to avoid liability for his acts by having suitable provisions inserted in the

<sup>1</sup> [86-D. (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner <sup>2</sup>[or to a private company of which such director is a member or director.]

Loans of directors.

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or in discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company.]

<sup>1</sup>[86-E. No director or firm of which such director is a partner or private

Director not to hold office of profit.

company of which such director is a director shall without the consent of the company in general meeting hold any office of profit under the company except that

of a managing director or manager or a legal or technical adviser or a banker :

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936, in respect of any office of profit under the company held by him at the commencement of the said Act.

*Explanation.*—For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company.]

<sup>1</sup>[86-F. Except with the consent of the directors, a director of the company, or

Sanction of directors necessary for certain contracts.

the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the

sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.]

<sup>1</sup>[86-G. (1) The company may by extraordinary resolution remove any

Removal of directors.

director, whose period of office is liable to determination at any time by retirement of directors in rotation, before

the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 42 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "or to a private company of which such director is a director" by S. 5 of Act II of 1938.

articles of association or in any contract with the company.

SEC. 86-D: AMENDMENT BY ACT XXII OF 1936.—This section is new, and it prohibits the making of loans of any kind to directors or guaranteeing any loans made by a director, and provides a punishment for breach of the same. It must however be noted that prohibition is not applicable to certain classes of private companies and to banking companies.

SEC. 86-E: AMENDMENT, 1936.—This section has been newly inserted by Act XXII of 1936 with a view to prevent directors or firms or private companies in which these

are directors, from holding offices of profit under the company, except those referred to in the section. Offices of profit held by directors elected or appointed before this amendment are expressly saved from the operation of this section. The explanation makes it clear that 'managing agents' shall not be deemed to hold any office of profit under the company.

SEC. 86-F.—This section has been added by Act XXII of 1936. By virtue of this section no director or firm in which also he is a director can enter into any contract with the company except with the sanction of the Board of Directors.

SEC. 86-G.—This section is newly added by Act XXII of 1936, and it makes provision for the removal of directors (excepting those who have been elected or appointed before the coming into force of this amendment), instead of leaving the matter to be provided for in the articles of association.

place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors.

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936.]

<sup>1</sup>[86-H. The directors of a public company or of a subsidiary company of a public company shall not except with the consent of the company concerned in general meeting,—

- (a) sell or dispose of the undertaking of the company ;
- (b) remit any debt due by a director.]

Vacation of office of director. <sup>1</sup>[86-I. (1) The office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of section <sup>2</sup>[85] or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or

(b) he is found to be of unsound mind by a Court of competent jurisdiction, or

(c) he is adjudged an insolvent, or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of section 86-D, or

(h) he acts in contravention of section 86-F.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section.]

<sup>3</sup>[87. (1) Every company shall keep at its registered office a register of its directors, managers and managing agents containing

Register of directors, managers and managing agents.

with respect to each of them the following particulars, that is to say :—

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 42 of Act XXII of 1936.

<sup>2</sup> This figure was substituted for the figure "84" by S. 4 of Act II of 1938.

<sup>3</sup> This section was substituted by S. 43 of Act XXII of 1936.

SEC. 86-H.—This has been inserted by Act XXII of 1936. It restricts the powers of the directors, and requires the consent of the general meeting for the sale or other disposition of the undertaking of the company, and also for remitting any debt due by a director.

SEC. 86-I.—This section has been newly inserted with a view to make provision in the Act itself for the vacation of office of director instead of leaving the matter to be provided for in the articles of association. Cl. (1) (a) reproduces here the provision

which was previously contained in sub-Cl. (2) of S. 85.

SEC. 87: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted in the place of the old one by Act XXII of 1936, and it follows S. 144 of the English Act. This makes provision for the register of directors, managers and managing agents, containing the prescribed particulars, kept corrected and open to inspection. Under the old section there was no time limit prescribed for filing with the Registrar a copy showing the changes, and such changes were rarely reported to the Registrar and if at all after inordinate delay. Nor was there any provision therein for the inspection of the register by the members. These defects have been rectified by the present amendment. 58 O. 882 and 35 L.W. 661, which were decided under the section as it stood before the amendment are no longer good

(a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality, and, if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships ;

(b) in the case of a corporation, its corporate name and registered or principal office and the full name, address and nationality of each of its directors ; and

(c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods respectively mentioned in this sub-section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register.]

#### <sup>1</sup>[*Managing Agents.*

87-A. (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936, be appointed

Duration of appointment of managing agent.

to hold office for a term of more than twenty years at a time.

#### LEG. REF.

1 This heading and S. 87-A were inserted by S. 44 of Act XXII of 1936.

law, as now a 'time-limit' has been fixed by the amending section. Hence the penalty provided for default in compliance with the section can no longer be evaded.

CONSTRUCTIVE NOTICE.—It was held in 27 Bom.L.R. 978=161 I.C. 126=1936 B. 62, that it cannot be said that persons dealing with a company have notice of the contents of all the documents on the file of the particular company; and that merely because a list of directors has to be filed with the Registrar under S. 87 of the Act, it cannot be said that persons dealing with the company have notice of who the directors of the company are. But it is doubtful if this decision will be good law now in view of the provision introduced in the amended section, as to the inspection of the register of director, etc., by the members and the public at the company's office on every

business day for a period of not less than 2 hours. Where a company makes default in complying with S. 87 (2) by failing to report to the Registrar of Joint Stock Companies a change in the directorships held by a director, it becomes liable under S. 87 (4). It is unnecessary for the prosecution to prove that anybody connected with the company had knowledge of the change, etc. The words knowingly and wilfully in S. 87 (4) can only refer to a person and not to a company. 1942 M.W.N. 761=(1943) 1 M.L.J. 119=56 L.W. 80=1943 Mad. 214.

SEC. 87-A: AMENDMENTS—MANAGING AGENTS.—Ss. 87-A to 87-I have been inserted by the Amending Act XXII of 1936, and they deal with the subject of managing agents. They deal with their appointments, the conditions applicable to them, their remuneration, and the restrictions imposed on them as to the obtaining of loans, the purchase of shares of other companies under their management, the issue of debentures, the engaging of themselves in any other

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said twenty years.

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances, if any.

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid.

competitive business, and the appointment of directors. These subjects will be dealt with in greater detail under each of the sections following. It will be useful to give here a general idea as to the system of managing agency, which has been for the first time brought now within the purview of the legislature. This institution of managing agency is one which is peculiar to this country, and it is not to be found in this form in any other part of the world. This system owes its origin to the fact that in this country there have been no facilities for obtaining financial assistance in the case of corporations. Banks and money lenders have been unwilling generally to advance monies to companies without having the guarantee of some third party of undoubted financial stability. The people also, having been unaccustomed to companies which have been only of recent growth in this country, have been unwilling to invest their monies in such concerns unless they were assured of their proper management and conduct by persons of approved commercial ability and experience. Owing to these circumstances, there came into existence two classes of persons, *viz.*, (i) those of well-known financial standing who were in a position to advance their own monies or to obtain on their credits from their friends or banks, monies needed for the carrying on of the business of the companies; and (ii) those men of commercial experience who undertook the responsibility of incorporating and managing the companies. Taking advantage of their importance in connection with the formation and conduct of the companies, they often stipulated to keep the practical management of the companies in their own hands for very long periods, and sometimes hereditarily also in their families. They also managed to have their remunerations and commissions fixed at extraordinarily high rates, irrespective of the profits earned by the company. They generally had the liberty to engage in other competitive trades on their own account, using the funds of the companies under their management for

the purpose, and thereby causing great loss to these companies. Thus, being in a position to dictate terms, these agents generally procured for themselves terms which when critically examined were sometimes in the nature of unconscionable bargains. The terms contained usually in their contract of management providing for their conduct being supervised by the directors of the company, and for their removal for dishonesty or fraud by the shareholders often proved illusory, since the managing agents almost in all instances contrived to have the directorate packed with men subservient to them and to have the shares issued and rules framed in such a way as to have effective control over the votes of the shareholders. Thus it was very often found impossible to have them under control in any manner or to have them removed. This is but the dark side of the picture, and the abuse of the powers by some of the managing agencies. On the other hand in several instances, it has been also found that the managing agents in this country have been mainly responsible for the prosperity of many of the industrial concerns in this country. But for the aid and assistance of the managing agents, and the driving force and skill in the organization and management brought to bear by them, many an industrial concern in this country would not have come into existence at all, or would have languished in their infancy. Under the circumstances narrated above, the system of managing agency came for criticism and consideration from time to time. One set of persons contended that the system had outlived its utility and was now exhibiting only its dark features that it should be abolished altogether by statute. Another set of persons emphasised on the advantages of the system, and contended that it should not be interfered with by legislation, and that parties should be left free in the matter of such contracts. There was still a third party which steered a middle course, and wanted that the system should not be abolished altogether, but that the Act should provide

suitable provisions for regulating their tenure of office, appointment, powers, etc. The agitation regarding these matters became very wide and insistent especially as a consequence of the deplorable failure of several industrial concerns under the control of managing agents in recent years. The Government felt that it could no longer keep quiet without interfering in the matter. The points, therefore, for the Government to consider were, whether there was any necessity for its interference at all, and if so, to what extent, i.e., whether to abolish the system altogether or to have the same regulated by legislation. To decide as to this matter, the Government appointed committees to investigate into the matter and also invited the opinions of several responsible bodies. As a result of these inquiries and after considering the several opinions regarding this matter from responsible bodies, the Government was convinced that there were certainly very serious abuses in the system, but that no case was made out for the abolition of the system altogether, and that a good case had been made out for the remedying of those abuses by legislative enactment. In this state of things, the Government decided to allow the system of managing agency to function, and at the same time to prescribe by legislation the necessary and adequate limits as to its function, powers and privileges. The following matters were found to be some of the serious abuses, and the Government determined as follows:—(i) That the Act should contain some provisions regarding their appointment, tenure of office, remuneration, etc., beyond which the managing agents would not be able to go without the specific sanction and approval of the shareholders. (ii) That legislative provision should be made for the shareholders having a fair and real chance of having their say in matters connected with the conduct and management of the business. (iii) That the period of managing agents should be fixed and limited to a certain number of years. (iv) That provision should be made for the election of an independent directorate, who should have an effective supervision over the managing agents. (v) That the managing agents should be prohibited by legislation from obtaining loans from the companies, under their management either for themselves or for some other companies under their management. (vi) That their powers regarding entering into any contract with the company under their management for the purchase, sale or supply of goods to the company, should be restricted in some respects. (vii) That restrictions should be imposed regarding the transfer of their office, and the charging or assigning of their remuneration or any part thereof. (viii) That their power to appoint directors should be restricted to certain proportion.

(ix) That the managing agents shall be removable even before the expiry of the period of their appointment, in certain contingencies, e.g., insolvency or conviction for certain criminal offences. (x) That there should be legislative prohibition against their engaging themselves in any business which is competitive of the business under their management as managing agents. There was still further difficulty as to what should be done with reference to the existing managing agencies. The cry was raised that if the legislature touched the existing agencies it would mean a violation of the principle of sanctity of contracts and that any provision which would be made would be treated as exproprietary legislation. It was, on the other hand, pointed out by the Government that although it was the duty of every Government to see that the sanctity of contracts should be preserved, still it would be failing in its duty if, being convinced that reforms were needed, it held up its hands merely because legislation was likely to affect contracts. It was also pointed out that it was on this principle that several Acts were recently enacted for granting relief to debtors; and that these enactments affected not only contracts but even adjudications of Courts of competent jurisdiction in cases in which unhappy debtors were concerned. In view of all the abovesaid conclusions reached by the Government it brought forward a bill embodying certain provisions for the purpose of remedying the defects and abuses found in the working of the system of managing agency. The matter was thoroughly examined by the select committee of the legislature, and the bill as it emerged from the committee was with a few modifications passed into law. This section has been introduced by Act XXII of 1936. By this section, all new appointments of managing agents are to be for a period not exceeding 20 years at a time. In the case of existing agencies, notwithstanding the terms of their agreement or any provision in the articles of association, the period of office is to come to an end after 20 years. With a view to safeguard the rights of existing agents, the terms of office of many of whom will come to an end within 20 years, the section provides that no such termination will be effective unless the moneys due to the outgoing agents are paid off, and that in respect of all liabilities and obligations properly incurred by them, they would have by way of indemnity a charge on the assets of the company, subject to the existing charges, if any. Note that no compensation has been provided for in the case of existing agents whose term of office would come to a premature end as a result of the enactment of this section, for the obvious reason that it will not be just to penalise the company for the termination of tenure of office of such agent by operation



(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company.]

Conditions applicable to managing agents. 1[87-B. Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company—

(a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of an offence in relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, non-bailable; and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company:

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside on appeal;

(b) the office of a managing agent shall be vacated if he is adjudged insolvent;

(c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting:

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment;

(d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company;

#### LEG. REF.

1 This section was inserted by S. 44 of Act XXII of 1936.

of law. The fair time-limit of 20 years has been fixed for the managing agents to show by the results of their management that they are indispensable, while from the point of view of the shareholders, it will give them an opportunity of considering every twenty years how the managing agents have carried on, and if they are dissatisfied or find they can do without the managing agents, they may have an opportunity of doing away with them. *See also* 46 Bom.L.R. 265. With respect to agency agreement Companies Amendment Act, 1936, is not retrospective, except that by S. 87-A, managing agencies existing when the Act came into force can only survive for 20 years after that date. 1944 Bom. 205=46 Bom.L.R. 265.

SEC. 87-B: AMENDMENT, 1936.—This section is new and has been inserted by Act XXII of 1936. It lays down the conditions applicable to managing agents. This section also provides for the removal of the managing agent by a resolution passed at a general meeting of the company in cases of cer-

tain specified offences committed by him; for avoiding payments of certain dues and compensation to the managing agent in the case of a winding up caused by the negligence or default of the managing agent; and for the necessity of approval of the company in general meeting for the validity of the appointment and removal of a managing agent and of any variation of a managing agent's contract of management, made after the commencement of this amending Act. Preliminary appointments announced in a prospectus, which would be impracticable to hold in abeyance until the first general meeting have been expressly excepted from the conditions laid down.

SEC. 87-B (d).—The restriction by S. 87, Cl. (d) is against a managing agent making a voluntary charge or assignment of his remuneration and the object is undoubtedly to prevent him from doing so to the detriment of the company. It is an entirely different matter when a creditor of a firm of managing agents seeks to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor. 1941 Cal. 240.

(e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice however, to the right of the managing agent to recover any money recoverable by the managing agent from the company: Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management; and

(f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86-E:

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lue of prospectus where the terms of the appointment of such managing agent are there set forth.]

Sec. 87-B (f).—S. 87-B (f) does not authorise the removal of the Managing Agent by passing a simple resolution where the articles appoint the Managing Agent. The purpose of S. 87-B is to prevent the appointment or dismissal of a managing Agent to a company without the shareholders in general meeting, giving their assent. But when the articles of association bind the members of the company and the company itself to follow a certain procedure in dismissing its Managing Agents, and that procedure does not contravene the provisions of S. 87-B, but goes beyond those provisions in the way of providing protection for the members of the company, there is nothing in S. 87-B (f) which authorises the abrogation of a contract contained in the articles of association prescribing that the services of the Managing Agents shall be dispensed with in a particular manner. Where therefore the articles of association provide that the Managing Agents are removable by an extraordinary resolution of the company passed at an extraordinary general meeting at which persons holding not less than three-fourths of the issued ordinary capital of the company are present, an ordinary resolution at a general meeting passed by a majority of sixty-eight per cent. of the shareholders entitled to vote dismissing the managing agents is inoperative and invalid. 50 C.W.N. 310.

Sec. 87-B, Cl. (f), Proviso.—This proviso does not mean that the restrictions in the Act relating to the period of office and the remuneration, etc., will not be applicable to such an appointment. The exception merely amounts to this, viz., that provided the other limitations prescribed in the different sections of the Act are observed, an appointment made prior to the issue of a prospectus is not dependent for its validity on a resolution of the shareholders. Clause (c) debars a managing agent from transferring his office without the concurrence of his shareholders, while the assignment of his remuneration by a managing

agent is declared void as against the company. Changes in the constitution of a firm (where a firm is a managing agent) are, however, protected so long as one of the original partners continues in the firm.

The principle which applies to a case of master and servant applies also to a case of a company and its managing agents in considering the question of misconduct sufficient to justify the termination of their employment. In each case the question must be whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or on the discharge by the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business or the employee's efficient discharge of his duty to his employer. The nature of the particular business and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question. If the quarrels between the partners of the firm of managing agents are such as to be detrimental to the interests of the company, the termination of their employment is justified. 46 Bom.L.R. 324=78 C.L.J. 113=I.L.R. (1944) Kar. (P.C.) 57=57 L.W. 98=48 C.W.N. 181=A.I.R. 1944 P.C. 17=(1944) 1 M.L.J. 227 (P.C.). See also 46 Bom.L.R. 265.

The respondent agreed to serve the appellant, an Insurance company, as the secretary of its business in Madras for 5 years from 17—11—1939. He had to devote his whole time as such secretary and to do all in his power as such secretary to extend and increase the business of the company. He was subject to the control of the directors and of the managing agents and was to obey all directions or orders from time to time given to him. The managing agents were in charge of the management of the company and under the Articles of Association, they had power to appoint in their discretion, remove or suspend managers, secretaries, etc.



<sup>1</sup>[87-C. (1) Where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management.

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purposes of this section 'net profits' means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from <sup>2</sup>[any Government] or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund.

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance.]

<sup>3</sup>[87-D. (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent is a firm, <sup>4</sup>[or to any member or director of the private company,] if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 44 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the word "Government" by A.O., 1937.

<sup>3</sup> This section was inserted by S. 44 of Act XXII of 1936.

<sup>4</sup> These words were substituted for the words "or to any director of the private company" by S. 6 of Act II of 1938.

On 23—7—1941, the company appointed a general manager. The respondent resented this and on 29—7—1941 he absented himself from office and subsequently applied for leave which was refused. He did not return to his duties, but on 20—11—1941 he filed a suit for damages for wrongful dismissal. *Held*, (1) that the respondent was appointed merely as secretary and was a mere servant, his position being that he had to do what he was told, having no authority to represent anything at all; (2) that the agreement between him and the company did not preclude the company from appointing a general manager; (3) that the respondent having left his employment without reason had no right to bring the suit. (1944) Comp. C. 10.

SMO. 87-C.—This section is newly introduced by Act XXII of 1936. It provides that no managing agent can stipulate for his

remuneration anything other than a percentage of the nett profits with provisions for a minimum remuneration in case of inadequacy or absence of profits; and any other form of remuneration has to be sanctioned by the shareholders. This was meant to put a stop to the very bad practice which was prevailing before, of providing in their agreements for remuneration whether any profits were made by the company or not. Further, sub-section (3) prescribes the mode for fixing the nett profits, and the formidable list of deductions therein included enforces a reasonable basis for the calculation of profits.

SEC. 87-D.—This section has been inserted by Act XXII of 1936. Under this section, the giving of loans to or the guaranteeing of loans of managing agents is absolutely prohibited now. The privilege hitherto enjoyed by managing agents of entering into contracts with the company without any limitation is partly restricted by sub-section (5), which provides that except with the consent of three-fourths of the directors present and entitled to vote, no such contract can be entered into. A penalty also has been provided in this section for a breach of the provisions of this section. Private companies, excepting those which are subsidiary companies of a public company, have been excluded from the operation of

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business.

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company.

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.]

<sup>1</sup>[87-E. (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936,

Loans to or by companies  
under the same management.

which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent, and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company :

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 44 of Act XXII of 1936.

this section. Where the articles of association specifically excluded from the managing agent's powers, that of borrowing, but nevertheless such a managing agent borrows money and spends it, the company is not liable for the debts when the borrowings were neither *bona fide* nor necessary for the business of the company. 15 Luck. 515=1940 Oudh 202.

A company formed for the purpose of carrying on business as an investment trust authorised *E*, one of its managing directors to invest the firm's moneys in shares and securities and sell them when deemed necessary and for that purpose to borrow moneys from another firm of which *V*, a co-managing director, was the head and *E*, its Madras agent. *E* borrowed large sums from that firm and utilised them for gambling in differences on behalf of the company and also embezzled large sums of the company. The company having been compulsorily ordered to be wound up, the lending firm claimed to rank as a creditor for the amounts lent and interest. The official liquidator opposed the claim in respect of the major portion of the debt. *Held*, that *E* having been duly authorised to borrow though *E* had misappropriated

the moneys the lending company not being put upon inquiry as to the application of the moneys lent and as *E*'s knowledge of the fraud he was committing was not the knowledge of the firm or of the company, the company was liable and the fact that *V* was a managing director of the debtor company made no difference, as he knew nothing of the defalcations of *E* until all the moneys had been lent. 1944 M.W.N. 545=1944 Comp.C. 231=A.I.R. 1944 Mad. 532=(1944) 2 M.L.J. 77=I.L.R. (1945) Mad. 96.

SEC. 87-E.—This section has been added by Act XXII of 1936. This prohibits the evil practice of inter-investment of funds, which was prevailing formerly. Now, no managing agent can make a company under his management lend any portion of its funds by way of loan to any other company under his management. The guaranteeing of any loans of any such other company is also prohibited. As to existing arrangements, only renewals are permissible. A very heavy penalty besides the liability to make good the loss occasioned by any loan given or guarantee offered in breach of the prohibition created under the Act is put upon directors and other officers (which includes a managing agent), who act in contravention of the provisions of the Act.

loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee.]

<sup>1</sup>[87-F. A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company.]

Purchase by company of shares of company under same managing agent.

agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company.]

<sup>1</sup>[87-G. A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void.]

Restriction on managing agent's powers of management.

<sup>1</sup>[87-H. A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company.]

Managing agent not to engage in business competing with the business of managed company.

<sup>1</sup>[87-I. Notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors.]

Limit on number of directors appointed by managing agent.

#### Contracts.

Form of contracts.

88. (1) Contracts on behalf of a company may be made as follows (that is to say) :—

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 44 of Act XXII of 1936.

SEC. 87-F.—This section is new and was added by Act XXII of 1936. It lays down the rules regarding the purchase by a company of the shares or debentures of another company under the management of the same managing agent.

SEC. 87-G.—This section has been inserted by Act XXII of 1936, and it absolutely prohibits the creation of encumbrances over the assets of the company by the managing agent; and his rights to invest the funds of the company under his control is also limited to the limits fixed by the directors and is made dependent upon the authority to be given to him by the directors. The section also prohibits the delegation to the managing agent of any such power by the company.

SEC. 87-H.—This section has been inserted by Act XXII of 1936, and it prohibits the carrying on of any competitive business on his own account, by a managing agent.

SEC. 87-I.—This section has been inserted by Act XXII of 1936, and it limits the number of directors appointed by the managing agent to one-third of the whole number of directors.

serted by Act XXII of 1936. The packing of the Board of Directors by the nominees of the managing agent is now rendered impossible by this section; as he cannot have more than one-third of the total number of seats in the Board filled up by his nominees.

SEC. 88: "CONTRACT BEFORE FORMATION OF COMPANY".—A limited company is a distinct *personal* from the individuals composing it. 42 C. 1029=42 I.A. 97=25 M.L.J. 80 (P. C.). A company cannot be bound by a contract entered into on its behalf before the company was formed; nor is it competent to bring a company into existence bound to enter into a contract with a third party the terms of which have been arranged before the company was formed. It is for the company after its formation to determine whether it will enter into the contract or not. A clause in the memorandum of a company provided "that the firm of M.G. & Co. . . . shall be the agents of the company, so long as the said firm shall carry on business in Bombay. . . ." and it was held that this clause merely conferred a power upon the company but did not impose any obligation. 59 B. 218=36 Bom.L.R. 907=1934 B. 427. Further, a company can-

(i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.

89. A bill of exchange, hundi or promissory note shall be deemed to have

not ratify or adopt a contract entered into by a person on its behalf before incorporation, though it may enter into a new contract embodying the terms of the old one. 36 B. 564=14 Bom.L.R. 45=14 I.O. 353; 48 I.C. 787=1923 L. 100. An agreement made by the promoters of a company prior to its incorporation, cannot be enforced by the company even though it has adopted and ratified it after its incorporation. I.L.R. (1944) 2 Cal. 101. Under the Articles of Association a company was empowered to appoint and in their discretion to remove or suspend managers, secretaries, officers, clerks, agents and servants of the company. The company appointed the appellant as secretary on 17-11-39 for a period of 5 years whose duties were set out in the agreement between him and the company and who was in the discharge of his duties to be subject to the control of the directors and of the managing agents and obey all directions or orders from time to time given to him. On 29-7-41 a general manager was appointed by the directors of the company and on the secretary objecting to the right of the directors to make such an appointment and failing to get redress absented himself and filed the suit for damages. On a question as to whether he was entitled to the relief claimed.

*Held*, that the secretary was a servant of the company and was bound to carry out the duties assigned to him and that the agreement between him and the company could not be read as precluding the latter from appointing a general manager and as the secretary left his employment without reason, he was not entitled to bring the suit for damages. (1946) 1 M.L.J. 79.

**CONTRACT BY AGENT.**—Persons contracting with a company and dealing in good faith may assume that acts within the powers of the company have been properly and duly performed, and they are not bound to inquire whether the acts of internal management have been regular. Where an agent unauthorizedly borrowed on behalf of the company but the same was ratified by the directors at a later meeting, it was held that the defect in the convening of the meeting

did not render the contract and its ratification invalid. 53 A. 1009=1931 A.L.J. 1039=1932 A. 141. The chairman of a Corporation as principal officer while carrying on business of the corporation executed a declaration creating a lien on property of the corporation in respect of a loan sanctioned by the Board of Directors, but the Articles of Association were silent as to the authority of the person entering into agreement on behalf of the corporation. *Held*, that the chairman had implied authority to execute the declaration. 181 I.O. 681=1939 Sind 100. Where the matter of appointment of the staff of the company is in the hands of the chairman, and the directors have no reason to suspect the integrity of the chairman or advisory director, there being an entire absence of anything, which would point the finger of suspicion to either the chairman or the advisory director in the matter of the appointments, the directors cannot be made liable for the amounts misappropriated by the chairman or advisory director amounts paid by the staff as security for their employment; since the directors are justified in trusting the chairman and advisory director to deal properly with the employees it cannot be said that they are guilty of wilful negligence, and they cannot be called upon to pay the amount of the security utilised by the chairman or advisory director for their own purposes. 46 L.W. 869=(1937) 2 M.L.J. 848.

**IRREGULARITY IN RESPECT OF SEAL.**—One of the articles of association of a company provided that a document to which the common seal was affixed should also be signed by at least one director and counter-signed by an agent or other officer appointed by the Board for that purpose. The executant of a mortgage deed signed in his capacity as managing agent of the company and it bore the common seal of the company. It was held that the defect in respect of the seal did not render the document invalid as there was no provision of law requiring the deed to be under the common seal of the company. 53 A. 1009=1931 A.L.J. 1038=1932 A. 141.

SEC. 89: "AUTHORITY".—The ignorance

Bills of exchange and promissory notes.

the company by any person acting under its authority, express or implied.

90. A company may, by writing, under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place <sup>1</sup>[either in or outside British India]; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.

91. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory district or place not situate in British India, an official seal which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "not situate in British India" by S. 45 of Act XXII of 1936.

of the manager of the Bank of the terms of the articles of association does not affect his power to make a transfer of negotiable instruments. He is the agent of the Bank for performing all ordinary banking transactions, and the transfer of such an instrument is a very ordinary transaction. 80 I. C. 741=1924 L. 462. Where the memorandum of association merely stated that one of the objects of the company was to make promissory notes, and it was not stated that the managing agent is to make them; and where under the articles of association power was given to the managing agent to make contracts and sign receipts on behalf of the company, and no specific power was given to the managing agent to make promissory notes on behalf of the company, it was held that these provisions were insufficient to constitute the managing agents "a duly authorized agent" of the company for the purpose of executing a promissory note under S. 27 of the Negotiable Instruments Act. 52 A. 883=1930 A.L.J. 1052=128 I.C. 758=1930 A. 778.

**LIABILITY OF DIRECTORS ON BILLS, ETC.**—The question as to the liability of a company on any particular endorsement is in every case one of construction. Where the endorsement on a negotiable instrument was "M. & Sons, Managing Agents of L.A. company", it was held that it would not be clear to any one that the responsibility of L.A. company was involved and that therefore L.A. company was not liable. 52 C. 802=29 C.W.N. 828=1925 C. 1062. A company purchased certain machinery and in lieu thereof one of its Secretaries and Treasurers executed a promissory note signing it in his own name. The promissory note was on a sheet of paper printed

with the name of the company and bearing a stamp impression of the company. It was held that the promissory note was signed on behalf of the company and that, therefore, the company was liable on it. 24 Bom.L.R. 355=67 I.C. 941=1923 B. 29. Where a managing agent executes a promissory note and obtains a loan personally, the company cannot be made liable on it by the mere proof of the fact that the money so borrowed went to benefit the company. Before the company can be held liable it must be shown and found that not only that the money came into their hands but that it was in effect put into their hands by the creditor through the managing agents, it being understood by both parties when the note was executed that the company would be liable for repayment. 1946 A.L.W. 70=1946 O.W.N. (H.C.) 70. Where the managing agent of a company who is authorised to borrow money for the company, borrows money by executing a promissory note in his name alone and not on behalf of the company, the company cannot be held liable having regard to the provisions of S. 89 of the Companies Act. The facts that the money was borrowed for the company, that the company benefitted by it, and the creditor knew for what purpose the money was being borrowed, are not by themselves sufficient to bind the company. If B borrows money from A in order for his own purposes to lend it to C, C cannot be held liable to A, even if A knew with what object the money was being borrowed. Before he can be held so liable, it must be found that the loan was actually a loan to C. 223 I.C. 311.

**SEC. 90: AMENDMENT BY ACT XXII OF 1936.**—For the words "not situate in British India", the words "either in or outside British India" have been substituted by the amendment. The old section empowered a person to execute deeds on behalf of a company in any place outside British India.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

<sup>1</sup>[91-A. (1) Every director who is directly or indirectly concerned or interested

Disclosure of interest by director.

in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest

then exists or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement :

Provided that a general notice that a director is a <sup>2</sup>[director or a member of any specified company or is a member of any specified firm], and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

<sup>3</sup>[(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office of the company during business hours.]

<sup>3</sup>[(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees.]

#### LEG. REE.

<sup>1</sup> This section was inserted by S. 3 of Act XI of 1914.

<sup>2</sup> These words were substituted for the words "member of any specified firm or company" by S. 46 of Act XXII of 1936.

<sup>3</sup> These sub-sections were added by *ibid*.

Now the section has been made to apply also to British India itself.

SEC. 91-A: AMENDMENTS BY ACT XXII OF 1936.—(i) In the proviso to sub-section (1), for the words "member of any specified firm or company" the words "director or a member of any specified company or is a member of any specified firm" have been substituted by the amendment. This is merely a verbal correction.

(ii) Sub-section (3) has been newly added. It was thought necessary that some provision should exist to ensure that, shareholders may obtain information about contracts in which directors of the company are interested. Hence it is provided that a register should be maintained to supply this

information.

(iii) Sub-section (4) also has been added by Act XXII of 1936, and it provides penalty for acting in contravention of provisions of sub-section (3).

SCOPE OF SECTION.—The breach of Ss. 91-A, 91-B, and 91-C, though made punishable, does not *ipso facto* render the contract void or voidable. 1928 M.W.N. 481=115 I.C. 486=1929 M. 353. S. 91-A (1) is not limited to contracts entered into at a meeting of the directors but applies also to cases in which contracts were not made at such a meeting. 42 O.W.N. 583=1938 Cal. 440.

"INTEREST".—In India the interest of a director in a contract need not necessarily be a pecuniary interest. Even mere relationship, as that of husband and wife or father and son, is interest, if the circumstances are such that it may reasonably be regarded as affecting the director's mind. 1929 M. 353. Sub-partnership with the other party to the contract is an interest in the contract. 1929 M. 353.



<sup>1</sup>[91-B. (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned

Prohibition of voting by interested director.

<sup>2</sup>[nor shall his presence count for the purpose of forming a quorum at the time of any such vote]; and if he does so vote, his vote shall not be counted :

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 3 of Act XI of 1914.

<sup>2</sup> These words were inserted by S. 47 of Act XXII of 1936.

**DISCLOSURE OF INTEREST.**—Where the interest of the director is such that it is likely to produce a conflict between his duty to the company and his duty or interest in the other party, he is bound to disclose it. But if the whole body of the directors was already aware of such interest, formal disclosure is not necessary. 1928 M.W.N. 481=115 I.O. 486=1929 M. 353. Where the company sues the director on the ground that he had interest in the contract entered into by him on behalf of the company, the fact of non-disclosure under this section must be set forth in the plaint; and the plaint will not be allowed to be amended after issues framed and evidence closed. 1929 M. 353. A letter written by the purchasing director to the chairman of the Board of Directors who merely signed it as noted, does not prove that the disclosure of the directors's interest was made at any meeting of the directors as required by S. 91-A (1), when it is not referred to in the minutes of any of the meetings. 42 C.W.N. 533=1938 Cal. 440. Petty purchases by a director of a company from a firm in which he has an interest are covered by the proviso to S. 91-A (1); and the director's interest should be disclosed in the manner provided for therein. 42 C.W.N. 533=1938 Cal. 440.

**SEC. 91-B: AMENDMENT BY ACT XXII OF 1936.**—The amendment has introduced a salutary provision, the equity of which has been recognised by the Courts.

**OBJECT OF SECTION—HOW FAR THIRD PARTIES ARE AFFECTED.**—The object of S. 91-B of the Act is clearly to ensure that a company shall have the benefit of the judgment of an entirely independent Board. It is very well settled law in the case of English joint-stock companies that people dealing with such a company are fixed with notice of any limitations on the power of the company contained in the statute under which it is incorporated or in the memorandum or articles of association; but that if it is shown that a particular act was ostensibly authorised by the statute and the memorandum or articles of association persons dealing with the company are not concerned to see that the company has put itself into a position to exercise its power properly. That is to say, outside parties are not concerned with the internal management of the company; and

if the disability of a director to vote upon a contract in which he is personally interested were imposed by the articles of association, the question whether he is personally interested in, and entitled to vote upon, a particular contract would be regarded as a matter of internal management, with which outside persons dealing with the company would not be concerned. The principle of English Law ought to be applied to a case of disability of directors arising under S. 91-B of the Companies Act. But when a person has notice of the terms of the contract to which he is a party, he necessarily has notice of the circumstances under which the contract was passed or resolved upon by the directors. 37 Bom.L.R. 978=1936 B. 62. Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into a transaction with the company of which he is the director, he comes within the rule laid down in S. 91-B and the transaction is voidable at the instance of the company with whom it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others. S. 91-B would not however deprive of the benefit of his contract with the company a third party who had no notice of the defect in the director's authority. Such a person would be entitled to assume that the internal management of the company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him. I.L.R. (1938) Bom. 421=42 C.W.N. 733=40 Bom.L.R. 1109=1938 P.C. 159 (P.C.).

**SEC. 91-B (1) (BEFORE AMENDMENT): SHAREHOLDER CREDITOR—RIGHT TO VOTE FOR RESOLUTION AUTHORISING SET-OFF OF FUTURE CALLS AGAINST DEBT DUE.**—It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set-off against future calls. But where such shareholder creditor is himself a director and the managing agent, he cannot validly vote for a resolution authorising such set-off. The resolution would be invalid when the necessary quorum is lacking without such director's vote. Such a shareholder can, therefore on liquidation, be placed in the list of contributories in respect of the unpaid share money. 54 L.W. 440=(1941) 2 M.L.J. 595=1942 Mad. 95.

**VOTE.**—Where the articles of association

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

<sup>1</sup>[(3) This section shall not apply to a private company:]

<sup>2</sup>[Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.]

<sup>3</sup>[91-C. (1) Where a company enters into a contract for the appointment of a manager <sup>4</sup>[or managing agent] of the company

Disclosure to members in case of contract appointing a manager.

in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall <sup>4</sup>[, within twenty-one days from the date of entering into the contract or the varying of the contract,] send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.]

<sup>5</sup>[91-D. (1) Every manager or other agent of the company other than a private company <sup>6</sup>[not being the subsidiary company of a

Contracts by agents of company in which company is undisclosed principal.

public company] who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

#### LEG. REF.

1 This sub-section was added by S. 2 of Act XLIII of 1920.

2 This proviso was added by S. 47 of Act XXII of 1936.

3 This section was inserted by S. 3 of Act XI of 1914.

4 These words were inserted by S. 48 of Act XXII of 1936.

5 These words were inserted by S. 49, *ibid.*

of a company required a quorum of three at the directors' meeting, and five directors at a meeting by their resolution allotted the unallotted shares of the company to three of them in certain proportions, it was held that the allotment of shares was a contract, that the three directors to whom the shares were allotted were not entitled to vote and that, therefore, there was no quorum and the resolution and allotment were invalid. 23 Bom. L.R. 1104=64 I.O. 933=1921 B. 372. That the interested director should not be counted in determining the quorum, is based on the principle that where a bare quorum is assembled, no contract can be made with a member of that quorum, because such a contract requires his concurrence, and he cannot be on both sides of these same contract. As to that contract he is not a direc-

tor, but is a stranger; and when he steps out of the bare quorum and assumes the attitude of a stranger the quorum is broken.

SEC. 91-C: AMENDMENT BY ACT XXII OF 1936.—After the word "manager" the words "or managing agent" and after the words "the company shall" the words "within 21 days from the date of entering into the contract or the varying of the contract" have been inserted by the amendment. The first change has been made in view of the fact that the term "manager" does not include now after this amending Act a "managing agent". The second provides a time limit within which the information is to be given to the members, so that there may be no long delay or evasion.

SEC. 91-D: AMENDMENTS BY ACT XXII OF 1936.—In sub-section (1) after the words "private company" the words "not being the subsidiary company of a public company"; and in sub-section (2) after the words "to the company" the words "and send copies to the directors" have been added by the amendment. The object of the amendment is to have copies of contracts by agents of the company in which the company is an undisclosed principal sent to the directors in advance.



(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company <sup>1</sup>[and send copies to the directors], and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.]

#### *Prospectus.*

92. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

93. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

Specific requirements as to particulars of prospectus.

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 49, Act XXII of 1936.

SEC. 92: APPLICATION OF SECTION.—It cannot be said that a prospectus is such only when it conforms to the terms of S. 93, and a person who incurs a penalty for failure to file a prospectus under this section cannot avoid the penalty by allowing the prospectus to lack some of the requisites laid down under S. 93, for that would be taking advantage of one's own wrong. 67 M.L.J. 437=40 L.W. 519=1934 M. 641.

OFFENCE UNDER SECTION NOT TECHNICAL.—*R* filed a prospectus fulfilling all requirements of law in the office of the Registrar, Joint-Stock Companies and subsequently issued a prospectus in Bengali. It was found that the prospectus in Bengali did not contain certain particulars required by S. 93, Companies Act, and was not a verbatim translation of the English prospectus. The Registrar filed a complaint under S. 92 (5) on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate holding the offence to be purely technical and omission not culpable

acquitted *R*. *Held*, that *R* was liable to be convicted under S. 92 (5), Companies Act. That the proceedings were initiated by the Registrar and not by a private person and as the question involved was one of great importance in view of the scope of the Act and of the necessity in the interest of the community of the strictest observance of its provision; the High Court could not refuse to interfere with the order of acquittal. 160 I.C. 829=40 C.W.N. 320=1936 C. 33.

SEC. 93: AMENDMENT BY ACT XXII OF 1936.—This section has been considerably amended by the amending Act (1936). The amendment provides for the disclosure in the prospectus of a company of certain details, which have not hitherto been required to be so disclosed. Chief among them are the following:

(i) In sub-section (1), clause (c), words have been added, to provide for the disclosure of the names of managing agents or proposed managing agents; and of the provision in the articles or in any contract as to the appointment of managers and managing agents, and the remuneration payable to them.

(a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company <sup>1</sup>[and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption]; and

(b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers <sup>1</sup>[and managing agents or proposed managing agents] (if any) <sup>1</sup>[and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them]; and

(d) the minimum subscription on which the directors may proceed to allotment and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and

<sup>2</sup>[*ee*] where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations; and]

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 50 of Act XXII of 1936.

<sup>2</sup> This clause was added, *ibid*.

(ii) After sub-section (1), clause (e), a new clause (*ee*) has been inserted requiring the prospectus to contain information about the underwriting of shares.

(iii) After sub-section (1), clause (f), a new clause (*ff*) has been inserted. By virtue of this amendment, where any property, purchased or acquired by the company, had been the subject of transfer by sale within the previous 2 years, the amounts of each of such transfers; and where the property is a business, then particulars relating to the profits of such business during the previous 3 years, and the balance-sheet of the business made up to at least 90 days prior to the issue of the prospectus, should be appended to the prospectus.

(iv) In sub-section (1), clause (h), words have been inserted, so as to make the provision as to disclosure amplified and applicable to discount also. Under the Amending Act power to issue shares at a discount under certain circumstances have been provided for in the new S. 105-A, and hence this amendment in this clause has become necessary.

(v) The amendment of clause (l) of sub-section (1) has been made with a view to secure fuller information in respect of pro-

perty purchased or to be purchased, *e.g.*, as to the existence of charges on such property.

(vi) After sub-section (1), clause (o), a new clause (*p*) has been inserted for the disclosure of the nature and extent of the restrictions contained in the articles upon the members' right to attend, speak or vote at meetings of the company; or upon their right to transfer shares, or upon the directors' powers of management.

(vii) Sub-section (1-A) has been newly inserted, with a view to render necessary further disclosure to be made in the prospectuses issued by a company which has been carrying on business prior to the issue thereof.

(viii) Sub-section (1-B) has been inserted newly for the purpose of avoiding by an explanation any difficulties in interpreting the word "profits".

(ix) A proviso has been added to clause (c) in sub-section (4), so as to be supplementary to the provision contained in S. 154 (1) of this Act. On this section, *see* 160 I. C. 829—40 C.W.N. 320—1936 C. 33, cited under S. 92 *supra*. Rights of shareholders—Prospectus, if relevant. Ordinarily the prospectus is not relevant in any matter touching the contract between shareholder and the company. It is not the contract but only matter which induces the contract. It would be relevant in an action for rescission based on misrepresentation or fraud,

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor : Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors ; and

<sup>1</sup>[ (ff) where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus ; and]

(g) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for good will ; and

(h) the amount (if any) paid within the two preceding years or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of, the company, <sup>2</sup>[or as discount in respect of shares issued, showing separately the amount if any, so paid to the managing agents] : Provided that it shall not be necessary to state the commission payable to sub-underwriters ; and

(i) the amount or estimated amount of preliminary expenses ; and

(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment ; and

(l) the dates of, and parties to, every material contract <sup>3</sup>[including contracts relating to the acquisition of property to which clause (j) applies], and a reasonable time and place at which any material contract or a copy thereof may be inspected : Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on intended to be carried on by the company, or to any contract <sup>3</sup>[ (except a contract appointing or fixing the remuneration of a managing director or managing agent) ] entered into more than two years before the date of issue of the prospectus ; and

(m) the names and addresses of the auditors (if any) of the company ; and

(n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by

#### LEG. REF.

<sup>1</sup> This clause was inserted by S. 50 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "or at the rate of any such commission," *ibid.*

<sup>3</sup> These words were inserted by S. 50, Act XXII of 1936.

or in an action for deceit, but not in a matter of contract. The contract proper is to be found in the application for allotment of shares and in the articles of association. But where the application for allotment sti-

ulates that the shares are to be subject to certain special conditions found in the prospectus, that portion of the prospectus must be read into the contract. 1946 N.L.J. 128.

SECS. 93 AND 183 (5).—False and misleading prospectus—Right to avoid agreement to purchase shares is to be exercised within reasonable time—Application under S. 183 (5) for removal from list of contributories cannot be allowed after 11 years. *See* I.L.R. (1938) All. 301=1938 A.L.J. 94=1938 All. 193.

any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, <sup>1</sup>[and the rights in respect of capital and dividends attached to], the several classes of shares respectively; <sup>2</sup>[and]

<sup>3</sup>[(p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions;] <sup>4</sup>[and]

<sup>5</sup>[(q) where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof.]

<sup>6</sup>[(1A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely:—

(i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus, and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact;

(ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus:

Provided that, if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.]

<sup>6</sup>[(1B) The statement referred to in clause (ff) of sub-section (1) and the report referred to in sub-section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.]

<sup>7</sup>[\* \* \* \* \*]

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

#### LEG. REF.

<sup>1</sup> These words were added by Act XXII of 1936.

<sup>2</sup> This word was added by Act XXII of 1936.

<sup>3</sup> This clause was inserted by *ibid.*

<sup>4</sup> This word was inserted by S. 2 and Sch.

I of Act XX of 1937.

<sup>5</sup> This clause was inserted by S. 2 and Sch. I of Act XX of 1937.

<sup>6</sup> This sub-section was inserted by S. 50 of Act XXII of 1936.

<sup>7</sup> Sub-S. (1-C) was omitted by S. 3 and Sch. II of Act XX of 1937.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

<sup>1</sup>[Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses shall apply to a prospectus filed in pursuance of section 154.]

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of

Meaning of "vendor" in section 93. purchase, of any property to be acquired by the company, in any case, where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus ; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression

Application of section 93 to the case of property taken on lease. "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

96. <sup>2</sup>[(1) ] Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements

Invalidity of certain conditions as to waiver or notice. of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

<sup>2</sup>[(2) It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of section 93 :

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

(a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five hundred rupees.]

#### LEG. REF.

<sup>1</sup> This proviso was added by S. 50 of Act XXII of 1936.

<sup>2</sup> S. 96 was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 51 of Act XXII of 1936.

SEC. 96.—This section has been amended by Act XXII of 1936. The amendment makes it unlawful now to issue any form

of application for shares in or debentures of a company unless the form is issued with a proper prospectus, and a penalty is provided for any contravention of this requirement. Exception, however, is made in the proviso in the case of *bona fide* invitation to an underwriting agreement and with reference to shares or debentures not offered to the public.

97. <sup>1</sup>[(1) If a prospectus is issued which does not comply with the provisions of section 3, every person who is knowingly

Saving in certain cases of non-compliance with section 93. responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of section 93 is filed.]

<sup>1</sup>[(2) ] In the event of non-compliance with <sup>2</sup>[or contravention of] any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance <sup>2</sup>[or contravention] if he proves that—

(a) as regards any matter not disclosed, he was not cognisant thereof; or

(b) the non-compliance <sup>2</sup>[or contravention] arose from an honest mistake of fact on his part; <sup>3</sup>[or]

<sup>3</sup>[(3) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused :]

Provided that, in the event of non-compliance with <sup>2</sup>[or contravention of] the requirements contained in clause (n) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance <sup>2</sup>[or contravention] unless it be proved that he had knowledge of the matters not disclosed.

98. (1) A company which does not issue a prospectus on or with reference to

Obligations of companies where no prospectus is issued.

its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named there as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars <sup>4</sup>[set out in the form marked I in the Second Schedule].

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital.

<sup>5</sup>[98-A. (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any

Document offering shares or debentures for sale to be deemed a prospectus.

of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as

#### LEG. REF.

<sup>1</sup> The original S. 97 was re-numbered as sub-S. (2) of that section and sub-S. (1) was inserted by S. 52 of Act XXII of 1936.

<sup>2</sup> These words were inserted, *ibid.*

<sup>3</sup> The word "or" and Cl. (c) were inserted, *ibid.*

<sup>4</sup> These words were substituted for the words "set out in the Second Schedule" by S. 53, *ibid.*

<sup>5</sup> This section was inserted by S. 54 of Act XXII of 1936.

SEC. 97: AMENDMENTS BY ACT XXII OF 1936.—The original section has been altered as sub-section (2) of this section, with some amendment and addition of clause (c). Sub-section (1) of this section has been newly inserted. The words "or contravention"

found in the present sub-section (2) have been newly added and so also clause (c). The present sub-section (1) has been inserted with a view to provide a penalty for the issue of prospectus which fails to comply with the provisions of S. 93.

SEC. 98: AMENDMENT BY ACT XXII OF 1936.—In sub-section (1) for the former words "in the second schedule" the words "in the form marked I in the second schedule" have been substituted by the Amending Act. This amendment is consequential on the alteration now made in the second Schedule of this Act.

SEC. 98-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly introduced, with a view to escape the stringent rules regarding the issue and the content of a prospectus. (What certain companies

to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures have been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing.]

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

99. A company shall not, at any time, vary the terms of contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

100. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become

were previously doing was to sell their shares or debentures to a purchaser, and to cause the purchaser to offer the same for sale to the public. Such a purchaser not being a person who was or had been engaged or interested in the formation of the company, the offer for sale to the public made by him did not strictly come under the term "prospectus". By this means, unscrupulous companies successfully managed to evade the provisions of the Act relating to the prospectus. With a view to avert this mischief and fraud, this section has been enacted. This section introduces S. 38 of the English Act, and renders every document containing an offer of shares subject to the provisions of the Act regarding "prospectus" and thereby renders the evasion of the rules impossible.

SEC. 100: "REASONABLE PUBLIC NOTICE".—Under S. 101 (1), it is immaterial whether

the director sees the prospectus or not; and he is liable if he authorizes the issue of a false prospectus. 67 M.L.J. 437=40 L.W. 519=1934 M. 641.

SOME DIRECTORS RETIRING BEFORE ALLOTMENT.—Where before allotment of shares in a limited company two of the directors mentioned in the prospectus retired, and the fact of retirement was not communicated to the allottee; the latter would be entitled to rescind the contract of allotment and claim a refund of the monies paid by him. 32 L.W. 108=124 I.C. 193=1930 M. 325. The fact that subsequent to the formation of the company after allotment, there is every likelihood of a change in the directorate has no bearing at all on the question, because until allotment of the shares, the allottee has a right to withdraw his offer; if there should be any breach in the terms of the contract published in the prospectus. 1930 M. 325.



a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true ;

(b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation : Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it ; and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document : or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent ; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent ; or

(iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as director of the company, or as having agreed to become a director thereof, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression “promoter” means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company ;

(b) the expression “expert” includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

#### *Allotment.*

101. <sup>1</sup>[(1) No allotment shall be made of any share capital of a company

offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent. thereof has been paid to or received in cash by the company.]

<sup>1</sup>[(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely :—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company ;

(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters, and

(d) working capital.]

<sup>1</sup>[(2-A) The amount referred to in sub-section.(1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.]

<sup>1</sup>[(2-B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as denfied in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103.]

#### LEG. REF.

<sup>1</sup> This sub-section was substituted by S. 55 of Act XXII of 1936.

SEC. 101: AMENDMENT BY ACT XXII OF 1936.—The present sub-Ss. (1), (2) and (2-A) have been substituted in the place of the old sub-Ss. (1) and (2). The amendment introduces the provisions of S. 39 of the English Act, and is aimed at discouraging floatation of companies with insufficient capital. Under sub-Ss. (1) and (2), as they stood previously, it was possible for mushroom companies to be formed with large authorized capital of which very little used to be subscribed. By providing for a nominal amount as “the minimum subscription” they were enabled to commence business almost immediately after incorporation and to exercise their borrowing powers. Their activities were frequently of a questionable character and they invariably came to grief within a very short time. When the crash came the creditors usually found themselves in a hopeless position. The existence of such

companies was a source of considerable danger to the commercial world, and caused immense damage to the growth of genuine companies. There has been an unanimous demand from all quarters for adequate legislation to prevent the formation of such companies. Several remedies were suggested, and the legislature has finally adopted the provisions contained in the amended sub-Ss. (1), (2) and (2-A) of this section.

(ii) Sub-Ss. (2-B) and (2-C) have also been inserted by the Amending Act XXII of 1936. (2-B) provides for the monies received in respect of shares to be kept deposited in Bank until the certificate to commence business has been granted, or until returned under the provisions of sub-S. (4).

APPLICATION MONEY NOT PAID—ALLOTMENT OF SHARES—POWER OF DIRECTORS.—S. 101 does not forbid the directors to allot shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do this

<sup>1</sup>[(2-C) In the event of any contravention of the provisions of sub-section (2-B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.]

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and <sup>2</sup>[eighty] days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and <sup>3</sup>[ninety] days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and <sup>4</sup>[ninetieth] day : Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares no allotment shall be made unless the minimum subscription (that is to say)—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment ; or

(b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash ;  
has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

#### LEG. REF.

1 This sub-section was substituted by S. 55 of Act XXII of 1936.

2 This word was substituted for the word "twenty", *ibid.*

3 This word was substituted for the word "thirty", *ibid.*

4 This word was substituted for the word "thirtieth", *ibid.*

would be an infringement of the Act. I.L.R. (1939) 2 Cal. 512=1940 Cal. 164.

SEC. 101, SUB-SEC. (3): APPLICATION OF.—Sub-S. (3) is applicable to all allotments of shares whether at the time of the floating of the company or any subsequent period. Any allotment which is made without payment of at least 15 per cent. of the nominal value of the shares by the applicant is, therefore, invalid. 161 I.C. 952; 154 I.C. 33=1934 A. 855. The directors who make such allotment would be guilty of misfeasance. (*Ibid.*) Sub-S. (3) to S. 101 lays down a mandatory requirement. The applicant for a share is under a statutory obligation to pay 5 per cent. of the nominal amount of the share along with his application, and the company is also under the obligation to see that he does so, and it is

against public policy that any allotment should be made without compliance with this requirement. That being so a company should not be allowed to take advantage of its own wrongdoing and neglect of the provisions of the Act by demanding the share money subsequently. 1939 Nag. 225 =I.L.R. (1941) Nag. 567. As to the liability of directors in respect of misfeasance, see S. 235, *infra*.

ALLOTMENT, WHEN VALID.—An allotment of shares must be made within a reasonable time, and a shareholder is not bound to accept an allotment made after inordinate delay. 36 Bom.L.R. 32=1934 B. 97. *E.*, applied for shares on 10th August, 1930, and a sum of Rs. 250 was paid along with the application. The allotment was said to have been made on 17th October, 1931. A letter was also issued to *E.* on 2nd March, 1932, asking him to pay allotment money as well as the call money and the company resolved to go into liquidation on 3rd March, 1932, *held*, that *E.* was not the purchaser of the shares of the company since shares were not allotted to him till 17th October, 1931, and also because no notice of allotment was sent to *E.* 161 I.C. 294=1936 L. 16.

102. (1) An allotment made by a company to an applicant in contravention of the provisions of <sup>1</sup>[section 98 or section 101] shall be

Effect of irregular allotment. voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later <sup>2</sup>[or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later), and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of <sup>1</sup>[section 98 or section 101] with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Restrictions on commencement of business.

103. (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and

(c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with; and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

#### LEG. REF.

<sup>1</sup> These words and figures were substituted for the word and figure "section 101" by S. 7 of Act II of 1938.

<sup>2</sup> These words were inserted by S. 56 of Act XXII of 1936.

SEC. 102: AMENDMENTS BY ACT XXII OF 1936.—The words "or in any case . . . and not later" have been inserted by Act XXII of 1936. The reason for this amendment is that it supplies an obvious omission.

ALLOTMENT OF SHARES.—An allotment of shares by the Secretary and Treasurer would be valid if the articles, without specially providing for allotment by directors, provide that the general management should be by the Secretary and Treasurer, subject to

the directors' supervision. 26 I.C. 349. Where one or more directors make an allotment of shares, without being duly empowered for the purpose, the allotment would be invalid, and the allottee could revoke his application for allotment of shares before any valid allotment or proper ratification is made. 51 I.C. 812; 1 L.L.J. 1.

SEC. 103: FAILURE TO PAY FOR SHARES BY DIRECTORS.—IF VENDERS SHARES LIABLE TO FORFEITURE.—Where the directors who have signed the articles of association and memorandum undertaking to take a certain number of shares and pay for them fail to pay for them, it does not necessarily follow that they are liable to forfeiture of their shares. 1939 A.L.J. 950=1939 All. 739.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital.

104. (1) Whenever a company having a share capital makes any allotment of its shares, the company, shall within one month thereafter,—

Return as to allotments.

(a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act

SEC. 104.—Contract relating to allotment of shares—Statement in Form VII filed before Registrar—Nature of—Not conveyance. It is liable to stamp duty only as an agreement. 167 I.C. 513=1937 M. 259=(1937) 1 M.L.J. 108 (F.B.). See also 39 P.L.R. 293, cited under S. 29.

AMENDMENT BY ACT XXII OF 1936.—Sub-section (4) has been newly added so as to exclude forfeited shares subsequently re-issued from the purview of the section.

SHARE ALLOTTED AS FULLY PAID UP, OTHERWISE THAN IN CASH.—As to a case where on a construction of a debenture deed, it was held that the share allotted was allotted as fully paid up otherwise than in cash. See 41 M. 307=33 M.L.J. 474=42 I.O. 674.

“CONSTITUTING THE TITLE OF THE ALLOTTEE.”—Ratification of a previous contract with vendors of business by the Board of Directors cannot be described as a contract in writing constituting the title of the allottee within the meaning of S. 104 (1) (b). 23 L.W. 571=1926 M.W.N. 6=94 I.C. 892=1926 M. 380.

“ONE MONTH.”—The Registrar should file the document, even when it is presented beyond time; and should inform the officer of the company that unless, within a time to be specified by the Registrar, he obtains an

order from the Court extending the time up to the date of filing, he will take steps to prosecute him for the default. 56 C. 976=122 I.C. 214=1930 C. 146.

FAILURE TO FILE AGREEMENT, EFFECT OF.—The only consequence of a failure to file the agreement under this section is the penalty, provided in sub-section (3). 48 A. 503=24 A.L.J. 576=1926 A. 524. Ignorance of law will not excuse default. 52 I.C. 885.

STAMP DUTY.—An agreement for the allotment of shares by a company *in future*, need not be stamped as a “conveyance”. 1932 A.L.J. 394=137 I.C. 337=1932 A. 291. Nor need the prescribed particulars furnished to the Registrar in respect of such an agreement require to be stamped as a ‘conveyance’. 15 L. 501=1934 L. 530. Where 200 shares had been allotted in consideration of a written agreement as regards the transfer of a business and the company submitted a return as to allotment in Form No. 6, accompanied by the agreement which formed the consideration for the allotment of the 200 shares, it was held that the agreement did not constitute a conveyance, and that it was liable to a stamp duty of Re. 1 only, and that the fact that the agreement was in writing was immaterial. 15 L. 509=1933 L. 533.

1889, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

<sup>1</sup>[(2-A) If the registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit, and, if he does so, the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the said period of one month the extended period allowed by the registrar were substituted.]

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues :

Provided that, in case of default in filing with the registrar <sup>2</sup>[within the time specified in sub-section (1) and (2) any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

<sup>3</sup>[(4) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited for non-payment of calls.]

#### *Commissions and Discounts.*

105. (1) It shall be lawful for a company to pay a commission to any

Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.

person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent. of the commission paid or agreed to be paid is—

(a) in the case of shares offered to the public for subscription, disclosed in the prospectus ; or

(b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid <sup>4</sup>[and save as provided in section 105-A,] no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise.

#### LEG. REF.

<sup>1</sup> Sub-S.2-A of S. 104 added by Act XXVI of 1941.

<sup>2</sup> Substituted by Act XXVI of 1941.

<sup>3</sup> This sub-section was added by S. 57 of Act XXII of 1936.

<sup>4</sup> These words were inserted by S. 58 of Act XXII of 1936.

SEC. 105: AMENDMENT BY ACT XXII OF 1936.—In sub-section (2) after the words "as aforesaid" the words "and save as provided in S. 105-A" have been added consequent on the introduction of the new section 105-A by the Amending Act.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

Power to issue shares at a discount. <sup>1</sup>[105-A. (1) Subject to the provisions of this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued :

Provided that—

(a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court ;

(b) the resolution must specify the maximum rate of discount (not exceeding ten per cent. in any case) at which shares are to be issued ;

(c) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business ;

(d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question

(3) If default is made in complying with sub-section (2), the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees.]

<sup>1</sup>[105-B. (1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are or at the option of the company are to be, liable to be redeemed.

Provided that—

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company ;

(b) no such shares shall be redeemed unless they are fully paid ;

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called " the capital redemption reserve fund," a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company ;

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 59 of Act XXII of 1936.

SEC. 105-A: AMENDMENT BY ACT XXII OF 1936.—This section is new. Before this amendment, the issue of shares at a discount was not allowed. It was thought desirable to legalise the issue of shares at a discount with a view to helping companies which have failed to attract subscribers. S. 47 of the English Act has been adopted in this respect, with necessary modifications suitable to the circumstances of this country.

SEC. 105-B: AMENDMENT BY ACT XXII OF 1936.—This section has been newly added by Act XXII of 1936. Under the Act as it

previously stood, there was no provision for issuing any redeemable preference shares. The needs of modern times, however, require that companies should have the power to issue such shares. It was found to be very useful in England and it was thought desirable to introduce the provisions of S. 46 of the English Act, in this respect, with proper modifications and necessary safeguards in this country also.

PREFERENCE SHARE-HOLDERS—RIGHTS OF—ARREARS OF PREFERENTIAL DIVIDENDS—PAYMENT OF.—It was provided by the Memorandum of Association of a company that the preference shares should rank both as regards dividend and capital in priority to



(d) where any such shares are redeemed out of the proceeds of a fresh issue the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed.

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be, liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption.

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees.

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the fees payable under section 249 be deemed to be increased by the issues of shares in pursuance of this sub-section :

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares.

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares ]

<sup>1</sup>[105-C. Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be

Further issue of capital.

offered to the members in proportion to the existing shares held by each member (irrespective of class) and such officer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer if not accepted, will be deemed to be declined ; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.]

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 59 of Act XXII of 1936.

the ordinary shares. The articles of association provided that preference shareholders should receive out of the profits of the company, if any, as a first charge thereon, a cumulative preferential dividend of 7 per cent. per annum on the paid up amount of the preference shares held by them, and subject to the rights of the preference shareholders, the surplus profits should be divided among the holders of the ordinary shares. There was also a further provision that if the company should be wound up, the surplus assets should be applied in the first place, in repaying to the holders of preference shares the amount paid up thereon, and the residue should belong to the holders of ordinary shares. The company was wound up voluntarily, and no dividend on preference

shares had been declared or paid for several years prior to the winding up. It was held, (i) that the surplus assets must be applied in the first place in repaying to the holders of preference shares the amount paid up thereon and the residue belonged to the holders of the ordinary shares; (ii) that the arrears of preferential dividends could not be treated as "debts" and therefore be paid out of the assets of the company before the "surplus assets" were ascertained. I.L.R. (1938) 2 Cal. 533=1939 Cal. 126. Preference shares not free from income-tax—Dividend at seven and half per cent. subject to tax—Right of company to deduct tax when no tax payable by company. See I.L.R. (1940) Bom. 165=42 Bom.L.R. 57=1940 Bom. 97 (F.B.).

Sec. 105-C: AMENDMENT BY ACT XXII OF 1936.—This section has been added by Act XXII of 1936. This provides that the first choice to take up any further issue of

106. Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off.

Statement in balance-sheet as to commissions and discounts.

*Payment of Interest out of Capital.*

107. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant :

Power of company to pay interest out of capital in certain cases.

Provided that—

(1) no such payment shall be made unless the same is authorised by the articles or by special resolution ;

(2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the <sup>1</sup>[Central Government] which sanction shall be conclusive evidence for the purposes of this section that the shares of the company in respect of which such sanction is given, have been issued for a purpose specified in this section ;

(3) before sanctioning any such payment, the <sup>1</sup>[Central Government] may at the expense of the company, appoint a person to inquire and report to <sup>2</sup>[the Central Government] as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry ;

(4) the payment shall be made only for such period as may be determined by the <sup>1</sup>[Central Government] ; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided ;

(5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the <sup>1</sup>[Central Government] may, by notification in the Official Gazette, prescribe ;

(6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid ;

(7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate ;

(8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895 ; or the Indian Tramways Act, 1902, applies.

*Certificates of Shares, etc.*

108. (1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

Limitation of time for issue of certificates.

LEG. REF.

<sup>1</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup> These words were substituted for the words "such Central Government" by S. 2

and Sch. I of Act XXXIV of 1939.

shares in an increase of the capital should be given to the existing members in the proportion of shares already held by them.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

*Information as to Mortgages, Charges, etc.*

Certain mortgages and charges to be void if not registered. 109. <sup>1</sup>[(1)] Every mortgage or charge created after the commencement of this Act by a company and being either—

- (a) a mortgage or charge for the purpose of securing any issue of debentures ; or
- (b) a mortgage or charge on uncalled share capital of the company ; or
- (c) a mortgage or charge on any immoveable property wherever situate, or any interest therein ; or
- (d) a mortgage or charge on any book debts of the company ; or
- <sup>2</sup>[(e) a mortgage or a charge, not being a pledge on any moveable property of the company except stock-in-trade ; or]

LEG. REF.

<sup>1</sup>S. 109 was re-numbered as sub-S. (1) of that section by S. 60 of Act XXII of 1936.

<sup>2</sup>This clause was inserted and the original Cl. (c) was re-lettered (f), by S. 60 of Act XXII of 1936.

SEC. 109: AMENDMENTS BY ACT XXII OF 1936.—Under the Act before the amendment, a charge or mortgage created over moveable property of the company other than book debts or the uncalled share capital need not be registered. The insertion of the present Cl. (e) to sub-S. (1) requires such charges or mortgages to be registered with certain qualifications. The insertion of sub-S. (2) is designed to affect transferees with notice as from the date of registration.

APPLICATION AND SCOPE.—This section applies to a mortgage or charge created by the company by contract and not to a charge arising by operation of law. 2 Luck. 299 = 99 I.C. 483 = 1927 O. 55. Proviso (iv) to sub-S. (1) means merely that a mortgage or a charge granted by a company is not to be deemed to be an interest in immovable property simply because it comprises or takes effect over debentures held by the company and such debentures constitute a charge on the immovable property of the company issuing the same. 57 O. 328 = 34 C.W.N. 605 = 1930 O. 536. As to whether and when such debentures require registration under the Indian Registration Act, S. 17, see 58 O. 136 = 1931 O. 223; 59 C. 377 = 58 I.A. 323 = 35 C.W.N. 1034 = 61 M.L.J. 589 (P.C.). The purpose effected by registration under this section is only the prevention of a party from setting up forged and false instruments, and this registration does not affect the provisions of the Registration Act regarding the necessity for registration of any document under S. 17 of that Act, or regarding the priority given to registered documents under S. 48 of that Act. 58 C. 136 = 34 C.W.N. 405 = 1931 O.

223.

EFFECT OF DELAYED REGISTRATION.—A mortgage registered within 21 days under this section has priority over a prior mortgage registered subsequently under an order of extension by the High Court. (1915) 1 Ch. 643; 102 I.C. 592 = 1927 O. 300. The company itself while it is a going concern cannot repudiate its mortgage on the ground of want of registration under this section. 5 R. 585 = 104 I.C. 326 = 1927 R. 288.

MORTGAGE NOT REGISTERED NOT INVALID ALTOGETHER.—The section does not avoid absolutely the mortgage which is not registered under the section, but it does only so far as any security is given thereby on the company's property or undertaking. The effect therefore is that if a mortgage is not registered, it is valid as an admission of debt, but as against a creditor or a liquidator it could not be said that a valid charge on the company's property had been created. 57 I.A. 76 = 5 Luck. 128 = 1930 P.C. 66 = 59 M.L.J. 540 (P.C.). An instrument creating charge on the property of a corporation, if not registered with the Registrar as provided by S. 109, is void as against the Official Receiver. 181 I.C. 681 = 1939 Sind 100.

S. 109 (e) of the Companies Act clearly contemplates that there can be a mortgage which is also a pledge; the words "not being a pledge" must be held to have been inserted in S. 109 (e) with the object of providing that registration should not be necessary where the person entitled to the security has obtained possession of the goods. Though a transaction may amount to a mortgage, when there are all the requirements of a valid pledge, it is a pledge as well and hence does not require registration under S. 109 (e). The difference between a mortgage and a pledge is that in the case of a mortgage the ownership of goods passes, whereas in the case of a pledge the pledgee gets possession, but no right to the goods beyond what is necessary to secure the debt. (Case

<sup>1</sup>[(f)] a floating charge on the undertaking or property of the company; shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable :

Provided that—

(i) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one days after the date on which

#### LEG. REF.

<sup>1</sup> *Vide* footnote 2, p. 1487.

of bailment of the promissory notes as security for the payment of the debt). 1942 M. W.N. 692=55 L.W. 709=A.I.R. 1943 Mad. 73=(1943) 1 M.L.J. 142.

EQUITABLE MORTGAGE.—It is necessary to file with the Registrar the particulars of a mortgage by deposit of title deeds, whether or not it is accompanied by a memorandum of deposit. 29 Bom.L.R. 253=101 I.C. 144=1927 B. 167. An assignment of a book-debt as security for an existing debt constitutes a mortgage thereof and requires registration under this section, although the transfer may be in the form of an absolute assignment. 62 C. 1=38 C.W.N. 1190=1935 C. 218.

FLOATING CHARGE, WHAT IS.—It is the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. 1936 A.L.J. 195=148 I.C. 498=1934 A. 161. A floating security is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it. On the other hand it is not a specific security. The holder cannot affirm that the assets are specially mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating charge is a present charge though it does not finally attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of its business. Where a debenture charged the company's properties and assets, present as well as future, and there was no stipulation to qualify the elasticity of the floating charge, it leaves the company at liberty to create specific mortgages or charges in priority to itself. In re *Florence Land Co.*, (1878) 10 Ch.D. 503; In re *Colonial Trust*, (1880) 15 Ch.D. 465. But it is not uncommon to insert in debentures words to the effect that the floating charge is not to authorize

the company to create any mortgage or charge ranking in priority to the debenture. 38 C. 136=34 C.W.N. 405=1931 C. 223. The principal tests as to whether a charge is a floating one are (1) Is it a charge upon all or a certain class of assets, present or future? (2) Would the assets charged in the ordinary course of business be changed from time to time? (3) Has the company power until such step is taken by the charges to carry on the business of the company in the ordinary way? Where a clause in an agreement was 'that the amount of security money will be the second charge on the machinery and other goods of the company', on a construction with reference to the tests laid down it was held that it amounted to a floating charge and that if not registered was void. I.L.R. (1938) All 896=1938 A. L.J. 820=1938 All. 574. Where the assets of a corporation are of a fluctuating nature and must change from time to time in the ordinary course of business, and while taking loan creating charge on their assets, no restraint of any kind whatever is placed on the conduct of the business of the corporation, and the charge does not crystallize into a fixed security, the charge so created is a floating charge. 181 I.C. 681=1939 Sind 100. Where a deed created a charge on all assets of a company and provided that the property should be in possession and control of the lender, that the company should not alienate such property, and that in case of necessity the property may be alienated on an undertaking to replace the same by another property of equal value, it was held that the element of possession contemplated by the deed and which was actually given at the time prevented the charge from being a purely equitable charge coming within the description of a floating charge. 54 C. 513=103 I.C. 748=1927 C. 682. Only a floating charge is created when the director of a company pledges the movable assets of the company, but remains himself in possession as agent of the pledges, and the same would be void against the liquidator if it was not registered in accordance with S. 109. 27 Bom.L.R. 1218=91 I.C. 834=1926 B. 28.

the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar; and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on immoveable property shall not be deemed to be an interest in immoveable property.

<sup>1</sup>[(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.]

<sup>2</sup>[In this section 'British India' does not include Burma or Aden, whatever the date of the mortgage or charge in question.]

<sup>3</sup>[109-A. (1) Where after the commencement of the Indian Companies (Amendment) Act, 1936, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed :

Provided that, if the property is situate and the charge was created outside British India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees.]

110. Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or,

Particulars in case of series of debentures entitling holders *pari passu*.

#### LEG. REF.

<sup>1</sup> This sub-section was added by S. 60 of Act XXII of 1936.

<sup>2</sup> These words were inserted by A.O., 1937.

<sup>3</sup> This section was inserted by S. 61 of Act XXII of 1936.

SEC. 109-A: AMENDMENT BY ACT XXII OF 1936.—This section is new and follows S. 81 of the English Act. It was thought

anomalous that, while particulars of every charge or mortgage over its property *created by the company* should be registered, there should be no provision for the registration of the particulars of any previous charge or mortgage over the property which may be acquired by the company subject to such charge. This has been rectified by the enactment of this section.

if there is no such deed, after the execution of any debentures of the series, the following particulars :—

- (a) the total amount secured by the whole series ; and
  - (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined ; and
  - (c) a general description of the property charged ; and
  - (d) the names of the trustees (if any) for the debenture-holders ;
- together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register :

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

III. Where any commission, allowance or discount has been paid or made

Particulars in case of commission, etc., on debentures.

either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

112. (1) The registrar shall keep, with respect to each company, a register

Register of mortgages and charges.

in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(2) After making the entry required by sub-section (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

113. The registrar shall keep a chronological index, in the prescribed form

Index to register of mortgages and charges.

and with the prescribed particulars, of the mortgage or charges registered with him under this Act.

114. The registrar shall give a certificate under his hand of the registration

Certificate of registration.

of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and

SEC. 114: POWER OF REGISTRAR TO ALTER OR CANCEL.—A debenture relating to immoveable property, after registration and grant of certificate by the Registrar, cannot be altered or cancelled by the Registrar of

his own accord, and even if he does so the validity of the debenture as between the company and the debenture-holder will not be affected. 57 C. 328=127 I.C. 760=1930 C. 536.

the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

Endorsement of certificate of registration on debenture or certificate of debenture stock.

115. The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

116. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

<sup>1</sup>[(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid.]

117. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

Copy of instrument creating mortgage or charge to be kept at registered office.

118. (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

Registration of appointment of receiver.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

119. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver, file with the registrar notice to that effect, and the registrar, shall enter the notice in the register of mortgages and charges.

Filing of accounts of receivers.

<sup>2</sup>[(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company,

#### LEG. REF.

<sup>1</sup> This sub-section was added by S. 62 of Act XXII of 1936.

<sup>2</sup> These sub-sections were substituted for the original sub-S. (2) by S. 63, *ibid.*

SEC. 116: AMENDMENT BY ACT XXII OF 1936.—Sub-S. (3) which has been newly added provides for the registration of charges when modified, so that the correct state of affairs may be available at the Registrar's Office.



or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.

(3) If default is made in complying with the requirements of this section, the company and every director, manager, managing agent, secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees.]

120. <sup>1</sup>[(1)] The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such charge or mortgage

<sup>2</sup>[, or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created] was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

<sup>3</sup>[(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.]

<sup>4</sup>[121. (1) It shall be the duty of the company to give intimation to the registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 within twenty-one days from the date of the payment or satisfaction thereof.

#### LEG. REF.

<sup>1</sup> S. 120 was re-numbered as sub-S. (1) of that section by S. 64 of Act XXII of 1936.

<sup>2</sup> These words were inserted by *ibid.*

<sup>3</sup> Sub-S. (2) was added by *ibid.*

<sup>4</sup> This section was substituted by S. 65, *ibid.*

SEC. 120: AMENDMENT BY ACT XXII OF 1936.—The insertion of certain words makes sub-S. (1) now applicable also to the omissions to give intimation to Registrar of payment or satisfaction of a debt for which a charge or mortgage was created. S. 121 as it stood previously empowered Registrar on proof of satisfaction of a mortgage or charge to record satisfaction in the registrar. But it was not, however, obligatory on the company or the mortgagee to have such satisfaction recorded, and the records of the Registrar may accordingly remain incomplete. The insertion of sub-S. (2) and the amendments made in Ss. 121 and 122 remedy this defect.

REGISTRATION AFTER TIME, EFFECT OF.—Sub-S. (2) protects the rights of any secured creditor whose security is registered between the expiration of the 21 days and the extended time allowed by the order, even though he has notice of the prior unregistered charge. Re *Monolithic Co.*, (1915) 1 Ch. 643. Subject to the above, the mortgage which is registered within the extended time constitutes a valid charge *ab initio* and

not merely from the time of its registration. So, where a person obtains a mortgage in the intervening period specifically stating it to be a second charge, his charge will not rank in priority over the mortgage subsequently registered within the extended period. 5 Luck. 128=59 M.L.J. 540=57 I.A. 76 (P.C.).

SEC. 121: AMENDMENT BY ACT XXII OF 1936.—The old section empowered Registrar to register satisfaction of a debt secured by mortgage or charge, on proof of the same being given to his satisfaction. It laid down no obligation either on the company or on the mortgagee to record such satisfaction. The absence of any compulsory provision, and consequent failure to have satisfaction registered, rendered the records in the office of Registrar incomplete. No correct information could be obtained from the records at the Registrar's Office as to whether the debts registered therein have been satisfied and, if so, when. It was thought also inappropriate that Registrar should have authority to determine whether the cause shown was satisfactory or not or to decide any matter in dispute under the section. Now this section makes it obligatory on the company to intimate all satisfactions to Registrar. Also the Registrar is obliged to register the satisfaction and has to make no inquiry as to correctness or otherwise of the satisfaction intimated to him by the company, but has only to send a notice to the mortgagee, and to note his protest, if any.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mortgagee calling upon him to show cause, within a time (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered on the register and shall if required furnish the company with a copy thereof.

(4) Where cause is shown, the registrar shall record a note to that effect in the register, and shall inform the company that he has done so.]

Penalties. 122. (1) If any company makes default in filing with the registrar for registration the particulars—

(a) of any mortgage or charge created by the company; or

<sup>1</sup>[(b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 109 or section 109-A; or]

<sup>1</sup>[(c)] of the issues of debentures of a series, requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly, and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability be liable on conviction to a fine not exceeding one thousand rupees.

123. (1) Every <sup>2</sup>[\* \*] company shall keep a register of mortgages and enter

Companies' register of mortgages.

therein all mortgages and charges specifically affecting property of the company <sup>3</sup>[and all floating charges on the undertaking or on any property of the company], giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

124. (1) The copies kept at the registered office of the company in pursuance

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of

#### LEG. REF.

<sup>1</sup> Cl. (b) was inserted and the original Cl. (b) re-lettered (c) by S. 66 of Act XXII of 1936.

<sup>2</sup> The word "limited" was omitted by S. 67, *ibid.*

<sup>3</sup> These words were inserted, *ibid.*

or 1936.—The first change makes the section applicable not only to limited companies but to all classes of companies. Formerly it was doubtful whether the provisions of the section were applicable to floating charges, in view of the fact that such charges did not affect the property until the charge became crystallized. The second change makes the intention of the section clear.

the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for everyday during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

125. (1) Every register of holders of debentures of a company shall, except

Right to inspect the register of debenture-holders and to have copies of trust deed.

when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered

holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one rupee or such less sum as may be prescribed by the company, or where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

#### *Debentures and floating Charges.*

126. A condition contained in any debentures or in any deed for securing

Perpetual debentures.

any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency however remote, or on the expiration of a period however long.

SEC. 126.—The debenture-holders can have no greater rights than the company from which their rights are derived. They have a charge on the assets of the company, but what those assets are depends on the rights of the company. 1940 A.L.J. 626 —1940 All. 490. A company formed in 1920, issued 200 first mortgage debentures of Rs. 25,000 each, bearing interest at 8 per cent. per annum; the debentures which were in common form were secured by a trust deed dated 8—8—1923, which contained (1) a specific charge on certain immovable and other assets of the company and (2) a floating charge on the rest of the property and undertaking. Later, in and after 1929, the company obtained financial assistance from the appellant's father, under an agreement dated 9—11—1925, which provided, *inter alia*, for a lien in favour of the lender for moneys advanced by him on raw materials in the company's godowns and other materials

products and property of the company. In 1927, in the course of a suit by the trustees of the debenture trust, a receiver was appointed of the property and undertaking of the company, and as the receiver was urgently in need of funds to pay off the wages of the staff and mill-hands of the company, who had not been paid for over three months, he was authorised by the Court to raise money and he raised money from the appellant by a charge of the company's property. The agreement recited, "as regards these goods it has been agreed upon that as there is no opportunity for sufficient inquiry at this time, hence in future if these goods will be proved to be the property and to have been purchased or under lien of X (appellant) then within 10 days of the said decision, I shall hypothecate to you (appellant) sufficient property worth at least. ...." The goods were found to be under lien to the appellant. *Held*, that the receiver could validly raise money by

127. (1) Where either before or after the commencement of this Act a

Power to re-issue redeemed debentures in certain cases.

company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued :

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed ; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

Specific performance of contract to subscribe for debentures.

128. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

129. (1) Where either a receiver is appointed on behalf of the holders of any

Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.

debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound, up the debts which in every winding up

a charge on the company's property ranking in front of the debentures, that the appellant was entitled to a charge in priority to the debenture-holders, and that as against the debenture-holders, an agreement to hypothecate

was as effectual as an actual hypothecation. I.L.R. (1945) All. 597=72 I.A. 133=58 L.W. 394=A.I.B. 1945 P.O. 121=(1945) 2 M.L.J. 141 (P.O.).

are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

*Statements, Books and Accounts.*

Books to be kept by company and penalty for not keeping proper books.

<sup>1</sup>[130. (1) Every company shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place ;

(b) all sales and purchases of goods by the company ;

(c) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

<sup>2</sup>[(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2).]

<sup>3</sup>[(4)] In the case of a company managed by a managing agent the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees.]

131. <sup>3</sup>[(1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure

Annual balance-sheet.

LEG. REF.

<sup>1</sup> This section was substituted by S. 68 of Act XXII of 1936.

<sup>2</sup> This sub-section was inserted and original sub-S. (3) was re-numbered (4) by S. 8 of Act II of 1938.

<sup>3</sup> This sub-section was substituted by S. 69 of Act XXII of 1936.

SEC. 130: AMENDMENT BY ACT XXII OF 1936.—This section adopts S. 122 of the English Act. The words 'during business hours' have been deliberately used in the section, as it is thought that it would be sufficient. Further, having regard to Indian practice, where there is a managing agent, he and not the directors are made responsible for securing compliance with this section.

SEC. 130, CL. (2).—*Shareholders* have not as a rule the right to inspect the books and accounts of the company, except in

cases and in the circumstances specifically provided for in this Act or the Articles of Association. This section makes provision for inspection only of the *directors*.

SEC. 131: AMENDMENT BY ACT XXII OF 1936.—The new sub-S. (1) adopts the substance of S. 123 (1) of the English Act. The provisions of sub-S. (4) in the old section omitted here, are now contained in S. 133 as now amended. The existence of some disputes regarding the amount due to the company, cannot constitute any excuse for not discharging the duty imposed by this section as to the issue of a proper balance-sheet. 143 I.C. 135=1933 L. 301. Penalty for non-compliance with the provisions of this section is laid down in S. 133 (3), *infra*. A person cannot be held liable under S. 131 in respect of default in preparing a balance-sheet or placing it before a general meeting of the company made long before he ever became a director or

account for the period in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months :

Provided that the registrar may for any special reason extend the period by a period not exceeding three months.]

(2) The balance-sheet <sup>1</sup>[and the profit and loss account or income and expenditure account] shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of <sup>2</sup>[such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report] to the registered address of every member of the company at least <sup>3</sup>[fourteen days] before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least <sup>3</sup>[fourteen days] before that meeting.

<sup>4</sup>\* \* \* \* \*  
<sup>5</sup>[131-A. (1) The directors shall make out and attach to every balance-sheet

Directors' report. a report with respect to the state of the company's affairs the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorised in that behalf by the directors.

(3) The provisions of <sup>6</sup>[sub-section (4)] of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section.]

132. (1) The balance-sheet shall contain a summary of the property and

Contents of balance-sheet. assets and of the capital and liabilities of the company <sup>7</sup>[in accordance with the requirements indicated by the items contained in the form marked F in the Third Schedule] giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 69 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "such balance-sheet so audited," *ibid.*

<sup>3</sup> These words were substituted for the words "seven days" *ibid.*

<sup>4</sup> Sub-S. (4) of S. 131 was omitted, *ibid.*

<sup>5</sup> This section was inserted by S. 70, *ibid.*

<sup>6</sup> Substituted by Act VI of 1945.

<sup>7</sup> Inserted by Act XXX of 1943.

officer of the company and indeed before he was even a share-holder, and the conviction of such a person is unsustainable. 45 L. W. 242=1937 M. 341. As to condonation of default or delay by Registrar, *see* 53 L. W. 660=1941 Mad. 504=(1941) 1 M.L.J. 419.

SECS. 131 AND 134.—Section 131 relates to the auditing of the balance-sheet of the accounts of a company and placing the same before the general meeting of the company,

C.C.M.—188

while S. 134 relates to the non-sending of a copy of the balance-sheet after it had been laid before a general meeting of the company. In respect of the same years the same persons cannot be charged with offences punishable under both Ss. 131 and 134, because S. 134 clearly contemplates the sending of a copy of the balance-sheet only after it has been placed or laid before the company at a general meeting; and where there has been a prosecution and conviction under S. 131 the offence under S. 134 cannot possibly have been committed, as the prosecution under S. 131 makes it clear that there was no placing of the balance-sheet before the company at a general meeting. 45 L.W. 242=1937 M. 341.

SEC. 131-A: AMENDMENT BY ACT XXII OF 1936.—This section reproduces sub-section (2) of S. 123 of the English Act.

SEC. 132: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) introduces a provision requiring disclosure, in the profit and

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

<sup>1</sup>[(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto.]

<sup>2</sup>[132-A. (1) Where a company, in this Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet, of the holding company the last audited balance-sheet, profit and loss account and auditor's report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 133, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company and in particular how and to what extent.

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and,

#### LEG. REF.

<sup>1</sup> This sub-section was added by S. 71 of Act XXII of 1936.

<sup>2</sup> This section was inserted by S. 72, *ibid*.

loss account now made compulsory by the amended sub-section (1) of S. 131, of certain information of importance to shareholders. The provisions as to the disclosure of the remuneration of the directors nominated as directors of any other company, has been adopted from S. 148 of the English Act.

**BALANCE-SHEET, NATURE AND CONTENTS OF.**—A balance-sheet is supposed to be a pictorial representation of the company easily appreciated not by ignorant people but by persons who are responsibly able to understand commercial expressions and commercial conditions. 40 O.W.N. 1841=1936 C. 680. If a balance-sheet shows as profits a sum of money representing the interest on bad or doubtful debts due to the bank which was never paid and was never likely to be paid, it contains a materially false statement and the directors signing it are liable to be prosecuted under S. 282. 25 S.L.R. 297=184 I.C. 998. It was held in 29 Bom.L.R. 723=102 I.C. 504=1927 B. 414 that all genuine book debts must be covered by the entry against this item in the balance-sheet, whether they are considered

good, doubtful or bad debts; and that if any part of a secret reserve (if permissible at all) is availed of to meet bad and doubtful book-debts, it must be revealed in the balance-sheet and not concealed. The present amended form of the balance-sheet makes suitable provision for the above matters. (As to balance-sheet of banks, *see* Sch. III, Form F, *infra*.)

**SEC. 132-A: AMENDMENT BY ACT XXII OF 1936.**—This section is enacted on the lines of S. 126 of the English Act with some additions. It requires that the balance-sheet and the profits and loss account of subsidiary companies and the Auditor's report should be circulated along with the accounts of the holding company. It further requires that members of the holding company should be empowered to inspect the accounts of the subsidiary companies, and should have rights in respect of them to demand investigation. Where the holding company is a public company, it has been thought necessary to deprive its subsidiary companies also, even if the subsidiary companies should be private companies, of certain exemptions contained in the Act regarding purely private companies. With this view other provisions also have been introduced by the amending Act in Ss. 82-A, 86-D, 87-C, 87-D, 91-B, 91-D, 144 (1), and 144 (5) (*ibid*) of the Act.



(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts :

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner :

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent. or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditors' report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the estate of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company may by a resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.]

Authentication of balance-sheet. 133. (1) Save as provided by sub-section (2) the balance-sheet <sup>1</sup>[and profit and loss account or income and expenditure account] shall—

(i) in the case of a banking company be signed by the manager <sup>1</sup>[or managing agent] (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors ;

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 73 of Act XXII of 1936.

SEC. 133: AMENDMENT BY ACT XXII OF 1936.—The substitution of a new sub-section (3) is with a view to apply the penalty which was provided in S. 131 (4) previously (now omitted by this amending Act)

to defaults under that section, as well as under Ss. 131, 132 and 132-A. The provisions of Ss. 131, 132 and 132-A are mandatory, and any company which makes default in compliance with them *ipso facto* renders itself liable to the penalty contained in this section. The position is different as regards the officers of the company. 37 C. W.N. 1159=1934 C. 63.

(ii) in the case of any other company, be signed by two directors or when there are less than two directors, by the sole director and by the manager <sup>1</sup>[or managing agent] (if any) of the company.

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet <sup>1</sup>[and profit and loss account or income and expenditure account] shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be subjoined to the balance-sheet <sup>1</sup>[and profit and loss account or income and expenditure account] a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

<sup>2</sup>[(3) If any default is made in laying before the company or in issuing a balance-sheet and profit and loss account or income and expenditure account as required by section 131 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 131, section 132, section 132A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.]

134. (1) <sup>3</sup>[After the balance-sheet and profit and loss account <sup>4</sup>[or the income and expenditure account as the case may be] have] been laid before the company at the general meeting <sup>5</sup>[three copies thereof] signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the <sup>6</sup>[copies] thereof required to be filed with the registrar.

#### LEG. REF.

1 These words were inserted by S. 73 of Act XXII of 1936.

2 This sub-section was substituted, *ibid.*

3 These words were substituted for the words "After the balance-sheet has" by S. 74, *ibid.*

4 These words were inserted by S. 9 of Act II of 1938.

5 These words were substituted for the words "a copy of the balance-sheet", *ibid.*

6 This word was substituted for the word "copy", *ibid.*

SEC. 134: GENERAL.—The provisions of this section are mandatory and any company which makes default in compliance with them *ipso facto* renders itself liable to the penalties mentioned therein. The position is different as regards officers of the company. 37 C. W. N. 1159=1934 C. 63. Though the section speaks also of authorization of defaults, to sustain a conviction under this section, it is not necessary to prove such authorization. The offence is also complete if the officers of the company concerned knew of the defaults and permitted them. 39 O.W.N. 1152=162 I.C. 282=1936 C. 237. Nor would the fact that the officer was away from the office and that

the company was in charge of others at the time the defaults occurred absolve him from liability. If he knowingly and wilfully authorises or permits the default, he is guilty and liable to be convicted. If he being aware of non-compliance with the requirements of the section takes no steps to have them complied with, he can be safely held to have "permitted the default". (*Ibid.*) Person convicted under S. 131—Conviction of in same year under S. 134 also—Legality. 45 L.W. 242=1937 M. 241. If debentures are issued by a private company, the company ceases to be a private company, and is therefore bound to file its balance-sheet and the profits and loss account with the Registrar of companies under S. 134 of the Companies Act. Default in filing the same renders the company and its directors liable to the penalty under S. 134 (4). 47 Bom.L.R. 660.

DEFENCE.—A charge under this section of non-filing the balance-sheet before the Registrar, receives a complete reply if the accused can show that the balance-sheet was not due to be filed before the Registrar. It is altogether immaterial whether they had or had not prepared the balance-sheet. 35 L.W. 661=138 I.C. 317=1932 M. 497. A plea that no meeting was held and that no

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

135. Save as otherwise provided in this Act, any member of a company shall

Right of member of company to copies of the balance-sheet and the auditor's report.

be entitled to be furnished with copies of the balance-sheet <sup>1</sup>[and the profit and loss account or the income and expenditure account] and the auditor's report at a charge not exceeding six annas for every hundred

words or fractional part thereof.

*Statement to be published by Banking and certain other Companies.*

136. (1) Every company being a limited banking company or an insurance

Certain companies to publish statement in schedule.

company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August

in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

(2) A copy of the statement <sup>2</sup>[together with a copy of the last audited balance-sheet laid before the members of the company] shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions.

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 75 of Act XXII of 1936.

<sup>2</sup> These words were inserted by S. 76, *ibid.*

balance-sheet was laid before the meeting and that it was impossible to comply with the section cannot be taken by a director. 45 C. 486=22 O.W.N. 96=41 I.C. 307.

FINE.—An order directing the directors to pay the fine imposed on the company is illegal. 86 I.C. 431=1924 L. 489.

JURISDICTION AND PROCEDURE.—As the office of the Registrar is in Calcutta, the Presidency Magistrate in Calcutta has jurisdiction to try a charge under this section even though the company is not in Calcutta. 45 C. 486=22 O.W.N. 96=41 I.C. 307. A complaint under this section which was not brought by the Registrar but was filed by a clerk of his office and counter-signed by the Public Prosecutor is not valid and will be rejected. 34 P.W.R. 1910 Cr. A case

under this section may be tried summarily. 35 A. 173=11 A.L.J. 196=18 I.C. 655.

SEC. 136.—It is no defence to a charge under this section that the statements could not be published in time on account of the change in the closing date of the financial year of the company. 48 B. 305=26 Bom. L.R. 68.

SEC. 136 (4).—Where there is nothing in the order of the Magistrate or in the summons to show that a particular person was summoned as representing a company, or that any proceedings were being taken against the company as such, the procedure in issuing a summons to such a person is clearly incorrect. Sub-section (4) of S. 136, provides for a penalty against the company and there is nothing to prevent the issue of a summons against the company itself. Sub-section (3) of S. 69, Cr. P. Code, provides for the service of such a summons. 1944 P.W.N. 275=A.I.R. 944 Pat. 210.

*Investigation by the Registrar.*

137. (1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports

Power of registrar to call or information or explanation.

to relate, he may, by a written order, call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence <sup>1</sup>, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit.]

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the <sup>2</sup>[Central Government].

<sup>3</sup>[(6) If it is represented to the registrar in materials placed before him by any contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may after giving the company an opportunity of being heard by written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act.]

## LEG. REF.

<sup>1</sup> These words were added by S. 77 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>3</sup> These sub-sections were added by S. 77 of Act XXII of 1936.

SEC. 137: AMENDMENTS BY ACT XXII OF 1936.—The amendment in sub-Sec. (3) provides for intervention by the Court to secure production of documents for the information of the Registrar. The insertion of sub-S. (6) extends the powers of the Registrar, providing at the same time that action shall be taken by the Registrar only after the company has been given an opportunity of explanation. It also provides as

a check on frivolous charges, that the Registrar shall disclose the identity of his informant if he should find the allegations made to him to be frivolous or vexatious. The insertion of sub-S. (7) makes the provisions of this section applicable to documents required to be filed by a liquidator. This would now enable the Registrar to investigate any matters in connection with the documents filed by the liquidators. See 44 C.W.N. 454=1940 Cal. 232.

SECS. 137, 138 AND 141-A.—S. 137 has no relation to a prosecution for an offence under S. 282 nor does S. 138 or S. 141-A bar a prosecution upon a private complaint of an offence under S. 282. 1942 Sind 9=43 Cr.L.J. 304. See also 44 C.W.N. 454=1940 Cal. 232.

*Inspection and Audit.*

138. The <sup>1</sup>[Central Government] may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the <sup>1</sup>[Central Government] may direct—

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued ;

(ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued ;

(iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members ;

(iv) in the case of any company on a report by the registrar under section 137, sub-section (5).

139. An application by members of a company under section 138 shall be supported by such evidence as the <sup>1</sup>[Central Government] may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation ; and the <sup>1</sup>[Central Government] may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

Inspection of books and examination of officers.

140. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the Inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

141. (1) On the conclusion of the investigation, the inspectors shall report their opinion to the <sup>1</sup>[Central Government], and a copy of the report shall be forwarded by the <sup>1</sup>[Central Government] <sup>2</sup>[to the registrar and another copy] to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

## LEG. REF.

<sup>1</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup> These words were inserted by S. 78 of Act XXII of 1936.

SEC. 138.—The inquiry ordered under this section is not of the nature of a judicial proceeding and therefore the Court will not issue any order of injunction prohibiting its being held. *Grosvenor and West-End Railway Terminus Hotel Co.*, (1897) 76 L.T. 337 C.A. On this section, see also 12 L. 678=1931 L. 351.

SEC. 139.—As to the legal position of auditors with reference to this section, see 10 N.L.R. 98; 18 I.C. 97=12 M.L.T. 282. As to granting an injunction against the holding of an examination under sub-S. (2), see *Grosvenor and West-End Terminus Hotel Co.*, (1897) 76 L.T. 337 (C.A.).

SEC. 140 (3).—The refusal on the part

of the managing agent and director of a company to produce the book and accounts of the company before the Inspector appointed under S. 138 will not render him liable to conviction under S. 140 (3), if it is found that the Inspector has not been validly appointed. An Inspector appointed by a Provincial Government subsequent to the transfer of the functions of that Government under S. 138 of the Central Government and before the entrustment of these functions to the Provincial Government by Governor-General cannot be held to be validly appointed. 49 L.W. 651=1930 Mad. 589=(1939) 2 M.L.J. 97.

SEC. 141: AMENDMENTS BY ACT XXII OF 1936.—Certain words in sub-S. (1) and sub-S. (4) have been newly introduced with a view to have the report filed in the Registrar's Office also, so that the same may be available to the members of the public as part of the records of the company itself

(2) The report shall be written or printed, as the <sup>1</sup>[Central Government] directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the <sup>1</sup>[Central Government] directs the same to be paid by the company, which the <sup>1</sup>[Central Government] is hereby authorised to do.

<sup>2</sup>[Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land-revenue.]

<sup>3</sup>[(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody.]

<sup>4</sup>[141-A. (1) If from any report made under section 138 it appears to the <sup>1</sup>[Central Government] that any person has been guilty

Institution of prosecutions.

of any offence in relation to the company for which he is criminally liable, the <sup>1</sup>[the Central Government] shall

refer the matter to the Advocate General or the Public Prosecutor.

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give.

(3) For the purposes of sub-section (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction.]

Power of company to appoint inspectors.

142. (1) A company may by a special resolution appoint inspectors to investigate its affairs.

#### LEG. REF.

1 These words were substituted for the words "Local Government" by A.O., 1937.

2 This proviso was added by S. 78 of Act XXII of 1936.

3 This sub-section was added, *ibid.*

4 This section was inserted by S. 79, *ibid.*

in the office of the Registrar. The proviso to sub-S. (3) had to be introduced under the following circumstances. There was no provision formerly for the realization of costs in cases where inspectors were appointed by Local Government. The only remedy of Government was to take such proceedings as were available to the ordinary creditors of the company. The difficulty became greater if the company happened to go into liquidation. In respect of this claim, in the view of the Punjab High Court, Government was not entitled under the law as it stood previous to the present amendment, even to preferential payment although the investigation was directed by Government for the good of the company. (See 12 L. 678=134 I. C. 200). In view of proviso now inserted, there will not be any difficulty for the Government to recover the costs.

SEC. 141-A: AMENDMENT BY ACT XXII OF

1936.—This section is based on S. 136 of the English Act. The section names the Advocate-General or the Public Prosecutor as the legal advisers to be consulted on the question of instituting prosecutions. The words "of any offence in relation to the company for which he is criminally liable" in S. 141-A mean not only criminally liable under the Act but criminally liable under the Penal Code as well. 1942 Sind 9.

SECS. 141-A AND 137: PRIVATE PROSECUTIONS—IF BARRED.—There is nothing in the actual terms of S. 141-A or of S. 137 to justify the inference that the intention of the Legislature was that prosecution by private individuals under the Act should not be allowed. I.L.R. (1940) 1 Cal. 575=44 C.W.N. 454=1940 Cal. 232. The words "of any offence in relation to the company for which he is criminally liable" in S. 141-A mean not only criminally liable under the Act but criminally liable under the Penal Code as well. 43 Cr.L.J. 304=A.I.R. 1942 Sind 9.

SEC. 142: INSPECTORS APPOINTED BY SPECIAL RESOLUTION—POWERS OF.—Under S. 142, Inspectors appointed by special resolution have the same powers and duties as Inspectors appointed by the Central Govern-

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the <sup>1</sup>[Central Government], except that, instead of reporting to the <sup>1</sup>[Central Government], they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the <sup>1</sup>[Central Government].

143. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they

Report of inspectors to be evidence. have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

144. (1) No person shall be appointed or act as an auditor of any company other than a private company <sup>2</sup>[not being the subsidiary

Qualifications and appointment of auditors. company of a public company] unless he holds a certificate from the <sup>1</sup>[Central Government] entitling him to act as an auditor of companies :

<sup>3</sup>[Provided that a firm <sup>4</sup>[whereof all the partners practising in India] hold such certificates may be appointed by its firm-name to be auditor of a company, and may act in its firm-name.]

<sup>5</sup>[(2) The <sup>1</sup>[Central Government] may, by notification in the Official Gazette and after previous publication, make rules providing for the grant, renewal or cancellation of such certificates and prescribing conditions and restrictions for such grant, renewal or cancellation :

Provided that nothing contained in such rules shall preclude any person from being granted a certificate merely by reason that he does not practice as a public accountant.

(2-A) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates ;

(b) prescribe the qualifications for enrolment on the Register and the fees therefor ;

(c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees ;

(d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register ;

(e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise <sup>6</sup>[it] on all matters of administration relating to accountancy, and to assist <sup>6</sup>[it] in maintaining the standards of qualification and conduct of persons enrolled on the Register ; and

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Local Government", by A.O., 1937.

<sup>2</sup> These words were inserted by S. 80 of Act XXII of 1936.

<sup>3</sup> This proviso was substituted by S. 2 of Act XIX of 1930.

<sup>4</sup> These words were substituted for the words "whereof the partners all" by S. 2 of Act I of 1932.

<sup>5</sup> These sub-sections were substituted for the original sub-S. (2) by S. 2 of Act XIX

of 1930.

<sup>6</sup> This word was substituted for the word "him" by A.O., 1937.

ment. But Inspectors appointed by ordinary resolution would not have those drastic powers. 47 Bom.L.R. 428=A.I.R. 1945 Bom. 475.

SEC. 144: AMENDMENT BY ACT XXII OF 1936.—The amendments have been made with a view not to exempt private companies which are subsidiary to a public company from the provisions of this section.



(f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the Central Government may select, to advise <sup>1</sup>[it] and the Indian Accountancy Board on any matter that may be referred to them.

(2-B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.]

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(4) If an appointment of an auditor is not made at an annual general meeting, the <sup>2</sup>[Central Government] may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons, that is to say :

(i) a director or officer of the company ; and

(ii) a partner of such director or officer ; and

(iii) in the case of a company other than a private company, <sup>3</sup>[not being the subsidiary company of a public company] any person in the employment of such director or officer ; <sup>4</sup>[and

(iv) any person indebted to the company] shall not be appointed auditors of the company <sup>5</sup>[and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated.]

(6) A person other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting :

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

145. (1) Every auditor of a company shall have a right of access at all times

#### LEG. REF.

<sup>1</sup> This word was substituted for the word "him" by A.O., 1937.

<sup>2</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>3</sup> These words were inserted by S. 80 of Act XXII of 1936.

<sup>4</sup> This word and Cl. (iv) were inserted,

#### *ibid.*

<sup>5</sup> These words were added, *ibid.*

SEC. 145: AMENDMENTS BY ACT XXII OF 1936.—The amendments introduced in this section have been made chiefly with a view to supplement the duties of auditors, and to clarify the wording of the section as it

Powers and duties of auditors. to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet <sup>1</sup>[and profit and loss account] laid before the company in general meeting during their tenure of office, and the report shall state :—

(a) whether or not they have obtained all the information and explanations they have required ; and

<sup>2</sup>[(b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law ; and]

(c) whether <sup>3</sup>[or not] such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company ; <sup>4</sup>[and

(d) whether in their opinion books of account have been kept by the company as required by section 130.]

<sup>5</sup>[(2-A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.]

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

<sup>6</sup>[(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have

#### LEG. REF.

1 These words were inserted by S. 81 of Act XXII of 1936.

2 This clause was substituted, *ibid.*

3 These words were inserted, *ibid.*

4 This word and Cl. (d) were added, *ibid.*

5 This sub-section was inserted, *ibid.*

6 This sub-section was added, *ibid.*

stood previously. It also gives auditors power to attend the meetings of the Company and to explain the accounts. It was not obligatory on the part of the auditors previously to report as to whether proper accounts within the meaning of the Act have been kept. This is an information which the shareholders are entitled to have. So Cl. (d) and sub-S. (2-A) have been inserted to remedy this defect. Further, in meetings of the Company where the audited accounts of the Company are discussed, shareholders frequently required informations and explanations which the auditors alone could render; and in the absence of any provision for the auditors to attend as of right, the shareholders were often denied the rights of asking for such informations as may be necessary for them to protect their interests. Hence sub-S. (4) has been inserted. Auditors as officers of the Company used to be often protected by provisions in the articles of association, and in order to obviate the same and render them

liable to penalty for knowing and wilful default, sub-S. (5) has been inserted. Unless auditors are to be held strictly to their legal liability, however honest these may be, the object of the legislature in requiring a certificate from them would be absolutely defeated. It is nothing to an auditor whether the business of a company is being conducted prudently or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. He is to ascertain that position by examining the books of the company. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. If he fails in his duty, he will be jointly and severally liable with those who are responsible for the management of the company although he is not guilty of any dishonesty. 47 A. 669=23 A.L.J. 473=88 I.C. 785. The auditors appointed under the statutory powers contained in S. 144 are officers of the company and as such are liable for any misfeasance under S. 235. *Re London and General Bank* (No. 2), (1895) 2 Ch. 673 (C.A.). See also 6 Bur.L.T. 201.

been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.]

<sup>1</sup>[(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees.]

146. (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets <sup>2</sup>[and profit and loss accounts] of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

Rights of preference share-holders, etc., as to receipts and inspection of reports, etc.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act:

<sup>3</sup>[Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders of debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company.]

*Carrying on business with less than the legal minimum of members.*

147. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

*Service and authentication of Documents.*

148. A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

149. A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leaving it for him at his office.

150. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

*Tables, Forms and Rules as to prescribed matters.*

Application and alteration of tables and forms, and power to make rules as to prescribed matters.

151. (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

#### LEG. REF.

<sup>1</sup> This sub-section was added by S. 81 of

<sup>2</sup> These words were inserted by S. 82, *ibid.* Act XXII of 1936.

<sup>3</sup> This proviso was added, *ibid.*

SEC. 146: AMENDMENTS BY ACT XXII OF 1936.—The proviso added to sub-S. (2) gives the trustees for debenture-holders the right to receive and inspect the balance-sheets and the auditor's reports. The other amendment in sub-S. (1) is a consequential

one.

SEC. 148.—The word "document" is not defined in this Act. Under the English Act, S. 380, the word is defined as including summons, notice, order, and other legal process and registers. As to service of summons in proceedings under this Act, see 12 Bom. L.R. 730=7 I.C. 982. Service at a branch establishment of the company is not proper service under this section. *Pearks v. Richardson*, (1902) 1 K.B. 91.

(2) The Central Government may alter any of the tables and forms in the First Schedule, so that <sup>1</sup>[it] does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

(3) <sup>2</sup>['Any alteration or addition made under <sup>3</sup>[sub-section (2)] shall be published in the Official Gazette, and on such publication the table or form as so altered or the added form, as the case may be shall have effect as if enacted in this Act,'] but no alteration made by the Central Government in Table A in the First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the Central Government may make rules providing for all or any matters which by this Act are to be prescribed by <sup>4</sup>[its] authority.

(5) Every such rule shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

*Arbitration and Compromise.*

152. (1) A company may by written agreement refer to arbitration, in accordance with the <sup>3</sup>[\*] <sup>\*</sup> Arbitration Act, <sup>6</sup>[1940] an existing or future difference between itself and any other company or person.

Power for companies to refer matters to arbitration.

LEG. REF.

<sup>1</sup> This word was substituted for the word "he," by A.O., 1937.

<sup>2</sup> Substituted by Act XXX of 1943.

<sup>3</sup> "Sub-S. (2)" substituted for "Sub-Sec. (1)" by Act VI of 1945.

<sup>4</sup> This word was substituted for the word "his" by A.O., 1937.

<sup>5</sup> The word "Indian" omitted by Act XXXII of 1940.

<sup>6</sup> This figure was substituted for the figure "1899" by S. 49 and Sch. IV of Act X of 1940.

SEC. 151 (2) (AS AMENDED BY ACT XII OF 1936).—The Notification of the Governor-General issued on 16th January, 1937, under S. 151, amending Form F of the third schedule to the Act, differentiating between one class of companies and another (i.e. relieving banking companies from the obligation to disclose bad debts in the balance-sheet) is *ultra vires* and invalid. The Central Government has no power under S. 151 to alter Form F in such a way as to distinguish between companies, as that involves in substance an alteration of S. 132 of the Act. I.L.R. (1944) Bom. 302=46 Bom.L.R. 70=A.I.R. 1944 Bom. 107 (F.B.).

SEC. 151 (3) (AS AMENDED IN 1936).—SCOPE.—*Per Lokur and Rajadhyaksha, JJ.*—Where a Form is altered under S. 151 (2) of the Act, and the entire Form as altered is not published, what is published in the Official Gazette being only the alterations, there is sufficient compliance with the requirements of S. 151 (3). 1944 Bom. 107 (F.B.).

*Per Beaumont, C.J.*—What has to be published is the altered form and it is only upon such publication that the altered form takes effect as part of the Act. Publication of the alteration alone is not a sufficient compliance with the provisions of S. 151 (3).

I.L.R. (1944) Bom. 302=A. I. R. 1944 Bom. 107 (F.B.).

SEC. 152: SCOPE AND APPLICATION.—

S. 152 is an enabling one and it merely confers power on companies to refer disputes to arbitration under the Arbitration Act by an agreement in writing, when this course is preferred. It is not obligatory on a company governed by the Arbitration Act, to make a reference to arbitration out of Court in the Province of Punjab, only in pursuance of the provisions of the Arbitration Act and to file an award made on such reference in the Court of the District Judge as required by the Arbitration Act. It is permissible for the company, although governed by the Arbitration Act, to make a reference outside the Arbitration Act, and although the award on such reference is filed in the Court of the Senior Subordinate Judge, the decree passed on the basis of it is perfectly legal. 17 L. 722=1936 L. 731 (F.B.). [1929 L. 246=118 I.C. 533, not approved.] S. 152 (1) enables a Company to refer to arbitration disputes between it and another person in accordance with the provisions of Indian Arbitration Act; and if it does not wish to avail itself of the provisions of the Arbitration Act, reference to arbitration in accordance with Sch. II, C. P. Code, is open to the Company. S. 162 (1) does not exclude arbitration under the C.P. Code. An award passed in arbitration under the C.P. Code, is consequently valid and can be enforced by a Court though such Court has not been conferred jurisdiction under the Arbitration Act. The words "may by written agreement refer to arbitration in accordance with the Arbitration Act, 1940" in S. 152 (1) mean that if a Company wishes to refer to arbitration under the Arbitration Act, it can do so by written agreement; this carries with it the implication that reference to arbitration

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the <sup>1</sup>[\*      \*] Arbitration Act, <sup>2</sup>[1940] <sup>3</sup>[\*      \*      \*      \*      \*]

shall apply to all arbitrations between companies and persons in pursuance of this Act.

#### LEG. REF.

<sup>1</sup> The word "Indian" omitted by Act XXXII of 1940.

<sup>2</sup> This figure was substituted for the figure "1899" by S. 49 and Sch. IV of Act X of 1940.

<sup>3</sup> The words "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" were omitted by *ibid.*

under the C.P. Code, is still open to it, if it does not wish to avail itself of the provisions of the Arbitration Act. 56 L. W. 637=A.I.R. 1944 Mad. 95=(1943) 2 M. L.J. 489. It is not obligatory that any references to arbitration to which a limited company is a party should be made under the Arbitration Act. 190 I.C. 146=1940 Lah. 97. After the enactment of the Indian Companies Act (1913) and before the Indian Arbitration Act (1940) came into force, a company could only enter into an arbitration under the provisions of the Arbitration Act (1889) and consequently companies were outside the scope of Schedule II to the Code of Civil Procedure. I. L.R. (1944) Mad. 385=1944 Comp. C. 95=57 L.W. 221=A.I.R. 1944 Mad. 308=(1944) 1 M.L.J. 290 (F.B.). S. 152 only empowers a company to refer to arbitration an existing difference between itself and any other company or persons. But a shareholder of a company has no such right against the company. Apart from the Articles of Association of the company, a shareholder has no power to compel a submission to arbitration of a dispute arising out of the affairs of the company. 45 L.W. 405=1937 M. 405. The section applies to those cases only in which a Joint Stock Company by written agreement refers to arbitration in accordance with the provisions of the Arbitration Act, any dispute between itself and any other company or person. In a case where the reference to arbitration is not by written agreement of the parties, but is made by the Court in a pending suit, the arbitrator has to submit his report to the Court which has to pass judgment in the suit in accordance with the terms of the award or pass such other order in accordance with law as it thought fit. A decree on such award is open to appeal in the ordinary course. Such a case does not come under S. 152. 1936 L. 257=163 I.C. 339. The scope of S. 152 is that the provisions of Ss. 3 to 22 of the Old Arbitration Act would apply, where one

or both the parties to arbitration are companies registered under the Companies Act, by force and effect of the Companies Act itself, irrespective of the provisions of S. 2 of the Arbitration Act; that is to say, the said Act would apply in a case falling within the scope of the Act even when the *locus* of the subject-matter was outside a Presidency town, provided one of the parties or both of them were companies registered under the Companies Act. As the old Arbitration Act has no application to arbitration with the intervention of Court. S. 152 does not require the procedure laid down in the said Act to be followed in the case of such arbitration even if a company is a party to it. 1941 Cal. 127=I.L.R. (1940) 2 Cal. 237=44 C.W.N. 828. (See now the present Arbitration Act X of 1940). See also the following cases under the old Act. 14 L. 249=1933 L. 44 [overruling 32 P.L.R. 444=132 I.C. 379=1931 L. 555]; 13 Pat.L.T. 169=136 I.C. 445=1933 P. 49; 14 L.W. 249. A company under the Companies Act stands in the Punjab on no different footing than a private individual governed by Punjab Act I of 1911. Therefore if an agreement between the parties of which one is a company makes no specific reference to the Arbitration Act, the Arbitration Act will not apply to the arbitration agreement between the parties. 1938 Lah. 827. (Case under the old Act.) The word 'may' after the words 'a company' in the beginning of S. 152 does not go with the sentence 'in accordance with the Indian Arbitration Act, 1899,' but with the words 'refer to arbitration.' Again the existence of the words 'in accordance with the Indian Arbitration Act, 1899,' in Cl. (1) of S. 152 is an indication that the Legislature considered it to be *de rigueur* that every reference by a limited liability company to arbitration should be in accordance with the Arbitration Act, Cl. (3) is conclusive on the point that the provisions of the Arbitration Act only apply to arbitrations to which a limited liability company is a party. Limited liability companies cannot refer to arbitration independently of this provision of the law and Sch. II, C. P. Code, has no application. The Arbitration Act alone applies to all references to arbitration made by limited liability companies and hence the award is executable by the District Judge only and not by the Sub-Judge. (1934 Pesh. 107, Foll.) 177 I.C. 659=1938 Pesh. 54. The concluding words of S. 152 (3) "in pursu-

153. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between

Power to compromise with  
creditors and members.

the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

ance of *this Act* mean that the provisions of the Arbitration Act, except S. 2 thereof, would apply to all arbitrations in which one or both the parties are companies irrespective of the *locus* of the subject-matter by the force and effect of the *Companies Act*, and the procedure provided for in the Arbitration Act for extending its field of operation would not have to be followed in such cases. On this interpretation of S. 153 (3), Ss. 3 and 4 (a) of the Arbitration Act would apply to all arbitrations in which a company is a party. The Court in which the award will have to be filed must be either the High Court or the Court of the District Judge, as the case may be. I.L.R. (1940) 1 Cal. 358=44 C.W.N. 285=1940 Cal. 220. The power to refer cannot be exercised by the liquidator. Thus although a living company is allowed to refer matters in difference to arbitration, in a particular way, an official liquidator may not be allowed to do so. 50 A. 867=26 A.L.J. 810. An agreement as to submission to arbitration, though not under seal, is valid. 37 A. 273=13 A.L.J. 312.

SEC. 153: AMENDMENTS BY ACT XXII OF 1936.—The amendment in sub-sec. (6) simplifies the determination of the meaning of 'creditors of the same class' in view of the judicial uncertainty that has manifested itself on this point. The present sub-Ss. (3), (4), (5) and (7) introduce sub-Ss. (3) and (4) of S. 153 of the English Act and also specifically provide for appeals from orders made under this section. In cases where schemes of arrangements were proposed because of financial difficulties, it was very often found that on the initiation of the proceedings under this section obstructive creditors and contributories immediately began to file suits or apply for attachment before judgment or apply for the compulsory winding up of the company, and thereby render the application for the arrangement practically infructuous. Under the law as it stood previously, the Court was powerless to grant any interim protection against such proceedings, and the natural consequence was that the company was frequently obliged to submit to most extortionate terms in order to obtain the withdrawal of such proceedings. It was to obviate this difficulty that sub-S. (5) has been inserted.

SCOPE OF THE SECTION.—This section makes provision not merely for a scheme for the resuscitation or re-organising of companies, but it also provides for a scheme of arrange-

ment, which provides an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for winding-up, whether voluntary or under the Court. So, the failure of a scheme for resuscitation of a company is not by itself sufficient to justify a winding-up order being made, as it cannot be said that because the scheme has failed in this important particular it has failed in its entirety, leaving open to the Court only the simple course of ordering a compulsory liquidation. 16 Lah. 1029=158 I.C. 816=1935 L. 779. A scheme of merger of several companies under which a company should transfer its business and undertaking to the new combined or merger company, which involves a re-organization of capital altering rights conferred by the memorandum of association and re-organizing the rights of different classes of shareholders and which provides for a distribution of the assets of the company among the different classes of shareholders should the company be wound up after the merger, is one which may be sanctioned by the Court under S. 153 of the Act. An application for sanction of such a scheme is maintainable and the Court has jurisdiction to consider it, and see if it is fair and reasonable, even though the scheme may involve winding-up. But the Court may, in the exercise of its discretion, impose certain conditions upon the company before sanctioning it, i.e., it may ask the company to make some provision for the dissentients. Such a provision is not, however, a *sine qua non* to sanctioning a scheme if it is reasonable and fair. 39 Bom. L. R. 675=1937 Bom. 423. Even after an order for winding-up a company has been made, a creditor or a member of the company can move the Court under S. 153. The liquidator has also the right to make an application under S. 153 but he has not got the exclusive right to do so. It was not the intention of the Legislature to deprive the creditors or members of the right once an order for winding-up is made and place them at the mercy of the liquidator who may or may not choose to move in the matter. 1938 M.W.N. 1313=1939 Mad. 318. S. 153 does not make it obligatory either upon the Court or the company to serve a notice of the creditors' meeting on each and every creditor of the company, and a decision arrived at by the creditors and the company in the absence of any individual creditor is not, therefore, invalid. 39 P.L.R. 230=1937 L. 442. The unsecured creditors of a company who have

obtained decrees and the unsecured creditors who have not obtained decrees do not constitute different classes of creditors, and a scheme of composition passed and sanctioned under the provisions of the Companies Act binds all the creditors of the company including judgment-creditors. 39 P. L. R. 230=1937 L. 442. A scheme of arrangement sanctioned by the Court binds not only the creditors favouring the scheme but also the dissentient minority. 41 A. 566; 153 I.C. 119=1934 L. 515; 40 C.W.N. 551. Where after a scheme of composition has been passed by the creditors at a meeting the holder of a decree against the company applies to the High Court contending that the scheme is not binding on him, but the High Court decides that he is bound by the scheme, the decree-holder cannot be permitted to nullify that decision by getting his decree transferred to a mofussil Court and attempting to execute it against the assets of the company. If the decree-holder attempts to start execution the High Court has power to stop the execution proceedings and will issue an injunction to restrain him from further proceeding with the execution of the decree, so long as the scheme is in operation. 40 C. W. N. 551. Powers of the Court under S. 153 are strictly limited. The Court may either sanction or refuse to sanction a scheme approved by the company and its creditors or members. The Court has no power upon an application to alter the scheme which has been sanctioned by the Court and agreed to at a meeting under S. 153 without giving parties to the agreement an opportunity of considering the scheme in the way the Court proposes. I.L.R. (1937) 1 C. 368=1937 C. 124. It is not right to summon a joint meeting of the creditors and all policy-holders of an insurance company as they have different interests. I.L.R. (1942) 2 Cal. 85=46 C. W.N. 441=A.I.R. 1942 Cal. 578.

**CONSTRUCTION OF SECTION.**—The plain language of S. 153 is applicable both to a going company and to the case of company in liquidation; a compromise or arrangement can therefore be availed of both in the case of a company which is a going concern and also in the case of a company which is in the course of being wound up. It cannot therefore be contended that an application under the section cannot be made before an order for winding up is made. 1939 M. 53; 1939 Mad. 318. See also 1937 Bom. 423. This section enables the majority of a class of creditors to bind the minority and it exercises a most formidable compulsion upon dissentient or would be dissentient creditors; and it, therefore, requires to be construed with great care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do or of making a mere jest of the interests of the minority. 28 S.L.R. 213=149 I.C. 15=1934 S. 54. A petition was

presented by the Directors of a Bank under S. 153 asking the Court to refer a scheme, which they had prepared, to the shareholders and creditors for their consideration, but a winding up petition was filed subsequently by some of the creditors. *Held*, there was no bar to the hearing of the winding up petition, though the scheme was not placed before the shareholders and the creditors by the Court as prayed for. 48 L.W. 648=(1938) 2 M.L.J. 812.

**SANCTION OF COURT.**—The fact that the shareholders and creditors of a company have approved of a scheme of compromise or arrangement as contemplated by S. 153 of the Indian Companies Act does not mean that the Court is bound to accept the scheme. It is the duty of the Court to examine the proposals and decide whether they are fair and reasonable. That the shareholders and creditors have approved of a scheme will of course carry weight, but there may be more important considerations. Where the resolution approving of a scheme is shown to have been passed as a result of misleading statements contained in a letter written by one of the creditors of the company who was also a director thereof, and circulated to all the shareholders and creditors before the meeting, where the company is hopelessly insolvent and the scheme confers no apparent benefit on any one and in fact ignores creditors who are not depositors, and the scheme is itself not a feasible one, and where besides there are also allegations of unlawful and unauthorised acts on the part of the company's officials, justice demands that the resolutions approving of the scheme passed at the meeting of the shareholders and creditors should be disregarded. 51 L. W. 639=1940 Mad. 621. See also 1937 Bom. 423. A mere agreement on the part of the members or shareholders is not enough for the acceptance of the scheme. It is ultimately for the Court either to sanction it or not to sanction it. 1930 A. L.J. 305=1930 A. 330. It will be without effect if the sanction of the Court is refused; although when given, the agreement takes effect not from the date of the sanction but from the date when it is made. 46 I.A. 135=36 M.L.J. 562=50 I.C. 429 (P.C.); 106 P.W.R. 1916=40 I.C. 904; 41 A. 566; 32 I.C. 451=18 O.C. 272. See also 41 C. W.N. 1272=65 C.L.J. 503. What the Court has to do on an application for sanctioning a scheme is to see first of all that the provisions of the Act have been complied with; and, secondly that the majority have been acting *bona fide*. It must also see whether the scheme is a reasonable one or whether there is any reasonable objection to it. 39 Bom.L.R. 675=1937 Bom. 423. See also 1940 Mad. 621. The function of the Court is not to simply register the resolution come to by the creditors or the shareholders as the case may be. It is the duty of the Court to satisfy itself that the meeting was



duly held and conducted, that the compromise was a real compromise, that it was accepted by a competent majority, that the majority was acting in good faith and for the common advantage of the whole class, and that what they did was reasonably prudent and proper. 28 S.L.R. 213=149 I.C. 51=1934 S. 54; 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80; 1933 L. 51=149 I.C. 128. If the Court finds it otherwise, it will refuse its sanction. It is not the function of the Court to substitute its own scheme *suo motu* for the scheme presented to it for sanction. If the Court finds that some radical amendment ought to be effected in the scheme as presented, it is the duty of the Court to reject the scheme. 61 C. 913=38 C.W.N. 920=1934 C. 816; 10 B. 438=149 I.C. 133=1932 R. 154; 57 M.L.J. 633=1929 P.C. 256 (P.C.). A Court will not give sanction to a scheme which will have the effect of enabling a bank or other company, which is, to all intents and purposes, insolvent, to continue carrying on business and attract deposits which in all probability will go the way of the former deposits. These principles are to be adhered to in dealing with applications to sanction schemes of composition and arrangement intended to keep sinking banking companies afloat, whose assets consist principally of monies lent out on mortgages, simple bonds, promissory notes, decrees of Court and immovable property, but no cash. 63 C. 99.

**SCHEME SANCTIONED BY COURT—SUBSEQUENT MODIFICATION—POWER OF COURT.**—Under S. 153 of the Companies Act, the Court may order a meeting to be held to consider a scheme of arrangement, and may grant or withhold sanction of such scheme. If a scheme has been sanctioned by the Court, it has no power to subsequently modify or alter or expunge any part of it without the consent of those who have agreed to it. 41 C.W.N. 599=1937 Cal. 667. Where one Judge has sanctioned a scheme it is not within the power of another Judge exercising equal jurisdiction to declare in effect that the order sanctioning the scheme is to the extent that it affects a particular person, a nullity. 1937 Cal. 401. Where a scheme is passed by a meeting properly called and competent to approve it, the Court cannot either at the time of sanction or at any time thereafter, alter the terms of the scheme without consulting those who agreed to it and without their sanction. Therefore the Court has no power, either at the time of sanction or at any time thereafter, to expunge any part of the scheme or to modify it in any way without consulting those who passed it originally and without obtaining their consent. All that the Court can do is to refuse to sanction the scheme or possibly to withdraw the sanction which has already been given. 1937 Cal. 401. Upon confirmation by the Court of a scheme of arrangement, that scheme becomes by virtue of S. 153 binding upon the creditors,

the shareholders and the company. Its terms can thereafter only be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders and it is not possible for the company or its directors or shareholder whether by resolution or ratification or otherwise to alter the scheme. Nor is it possible for the company or its directors to vary the scheme under the guise of a compromise with a shareholder, as no variation or departure from that scheme can be validated by mere acquiescence of the shareholders or the creditors. 1938 P.C. 284=I.L.R. (1939) Loh. 1=(1939) 1 M.L.J. 98 (P.C.).

**MEANING OF TERMS.**—(i) *'Compromise or arrangement'*.—The mere fact that year after year the company, by appropriate means, as laid down in the memorandum, varies the rights of different classes of shareholders is tantamount to a compromise or arrangement between the company and its members. 57 A. 810=1935 A.L.J. 527=156 I.C. 1088=1935 A. 310. The word 'arrangement' used in this section is in the sense of something analogous to a compromise; and in any arrangement which can fairly be called a compromise or be considered as analogous to a compromise, there must be both 'give' and 'take' on both sides. 28 S.L.R. 213=149 I.C. 51=1934 S. 54.

(ii) *'Creditors'*.—This word includes all persons having any pecuniary claim against the company whether actual or contingent, present or future. Re *Midland Coal Co.*, (1905) 1 Ch. 267. It includes also debenture-holders and other secured creditors. Re *Empire Mining Co.*, (1890) 44 Ch.D. 402. As between a decree-holder and an unsecured creditor, their interests are not so dissimilar as to make it necessary to place them in different classes. Where a notice of a meeting to approve a scheme of arrangement between the company and its unsecured creditors is issued to its unsecured creditors the decree-holder who is also an unsecured creditor of the company is *prima facie* bound by such notice. 172 I.C. 717=1937 Cal. 401.

(iii) *'Company'*.—Where the directors of a company are authorised to manage the business and exercise all powers, a proposal by the Board of Directors made under this section in the name of the company, is valid and proper. 28 S.L.R. 213=149 I.C. 51=1934 S. 54.

(iv) *'Class'*.—This word must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Matured and unmatured policy holders of an insurance company belong to different classes, and a member holding a matured policy is entitled to dissent and cannot be bound by a resolution passed at a meeting of all the policy holders including both the matured and unmatured

class. 28 S.L.R. 213=149 I.C. 51=1934 S. 54. So also, holders of shares partly paid and holders of shares with the uncalled balance paid in advance of calls and carrying interest, constitute different classes from holders of fully paid-up shares. Re *United Provident Assurance Co. v. Dadd*, (1910) 2 Ch. 477. But an unsecured creditor of a company who is also a decree-holder is not entitled to be regarded as belonging to a defined and distinct class of persons as opposed to an unsecured creditor who has not got a decree. Consequently they are not entitled to execute their decrees after the scheme has been sanctioned and passed. 39 C.W.N. 1198=160 I.C. 407=1936 C. 12; 39 C.W.N. 1199=62 C.L.J. 310=1935 C. 977; 39 C.W.N. 875. But it was held in 38 C.W.N. 1171=155 I.C. 811=1935 C. 117; and in 156 I.C. 590=1935 C. 398=40 C.W.N. 1104; 40 C.W.N. 580=1930 C. 162, that a depositor in a company who had obtained a decree against the company before the scheme was embarked upon, belonged to a different class from the depositors who had not obtained decrees. But note that the Act has since been amended and there will no longer be any distinction between unsecured creditors who have obtained decrees and those who have not obtained decrees and those who have not section. See also I.L.R. (1937) 1 C. 368=1937 C. 124.

SEC. 153 BEFORE 1936 AMENDMENT.—Under the law as it was prior to the Companies Amendment Act, 1936, a depositor who has obtained a decree and one who has not obtained a decree cannot be regarded as belonging to the same class of creditors for the purpose of S. 153 and accordingly a notice sent to such a decree-holder directing him to attend a meeting of the depositors for the purpose of considering a scheme is not binding on him, as equally as he is not bound by anything which is decided at such meeting. But a depositor who has merely filed a suit, and has not obtained a decree on the date of the meeting of the creditors at which a scheme is agreed to by them, is in the same class of creditors as all the rest of the depositor, who have not filed suits, although he obtains a decree before the date on which the Court sanctions the scheme. Such a depositor is entitled to receive notice of the meeting of the creditors and to attend it, and if he does not choose to attend, he is bound by the scheme passed by the majority of his fellow depositors. The sanction of the scheme by Court has a retrospective effect, and the scheme, therefore, operates not from the date on which the sanction is given but from the date on which it is agreed to by the creditors, namely, the date of the meetings. The fact that in the suit filed up the depositor, the company filed a written statement subsequent to the passing of the scheme by the creditors admitting their liability and asking for time within which to pay does not preclude them

from resisting execution of the decree. 41 C.W.N. 1272=65 C.L.J. 503. See also 42 C.W.N. 610; 40 C.W.N. 1104; 1937 Cal. 169; 1938 Cal. 337=I.L.R. (1938) 2 Cal. 30. In view of the fact that it is impracticable to try and ascertain the true or real value of the policies of an Insurance Company, the nominal value of the policies must be accepted for the purpose of ascertaining majorities at meetings held to approve or disapprove of a scheme of compromise under S. 153. 45 C.W.N. 979.

MEETINGS ORDERED BY COURT.—The meetings ordered by the Court are subject to the direction of the Court. But when the Court has given no express direction, the meetings have to be conducted in accordance with the directions contained in the Articles of Association, as far as may be possible. 39 Bom.L.R. 197=108 I.C. 465=1928 B. 80. Before ordering a meeting of the class of creditors with whom it is proposed to make an arrangement it is not necessary that the Court should first have issued notices. A certificate from the Chairman of the meeting that notice of application and of meeting ordered, had been issued and acknowledged by the depositors, may be relied on for the fact that the provisions of the law have been duly complied with. 28 S.L.R. 213=149 I.C. 51=1934 S. 54. The Court has to exercise its discretion in making an order under S. 153 of the Companies Act. There is a *distinction between making an order under S. 153 (1) and an order under S. 153 (2)* when the scheme comes before the Court for sanction after the approval of the majority of the Court. It is very essential that any scheme put forward before the general body of creditors must as far as possible be based upon correct information; and any scheme which is approved must *prima facie* appear to be based on correct information and date. But that does not mean that an application under S. 153 to call a meeting of the creditors to consider a proposed scheme should be rejected merely because the same is not based on correct information as to the affairs of the company. The Court can call for a report giving a fair idea of the affairs of the company and on that information the scheme as adumbrated or with the necessary amendments can be circulated along with the report. A Court ought not to decline to order a meeting of the creditors unless the proposals are illegal as being in contravention of the Companies Act or incapable of modification in view of ascertained facts. 1939 Comp.C. 14=1938 M.W.N. 1313=1939 Mad. 318. It is not enough to hold a single meeting of all different classes of creditors in general, and any scheme of arrangement approved at such a meeting ought not to be sanctioned by the Court. 39 C.W.N. 690. The expression "a meeting of creditors or class of creditor" in S. 153 (1) of the Companies Act should

be interpreted as comprising all creditors of the company whether in British India or outside. There is nothing to preclude the Courts from directing a meeting of all such creditors. The question of principal liquidation or ancillary liquidation does not matter. 1938 M.W.N. 1313=1939 Mad. 318. Where after the issue of a notice of a meeting to frame a scheme under S. 153 on the general body of creditors of a company, one of them assigns his interest to a debtor of the company after the receipt of the notice and before the date of the meeting, the assignee is bound by the scheme adopted at the meeting and sanctioned by the Court. He cannot contend that he belongs to a class of "debtor creditor" and is therefore different from the class of creditors who formed the meeting and agreed to the scheme. 43 C.W.N. 1181=1939 Comp. C. 247.

**SCHEME SANCTIONED BY COURT—IF CAN BE CHALLENGED IN EXECUTION PROCEEDING.**—The executing Court cannot modify, alter or amend the scheme which definitely includes the depositors who had obtained decrees, and which has been sanctioned under S. 153. If there are circumstances to justify any modification or alteration or amendment of the scheme by excluding the depositors who had obtained decrees, the remedy is to go to the Court which sanctioned the scheme. An order sanctioning the scheme cannot be challenged collaterally in the executing Court as without jurisdiction either on the ground that no notice of the meeting was served upon the depositor who had obtained a decree in the proceedings under S. 153 of the Act, or on the ground that in the said proceeding the Court did not order that the meetings of the different classes of depositors should be held separately. Such objections to the order do not touch the question of the existence of the jurisdiction but relate only to the illegal or irregular exercise of the jurisdiction. So long as the order stands, it continues to be binding upon the party whom it purports to bind. 41 C.W.N. 406=1937 C. 211. A scheme of arrangement which is sanctioned by the Court under S. 153 has the force of a judicial pronouncement. Where in execution of a decree obtained against a loan company by one of its depositors, the sanctioned scheme is set up as a bar by the company, the executing Court cannot go behind the sanction unless it is shown that the order giving the sanction was without jurisdiction. When the matter comes before the executing Court, it is not open to the decree-holder to urge against the sanctioned scheme that there was any defect in the procedure or that there was no meeting of the particular class of creditors to which he belongs. Such defects, if any, do not take away the foundation of the authority of the Court in granting sanction under S. 153 and they are at the most irregularities and do not render the

sanctioned scheme a nullity in the eye of the law. The order of the High Court unless set aside or modified is binding on the decree-holder and on person who seeks to execute his decree and is one which the executing Court has to obey. I.L.R. (1938) 2 Cal. 30=1938 Cal. 337. See also I.L.R. (1937) 1 C. 781=41 C.W.N. 952=1937 C. 517.

**VOTE BY PROXY.**—The Court has jurisdiction under this section to settle the terms and form of the instrument of proxy to be used at the meeting. Any rule framed by the High Court under S. 246 of the Act, purported to fetter or restrict the jurisdiction of the Court in respect of this matter is *ultra vires* and not operative. 10 R. 438=140 I.C. 133=1932 R. 154. Where the Court has specifically directed that the decision of the chairman as to the admissibility of any proxy shall be final for the purpose of the meeting, the scrutineers appointed by the Court to assist the chairman, have no right to decide whether any proxy was good or bad, or to file any petition into Court for directions as to the validity of certain proxies used. 10 R. 189=137 I.C. 444=1932 R. 96. A vote given by an executor of a deceased member must be disallowed and it is not possible to distinguish the case of liquidator or receiver. 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80.

**JURISDICTION—Ss. 153, 270 AND 271.**—S. 153 confers jurisdiction on the High Court to deal with a scheme, but how the scheme when sanctioned can be rendered effective and operative on the company in question as a whole does not affect the jurisdiction of the Court to deal with it. 1938 M.W.N. 1313=1939 Mad. 318. The High Court has jurisdiction to entertain an application under S. 153, at the instance of a creditor or a member of a foreign company. A Bank incorporated outside British India and having its registered office outside British India is a foreign company, but it would be an unregistered company within the meaning of Ss. 270 and 271 of the Act and therefore liable to be wound up under the Act. The expression "Court" in the case of an unregistered company including a foreign company would mean "the Court in which the said company is liable to be wound up," and under S. 271, the High Court is the Court in which a foreign company is liable to be wound up. A Bank which has its central office in British India, which is the centre of administrative control, is subject to the jurisdiction of the High Court in that part of British India though its registered office and place of incorporation may be outside British India. 183 I.C. 353=1938 M.W.N. 1313=1939 Mad. 318. There is no warrant for holding that because an order for winding up a foreign company has been made by the Court of the place which is the registered office of the company a British Indian Court has no jurisdiction to entertain an application under S. 153. S. 271 of the

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributaries of the company.

<sup>1</sup>[(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.]

<sup>1</sup>[(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.]

<sup>4</sup>[(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuance of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.]

<sup>1-a</sup>[(6) In this section the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a re-organisation of the share capital of the company by the consolidation of shares or different classes or by the division of shares into shares of different classes or by both those methods, <sup>3</sup>[and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.] (Substituted by Act XVII of 1942).

<sup>4</sup>[(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeal from the decisions of the Court.]

#### LEG. REF.

<sup>1</sup> This sub-section was inserted by S. 83 of Act XXII of 1936.

<sup>2</sup> The original sub-S. (3) was re-numbered (6) by *ibid.*

<sup>3</sup> These words were added by *ibid.*

<sup>4</sup> This sub-section was added by S. 83 of Act XXII of 1936.

Act, on the other hand, negatives such a theory. Under S. 271, it is left to the discretion of the Court whether it would wind up the company in spite of a similar order having been passed in some other Courts. There is nothing to oblige the Court to pass an order of winding up. The desire to assist in the main liquidation—the desire to act as ancillary to the Court where the main liquidation is going on—will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation. The underlying principle is one of co-operation based on the essential principles of justice and equity. 183 I.C. 353=1938 M. W.N. 1313=1939 Mad. 318.

S. 153 (6): RETROSPECTIVE OPERATION.—The Legislature cannot be said to have altered the existing law by the addition of sub-S. (6) to S. 153 by amending Act XXII of 1936. The object of the added clause is merely to explain the meaning of the expression "creditors of the same class"

which occurred also in the Act as it stood before amendment. Consequently even depositors who obtained decrees against a Bank before the addition of the sub-section do not constitute a separate class from ordinary depositors and it is not necessary that there should be a separate meeting of such creditors before a scheme settled by the ordinary depositors can be sanctioned by the Court. 75 C.L.J. 203=1942 Comp.C. 110=46 C. W.N. 634=A.I.R. 1942 Cal. 442.

S. 153 (7).—Where the Court sanctions a scheme of reconstruction of an Insurance Company by its dissolution and creation of a new Insurance Company involving the transfer of the money deposited by the dissolved company under S. 7 of the Insurance Act (a property within the meaning of S. 153 (a) (1) (a) of the Companies Act) and the reduction of contracts of insurance, it does so under S. 153 of the Companies Act as the jurisdiction of the Court under that section to sanction such scheme has not been in any way affected by any provision of the Insurance Act though in the exercise of this jurisdiction the Court is to keep in view the provisions of S. 8, S. 36 and S. 61 of the Insurance Act. Consequently an order sanctioning a scheme of reconstruction of an Insurance Company is an order under S. 153 read with S. 153-A and is appealable under S. 153 (7). The Governor-General in Coun-

<sup>1</sup>[153-A. (1) Where an application is made to the Court under section 153

Provisions for facilitating the sanctioning of a compromise or arrangement arrangements and compromises proposed between a company and any such persons as are mentioned in that section, and it is shown to

the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company'), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters :—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company ;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;

(d) the dissolution, without winding up, of any transferor company ;

(e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement ;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof, to be delivered

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 84 of Act XXII of 1936.

oil, although he was not a party to the proceedings in the trial Court, is entitled to appeal against the order. So also the Superintendent of Insurance. I.L.R. (1942) 2 Cal. 85=46 C.W.N. 441=A.I.R. 1942 Cal. 578.

APPEAL.—An order rejecting a scheme is appealable. 10 R. 189; 27 Bom.L.R. 655; 10 R. 438=140 I.C. 133=1932 R. 154. It is only the creditors or contributories that have a right of appeal from an order under this section. Other persons having no present interest in the company, but only a prospective interest to be appointed secretaries and agents if the company was to be brought to life as a result of the scheme, are not entitled to file an appeal against the order refusing to sanction the scheme, even though they may have originally propounded the scheme and were parties in the lower Court. 56 B. 16=33 Bom.L.R. 1495=1932 B. 78.

SECS. 153 AND 213.—The plain language of S. 153 clearly shows that the machinery provided by the section is available where there is and where there is not a winding in

progress and the section would apply to a going concern as well as in a winding up. S. 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. 39 Bom.L.R. 675=1937 Bom. 423. See also 1939 M. 318.

SEC. 153-A: AMENDMENT BY ACT XXII OF 1936.—This section and S. 153-B have been newly added and thereby Ss. 154 and 155 of the English Act dealing with arrangements and reconstructions have been incorporated in this Act also. Schemes under this Act very often involved a transfer of shares or a class of shares in the company to another company; and in such cases the consent of the shareholders for the transfer had to be obtained. There will always be found a dissenting minority in every company, and although a scheme may have been approved by a substantial majority of their co-shareholders, the carrying out of the scheme used to be often rendered infructuous. To meet this contingency and to put through the scheme approved by a substantial majority, it was thought necessary to make some provisions for acquiring the shares of the dissenting minority on reasonable terms, and the present amendment contains suitable provisions in this respect.

to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression 'property' includes property, rights and powers of every description, and the expression 'liabilities' includes duties.

(5) Notwithstanding the provisions of <sup>1</sup>[sub-section (6)] of section 153, the expression 'company' in this section does not include any company other than a company within the meaning of this Act.]

<sup>2</sup>[153-B. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred

Power to acquire shares of shareholders dissenting from schemes or contract approved by majority.

to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as the 'transferee company'), has within four months after the making of the

offer in that behalf by the transferee company been approved by the holders of not less than three fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company :

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall by such terms as the Court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one

#### LEG. REF.

<sup>1</sup> This word, brackets and figure were substituted for the word, brackets and figure "sub-S. (4)" by S. 10 of Act II of 1938.

<sup>2</sup> This section was inserted by S. 84 of Act XXII of 1936.

„SEC. 153-B: AMENDMENTS BY ACT XXII OF 1936.—This section adopts S. 155 of the English Act. As to the necessity for this amendment, *see* notes under S. 153-A (Amendment), *supra*. The stringency of the requirements contained in the English Act has been slightly relaxed in this section.

SEC. 153-B: (AS AMENDED IN 1936)—SCOPE AND EFFECT—ENQUIRY UNDER.—All that S. 153-B of the Companies Act (as amended in 1936) does is to provide that where there is a contract or scheme for the acquisition by one company or shares in another company which has been accepted by the statutory majority of shareholders in the latter company the transferee company can acquire compulsorily the shares of

the minority, unless the Court otherwise orders. The section does not confer any right on the Court to consider the merits of the contract so far as concerns the majority of shareholders who have accepted it. In their case the matter is complete; the matter has gone through. The only question is whether the minority shareholders are to be left in possession of their shares or whether they can be compelled to sell their shares on the same terms as those which the other shareholders have accepted. The Court must consider whether the attitude of the minority was reasonable. The section is based on the view that *prima facie* the minority are acting unreasonably in refusing to come into line with the majority, and ought to be forced into line, unless the Court orders otherwise. The burden is on the dissentients to adduce reasons for thinking that the majority of shareholders were wrong. 1943 Comp.C. 249=45 Bom.L.R. 633=A.I.R.. 1943 Bom. 325.



month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.]

*Conversion of private company into public company.*

<sup>1</sup>[154. (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (13) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute a private company, the company, shall, as on the date of the alteration, cease to be a private company and shall, within the period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

LEG. REF.

<sup>1</sup> This section was substituted by S. 85 of Act XXII of 1936.

SEC. 154: AMENDMENT BY ACT XXII OF 1936.—The present section adopts the provisions of S. 27 of the English Act. Also a separate form has been introduced in the second schedule for use, when a private company is converted into a public company. In the section, even as it formerly stood, a private company could by making adequate alteration in its articles convert itself into a public company. But, there was no limitation provided as to the time within which the requirements of the section had to be complied with, and very often there used to be unreasonable delay in complying with all the requirements of the section. In such cases, it was difficult to state the exact position of the company before the provisions of the section had been fully complied with, viz., whether it was to be treated as a private or public company. To put an end to this delay and doubt, this present amendment provides a time limit for complying with the provisions of the section, and prescribes a penalty for default; and it also enacts that such companies would cease to be private companies and forfeit all the privileges of a private company as from the date of the

alteration of the articles.

Amendments to the articles of association of a company do not require the confirmation of the High Court. 22 Pat. 204=24 P.L.T. 226=A.I.R. 1943 Pat. 278.

SEC. 154: OBJECT AND SCOPE—PUBLIC COMPANY—CONVERSION TO PRIVATE COMPANY—PROCEDURE.—The conversion of a private company into a public company can be made by proper alterations in the articles of the company. The purpose of S. 154 is to ensure that when a company has been converted from a private company to a public company certain information must be sent to the Registrar and if such is not done certain penalties are provided. 22 Pat. 204=1943 Pat. 278. There is nothing in S. 154 from which it can be inferred that a public company cannot be converted into a private company by alteration of the articles. There was no need for a specific section to deal with such a conversion, because the information which S. 154 requires to be sent to the Registrar need not be sent where the conversion is from a public company into a private one. A public company can be converted into a private company by suitable alterations in the articles of the company. It is not necessary to wind up the company and reconstitute it. 24 P.L.T. 226=A.I.R. 1943 Pat. 278.



(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company :

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.]

#### PART V.

#### WINDING UP.

##### *Preliminary.*

Mode of winding up. 155. (1) The winding up of a company may be either—

- (i) by the Court ; or
- (ii) voluntary ; or
- (iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

##### *Contributories..*

156. (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this

Liability as contributories  
of present and past members.

section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say) :

SEC. 155: GENERAL.—Companies incorporated under this Act could be put an end to only in one of two ways, *viz.*, either through the machinery of a winding up or by the Registrar striking off the register defunct companies in certain cases.

APPLICABILITY OF THIS PART V.—The provisions relating to the winding-up are made applicable also to the following companies (Ss. 250 and 251) of the Act:

(i) Existing companies, *i.e.*, companies formed and registered under the Companies Act 1866, or under any Act or Acts repealed thereby, or under the Companies Act, 1882.

(ii) Companies registered but not formed under Act XIX of 1857 and Act VII of 1860 or either of them, or under the Companies Act of 1866 or 1882.

(iii) Unregistered companies, *i.e.*, any partnership, association or company consisting of more than seven persons and other than a railway company incorporated by Act of Parliament or by Act of the Governor-General in Council, and a company registered under this Act or any of the previous Companies Acts. In the case of the winding-up of these unregistered companies, certain exceptions and additions to the general provisions contained in this Part V are enacted in Part IX, Ss. 270-276 of this Act.

SEC. 156: SCOPE AND APPLICATION OF

SECTION.—This section proceeds on the assumption that the contributories are all innocent parties and that they must contribute equally towards the loss sustained by the company for no fault of theirs, subject however to certain equities which are contained in the exceptions contained in the section. Hence, whatever may be the effect of plea of fraud or misrepresentation as against managing agents, it does not affect the liability of the contributories, as such, in the winding-up of the company. 149 I.C. 869=1934 Sind 39. S. 156 creates a new liability as regards shareholders to contribute to the assets of the company, and this new liability arises for the first time upon the winding-up and is unaffected by the fact that previous calls have been made by the company and have become barred by limitation. 45 O.W.N. 879=1941 Cal. 143=I.L.R. (1940) 2 Cal. 175. After the commencement of the proceedings for the winding up of a company, the fact that the shareholder whose name stands and has been for over a year in the register of the company became a member under an instrument of transfer which, being improperly stamped cannot be admitted into evidence or acted upon, cannot be taken into account, and the shareholder must be treated as a contributory. 23 Pat. 18=1944 Pat 226.

- (i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up ;
- (ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member ;
- (iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;
- (iv) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member ;
- (v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up ;
- (vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract ;

It is too late in such a case to fall back upon the illegality of the transfer and to urge that the shareholder is not to be treated as a contributory. 23 Pat. 18=1944 Comp. C. 163=A.I.R. 1944 Pat. 226 (54 All. 827 =30 I.A. 1 P.O. Ref.).

“MEMBER”.—Where at the commencement of the winding-up a person had been in fact for over three years entered on the register of shareholders, with his full knowledge and consent, his liability flows from the fact of his being on the register in respect of those shares. Even if he took the shares under a contract with the company which is found to be illegal and void as offending against the provisions of S. 105 of the Act, that does not affect his liability to contribute on the winding up. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding-up his liability in respect of the shares arises *ex lege* and not *ex contractu*. 60 I.A. 1=54 A. 827 =37 C.W.N. 373=63 M.L.J. 859 (P.C.). By mere death a member of a company does not become a ‘past member’ within the meaning of this section. Having died, though he cannot continue to be a member, his estate continues to be liable. 55 A. 417=1933 A.L.J. 233=1933 A. 334. A director of a company who ceases to be a director does not thereby cease to be a member of the company. He cannot be held to be a ‘past member’ of the company within the meaning of S. 156 (1) (i). 32 S.L.R. 167=1938 Sind 187.

**LIABILITY OF CONTRIBUTORY.**—This liability of the contributory, on the winding-up, to pay the money remaining unpaid in respect of his shares, is a new statutory liability and is enforceable at the instance of the liquidators. That there had been some transactions with the company before the winding-up or that there had been an arrangement with the directors by which the

contributory's liability was excluded, cannot be pleaded in defence to the liquidator's claim. 59 C. 1099=36 C.W.N. 409=1932 C. 691. A person who is a signatory to the memorandum of association is responsible for the shares which in the memorandum of association are shown opposite his own name, and such a person is bound as far as the creditors of the company are concerned to pay up the amount due on such shares. 20 L.W. 74=83 I.C. 94=1924 M. 703. Where a person applied for obtaining certain shares in a company in the expectation of obtaining some commission or special gain, and an arrangement was made in accordance thereto by the promoters of the company and the application was granted, it was held that the allottee became a shareholder *in presenti* absolutely; and the breach or the unenforceability of the collateral agreement could not in any way interfere with the liability of the person as contributory on the liquidation of the company. 52 A. 476=1930 A.L.J. 139=1930 A. 357. There is a material distinction between an application with a *condition precedent* and an application with a collateral agreement or condition subsequent. 52 A. 406. So where a person signed a memorandum of association of a company purely on the understanding that he would be given certain number of shares *as fully paid up in consideration of assets transferred* to the company, and the memorandum itself showed the same, it was held that he was not liable as contributory even though the contract to transfer such paid-up shares was subsequently cancelled. 48 A. 503=24 A.L.J. 576=1926 A. 524.

**WHEN LIABILITY ARISES.**—When a company goes into liquidation and an official liquidator is appointed, the liability of the contributories to pay up the balance of their share amounts arise only when the Court is satisfied that the financial circumstances of the company are such that a call is necessary for discharging the liabilities of the

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustments of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up to contribute to the extent of any sums unpaid on any shares held by him.

company. Until the Court makes such an order, the shareholder need not pay the uncalled share-money. 1930 A.L.J. 1203=124 I.C. 726=1930 A. 617. The call in respect of the unpaid shares has to be made only after the list of contributories has been settled. But where, however, a liquidator who was appointed and given all the powers conferred by S. 179 of the Act made a call on the contributory in respect of his unpaid share before the settlement of the list of contributories and the same was paid, it was held that the contributory need not pay once over when the list was subsequently settled and a formal order of call was made. 59 I.C. 1099; 36 C.W.N. 409=139 I.C. 882=1932 C. 691.

**TRANSFER, FORFEITURE OF SURRENDER.**—Under this Act which is almost a reproduction of the English Act, the liability of the shareholder is not taken away so far as the company is concerned by any transfer, surrender or forfeiture of the shares. Even after a transfer, forfeiture or surrender of the shares, if the liquidation takes place within one year of such transfer, etc., and he is placed on the list of contributories, the shareholder is liable. 20 L.W. 74=83 I.C. 94=1924 M. 703. It is not necessary that the list should have been placed before a meeting of creditors, to make the shareholder liable in such a case. 1924 M. 703. An intention to forfeit, not carried into effect, is no forfeiture at all. Where there was only a notice that the shares will be forfeited if the payment of call was not made within a certain fixed time, and there was no resolution of the directors, in fact, forfeiting the shares, it was held that there was no forfeiture at all and that the shareholder was liable as contributory even though the company went into liquidation more than one year from the date mentioned in the notice. 10 P. 249=12 Pat. L.T. 215=1931 P. 44; 36 P.L.R. 382.

**CALLS IN RESPECT OF FORFEITED SHARES.—INTEREST.**—Where calls made by a company are not paid and their recovery by the company is time-barred, the liquidator can have no higher rights than the company and as such he also cannot recover them. But if the claim of the liquidator is not on foot of the debt but is for contribution under S. 156 of the Companies Act, which creates a new liability, the shareholder is liable for unpaid

calls and his liability is limited to the amount unpaid on the shares but not to interest. The fact that he has ceased to be a member by reason of the forfeiture of his shares by non-payment of call, would not help him. 1936 L. 226; 1936 L. 739.

**CLAIM OF SET-OFF AGAINST CALLS.**—Members with limited liability of a joint stock company under liquidation cannot set-off paid-up calls or calls to be paid up against a debt due to the company and thus give a preference over the creditors. The principle is applicable to a set-off claimed in Court as well as to one claimed one of Court. 40 M. 1004=32 M.L.J. 528.

**JURISDICTION OF COURT.**—After a winding up order the question as to the liability of a contributory should be decided only by the Court conducting the liquidation, and no suit is maintainable by a contributory in respect of it. 13 P.R. 1917=29 P.L.R. 1917=37 I.C. 791. When the liquidators of a company attached certain shares belonging to a contributory it was found that the son of the contributory was registered as the holder of those shares and in actual possession of them. The liquidators sought to prove that the transfer by the contributory to his son was a fraudulent one. *Held*, in such proceedings the executing Court is concerned only with the question of the possession of the property and cannot embark upon enquiries involving a decision as to the real as opposed to the apparent title to the property. The proper course for the liquidators to follow is to proceed by way of a regular suit under R. 63 of O. 21 of the Code of Civil Procedure if they have reason to believe that the transfer by the contributory was for any reason ineffective, inoperative and void as against the creditors in the winding up. (39 M.L.J. 350; I.L.R. 43 Mad. 700, Dist.) (1945) 2 M.L.J. 573. **Winding-up.—Contributory.—Order for payment.—Execution against legal representative after death of contributory.—Property transferred to legal representative before death of deceased.—Rejection of application for attachment.—Appeal.—Contention that transfer to legal representative was fraudulent preference.—Sustainability.—Proper remedy of liquidators.** See 1946 Comp.O. 18.

**LIMITATION.**—As soon as a company goes

157. In the winding up of a limited company any director whether past or present, whose liability is in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company :

Provided that—

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up ;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office ;

(iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up.

158. The term “ contributory ” means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Nature of liability of contributory.

159. <sup>1</sup>[ (1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.]

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns.

#### LEG. REF.

<sup>1</sup> This sub-section was substituted by S. 86 of Act XXII of 1936.

into liquidation, the shareholders are saddled with a new statutory liability in respect of unpaid calls, and such calls are recoverable at the instance of the liquidators, though barred by time and irrecoverable by the company. The right of the liquidator is distinct from, and independent of, the right of the company, before the winding up, to make calls. The period of limitation for a suit by the liquidator for recovery of unpaid calls from the shareholders is six years under Art. 120, Limitation Act, and time begins to run from the date of default. 16 L. 1055=1935 L. 335; 155 I.C. 16=1934 L. 1015.

SECS. 156, 212 AND 216.—Where a shareholder has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application, he can, in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case a Court can enforce the call without requiring the liquidator to institute a suit, and the amount of the call becomes payable irrespective of any question of limitation. There is no real difference between a company which is being compulsorily wound up and

a company which is in voluntary liquidation. Where the contesting respondent raises several defences, the Court may direct the liquidator to file a suit. I.L.R. (1941) Mad. 538=1941 Mad. 565=(1941) 1 M. L.J. 369.

SEC. 158: CONTRIBUTORY.—The term ‘contributory’ as defined in S. 158 includes a shareholder who holds fully paid up shares only. 1938 A.L.J. 925=1938 All. 613. The holder of fully paid up shares is a contributory. Re *Driffeld Gas Light Co.*, (1898) 1 Ch. 451, although his name will not be entered in the list of contributories except at his own desire, since he has no further liability to contribute to the assets. Re *Marlborough Club Co.*, (1868) L.R. 5 Eq. 365. See also 57 M. 955=67 M.L.J. 599=1934 M. 476. But a mere debtor to the company is not a contributory. Re *European Society Arbitration Act*, (1878) 8 Ch. D. 679; 25 A.L.J. 934=89 I.C. 994=1926 A. 101. Where a person who agreed to become a member on some condition precedent and the condition was not fulfilled, he does not become a member, and hence is not a contributory. 108 I.C. 192=1928 L. 234; 107 I.C. 492=1928 L. 236.

SEC. 159: AMENDMENT BY ACT XXII OF 1936.—Under the law as it stood previously there was some difficulty felt with reference to calls which may have been made more than three years before the winding up com-

160. (1) If a contributory dies either before or after he has been placed on

Contributories in case of death of member.

the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

menced. The language of the section was not clear as to the time when the cause of action with reference to such calls commenced. Hence it was thought necessary to render the matter clear and to provide by this amendment that in the case of such calls made before the date of winding up, the cause of action against the defaulter should be regarded as arising from the commencement of the winding up. Of course, on calls made after the commencement of the winding up the cause of action may properly be considered to rise from the date of the call.

**DEBT.**—Where a mutual benefit society carried on banking business by accepting deposits and granting loans to strangers, it was held that the transactions were *ultra vires* of the memorandum and articles of association of the company. Where the carrying on of a business by a company is *ultra vires*, the *ultra vires* transactions cannot create any debt either legal or equitable. The relationships between the depositor and the company in such cases, is not that of debtor and creditor, and the only possible remedy for the depositor is on *in rem* and not *in personam*. Hence, the contributories of the company during the liquidation proceedings are not liable to pay such debts. 1931 of fraud. 75 I.C. 745=1924 Lah. 649.

**FRAUD.**—A person whose agreement to be come a member of the company has been obtained by fraud may have the same rescinded before the commencement of the winding up. But when once an application for the compulsory winding up of the company has been made it is no longer open to the shareholder to get himself relieved of his liability as contributory on the ground of fraud. 75 I.C. 745.

**SEC. 159, SUB-SEC. (2).**—A suit by a company for recovery of arrears of allotment money and call money due on the shares allotted is cognizable by a Court of Small Causes. 34 P.L.R. 592=1933 L. 657. But see 59 C. 1186=36 C.W.N. 589=1932 C. 716. There it was held that a suit to enforce the liability of a shareholder for the balance due on his share was not cognizable by a Court of Small Causes, and that a second appeal was competent, even though the amount demanded was less than Rs. 500.

**SEC. 160: AMENDMENT BY ACT XXII OF 1913.**—Sub-section (3) has been added by the amending Act, and the provision contained therein has been aimed at securing that a surviving coparcener of a Hindu joint family under the Mitakshara law cannot escape liability under this section by asserting that he is neither an heir nor a legal representative.

**LIABILITY OF REPRESENTATIVES.**—Where a deceased person has been placed on the list of contributories and a payment order has been made against him, the remedy of the liquidator lies against the estate of the deceased in due course of administration as enacted in S. 160. 43 P.L.R. 650=1941 Lah. 480=199 I.C. 773. Until the company is duly informed of the death of a contributory, the deceased person continues to be liable as a member, and the company is not bound to take notice of the death otherwise. So all proceedings including the settlement of the list of contributories, adopted to the company in the name of the deceased, are good and are not a nullity as would otherwise be the case under the ordinary law. 59 B. 553=36 P.S.L.R. 1602=154 I.C. 178; 1934 B. 460. But see 52 A. 430=1930 A.L.J. 373=1930 A. 503, where it was held that an order against a deceased contributory was a nullity, and that, therefore, in order to fix the liability those persons who represent the estate of the contributory should be brought on record before an effective order may be made. But where the death of a contributory has taken place *after an order of payment has been passed against him*, the personal representatives of the contributory automatically become liable instead of the deceased contributory and no application is necessary to bring such representatives on record, and consequently, no question of limitation will arise in respect of such an application. The application is to be deemed to amount only to an intimation to the Court that the contributory was dead and that his representatives have to be treated by the Court as contributories. 141 I.C. 168=1932 L. 648. No question of limitation can arise in such a case. (*Ibid.*) See also 19 Pat.L.T. 214=1938 Pat. 287.

**EXTENT OF LIABILITY.**—The liability of the legal representatives of a deceased shareholder to contribute is limited to the extent of the assets, if any, which have come into their hands from the deceased shareholder. 10 P. 249=12 P.L.T. 215=1931 P. 44.

**JOINT HINDU FAMILY.**—Under this section a son in a joint Hindu family is liable as the legal representative of his father, as a contributory in due course of administration, only to the extent of the separate property of his father in which no other person had any interest in the lifetime of the father, when the joint family is constituted by members other than father and sons. The son's share in the joint family property is not liable under the doctrine of '*pious obligation*' as the doctrine applies only in cases where

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immoveable, or both, and of compelling payment thereof of the money due.

<sup>1</sup>[(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu Law shall be deemed to be his legal representatives and heirs.]

Contributories in case of insolvency of member.

161. If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

#### *Winding up by Court.*

Circumstances in which company may be wound up by Court.

162. A company may be wound up by the Court—

#### LEG. REF.

1 This sub-section was added by S. 87, Act XXII of 1936.

the family consists of father and sons alone. 55 A. 417=1933 A. 334. But this decision was disapproved in 57 A. 176, and the new sub-section (3) has been added to the section by the amending Act.

PROCEDURE.—This section lays down the procedure to be adopted in the matter of enforcing the liability of a deceased contributory. The proper course, in such a case, is to take proceedings to recover the amount in due course of administration of the estate of the deceased contributory and not by application for an order for payment against the heir personally. 59 B. 558.

SEC. 162: APPLICATION OF SECTION.—The power to wind up a company should not be used unless there is very strong ground for it because the Indian companies are governed by a majority of its own members, and where there is a domestic tribunal with powers to decide upon a question, it should, if possible, be left to the domestic tribunal. Unless a clear case is made out to the contrary it is for the shareholders of the company to decide whether the company's business shall be or shall not be carried on. 39 A. 334=15 A.L.J. 193=39 I.C. 570; 47 C. 654=59 I.C. 542. But this rule should not be as strictly applied in India as in England. In this country limited liability companies are in their infancy and shareholders and creditors are easily misled by fraudulent directors. Hence, while the opinion of shareholders and creditors undoubtedly ought to be taken into consideration, these classes of persons in India require to be protected against themselves. 16 L. 1029=38 P.L.

R. 166=1935 L. 779.

POWERS OF COURT.—Rules of companies curtailing the power of Court to wind up in circumstances under which the Court has power to do so under the Acts are *ultra vires*. 29 C. 688. A very wide discretion is given to the Court under this section, and the same has to be exercised with reference to the facts and circumstances of each case. Even where some of the requisites mentioned in the section exists, the Court is not bound to order the winding up. In a case where the business of the company was suspended for more than a whole year, the Court refused to order a winding up on an application by a shareholder, as it appeared to the Court that the suspension was due to temporary causes and was satisfactorily accounted for, and that there was every prospect of the business being resumed. 47 C. 654=59 I.C. 542. So also in a case where there was a failure to meet the statutory demand for payment of a creditor's debt, the Court refused to order the winding up at the instance of the creditor as it found that there was a *bona fide* dispute as to the company's liability to that debt. 106 I.C. 423=1939 M. 265. Similarly in the case of a company which had lost 5 lacs out of 7 lacs of its capital, in a misadventure, the Court refused to order the winding up of the company, as the majority of the shareholders was opposed to the winding up and as the loss was due to mismanagement of the former directors, and as the company was showing progress under the new management. 5 B. 685=107 I.C. 860=1928 R. 36. On the other hand, where owing to the fraudulent and undue influence exercised by the directors, a majority of shareholders and creditors happened to prefer a voluntary winding up conducted by



- (i) if the company has by special resolution resolved that the company be wound up by the Court ;
- (ii) if default is made in filing the statutory report or in holding the statutory meeting ;
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;
- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven ;
- (v) if the company is unable to pay its debts ;

some of the directors themselves, the Court ordered compulsory liquidation at the instance of a minority. 16 L. 1029=38 P.L.R. 166=1935 L. 779. In an application for winding up a company, the Court will not investigate into conduct of the directors or consider whether they have exceeded their borrowing powers given to them under the articles of association. The question of exceeding the borrowing powers, is essentially a question of internal management of the company, and when the company has taken the view that the directors acted in the best interests of the company the Court will not go behind that. 1942 Comp.C. 215=44 Bom. L.R. 387=A.I.R. 1942 Bom. 231. Where in consequence of an onerous contract with a creditor the company loses its identity and the creditor becomes *de facto* the company with a power to bring it to an end whenever it suited him and in accordance with the stipulations of the contract he seizes the machinery and plant of the company with the result that the company is unable to carry on its business and to pay its debts it is just and equitable to wind up the company. 1941 P.O. 106 (P.O.). As to right of policy-holder of life Assurance company to apply for winding up. See 40 Bom.L.R. 52=1938 Bom. 182. In an application for winding up of a company, the mere fact that the petitioner or applicant holds only a small number of shares, e.g., five shares out of 2500 shares issued, should not by itself prevent the Court from making the order asked for. The main consideration which the Court has to keep before it is the interest of both the shareholders and the creditors, and the fact that the overwhelming majority of the shareholders are opposing the application and a large number of creditors are also doing the same and the rest are taking no part is a fact which must bear the Court in coming to its decision. 44 Bom.L.R. 387=A.I.R. 1932 Bom. 231. In judging the financial position of an insurance company at a given moment, while it is not possible to regard the entire unpaid capital as available to the creditors at its face value, it is equally wrong to leave it out of consideration altogether, regardless of the position and solvency of the shareholders. On the one hand, allowance must be made for the fact that some of the shareholders may not be able to meet the call when made, and those who have the means may not be willing

to pay too readily; on the other hand, it cannot be assumed that not a single pie out of this large sum can be taken to be available for meeting the contingent liability of the policy-holders. 45 P.L.R. 49=A.I.R. 1943 Lah. 109.

SEC. 162, CL. (1): JURISDICTION.—An order for voluntary liquidation under supervision passed by the Court, consequent upon the resolution passed at the extraordinary meeting of the company, is not without jurisdiction merely by reason of the fact that the meeting was convened within 14 days of the issue of notice, or that the resolution was conditional. It may be a bad order, but it is not without jurisdiction. 126 I.C. 74=1930 L. 721.

PROPER APPLICATION NECESSARY FOR COURT TO ACT.—An application for the appointment of an Official Liquidator cannot be treated as one for compulsorily winding up the company when on the face of it the rules to be strictly observed have not been observed. The Court is not concerned merely with the litigants or the parties before it in the jurisdiction conferred upon it under the Companies Act, but is concerned with the creditors, or contributories and the public generally, and indeed it has no power to waive any irregularity as regards the strict compliance with the law laid down in the Act and the rules made thereunder. 162 I.C. 213=1936 P. 468.

SEC. 162, CL. (iii).—Where the firm of managing agents of a company was dissolved, and steps were being taken at extraordinary general meetings to appoint new managing agents, it was held that there was sufficient indication that it was possible to carry on the business of the company and that there was no complete deadlock necessitating the compulsory winding up of the company. 47 C. 654=59 I.C. 542.

SEC. 162, CL. (v).—The Court has to see under this clause whether the company is commercially insolvent, i.e., whether it is unable to meet its current demands, although the assets when realised may exceed its liabilities. If the company is commercially insolvent, it may be wound up. 143 I.C. 185=1933 L. 301. When the Court is called upon to wind up a company under S. 162 (v) on the ground that it is unable to pay its debts, what has to be ascertained is not



(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

whether the company if it converted all its assets into cash, would be able to discharge its debts, but whether, in a commercial sense, the Company is solvent. In deciding whether a company is able to pay its debts, the subscribed capital of the company which is due and which has not yet been called up can be taken into account as money available for the discharge of the debts. A company is entitled to regard money which it is entitled to call up on account of shares from the contributories as money available for the discharge of its debts. 20 Pat. 538 = 1941 Pat. 603. See also 1941 P.C. 106 (P.C.); 23 Pat.L.T. 23. There is obviously a great difference between a question of positive fact, such as the pecuniary position of a trading company, at a particular date, and a question of the prospectus of such a company in the future, a matter which must depend on all sorts of views as to the state of world trade, the confidence of the public, the price at which articles can be sold, a matter which depends very largely upon the number of such sales and an infinity of other considerations very difficult either to summarise or to define. It is not the function of a Court to determine such a matter on its own views as to probable success or failure, but to form the best opinion it can upon the evidence given by persons with a practical knowledge of the trade in question and the local conditions where these affect the matter. 161 I.C. 539 = 1936 P.C. 114 (P.C.). The debt referred to in this sub-clause is one which is presently payable, and in respect of which the title of the petitioner must be complete. It is not sufficient to show that some other debt is due or even that there is something over Rs. 500, due in respect of the claim made if that is not the sum in respect of which the statutory demand (*vide* S. 163, *infra*) was made. The law requires that a demand must be made for a debt that is due, and it is not permissible to support a petition by alleging that something else is due. 62 C. 294. And where there is a *bona fide* dispute as to the company's liability to pay the debt of any creditor, the creditor's application for its winding up will not be granted. The Court will not allow in such a case the provisions of this section being used for getting the payment of his debts, but he will be referred to a suit to recover his claim. 106 I.C. 423 = 1929 M. 265; 2 R. 575 = 1925 R. 128. But where there is no trace of any *mala fides*, and the object of the creditor is simply to recover his debts out of the assets as may be available and the company is not in a position to pay the debt, the creditor is *prima facie* entitled to an order of winding up. A shareholder who was also the principal creditor of a company applied for winding up of the company. Before filing his

application, he had served on the company a notice of demand requiring payment of his debt, but the company failed to pay the same. The company was in a moribund condition, its main assets had fallen much in value, and it had suffered heavy losses. It was held that there were proper reasons for granting a winding up order. 11 L. 80 = 1929 L. 651.

S. 162 (v) AND (vi).—Winding up—Grounds—Misconduct or mismanagement of directors—Company working at a loss.—The mere fact that the Court is of opinion that the business of a company cannot be carried on, or probably will not be carried on in a successful manner is not a sufficient ground for winding up. So, again, mere misconduct or mismanagement on the part of the directors, even though it might be such as to justify a suit against them in respect of such misconduct or mismanagement, is not of itself sufficient to justify a winding up order. The substratum of the company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, in other words there is no reasonable hope that the object of trading at a profit can be attained or (d) the existing and probable assets are insufficient to meet the existing liabilities. It is impossible to say that the assets are insufficient to meet the existing liabilities when no creditor is pressing for payment of his debt. It would not be just and equitable for the Court to make a winding up order on the grounds merely that the directors were guilty of misconduct and that the business has been carried on at a heavy loss. There are *per se* not grounds on which a winding up could be ordered. 44 Bom. L.R. 387 = A.I.R. 1942 Bom. 231.

SEC. 162, CL. (vi): JUST AND EQUITABLE GROUNDS, GENERAL PRINCIPLES.—No general rule can be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase 'just and equitable' for purposes of winding up. The decisive question must be whether at the date of the presentation of the winding up petition there is any reasonable hope that the object of trading at a profit, with a view to which the company is formed, can be attained. In considering that question, the guarantee of the preference shares should be left out of sight, except in so far as it may have biased the evidence on either side. Where there was no question of a deadlock, nor was there any question of shareholders who have the voting power using that power for their own commercial interests outside the company in

disregard of the interests of a minority, nor again was there any question involved of an improper management of the company by the directors who were in control and the problem involved was of the nature of a business problem: *Held*, that if there was at the relevant time a reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit, there would seem to be no sufficient reason why the Court should wind up the company under the just and equitable clause. 161 I.C. 539=1936 P.C. 114 (P.C.). The position of the Court in determining whether it is just and equitable to wind up the company requires a fair consideration of all the circumstances connected with the information and the carrying on of the company; and the common misfortune which had befallen some shareholders in the company does not involve the consequence that the ultimate desires and hopes of the ordinary shareholders should be disregarded merely because there is a strong interest in favour of liquidation naturally felt by the holders of the preference shares. 161 I.C. 539=1936 P.C. 114 (P.C.). *See also* 1936 A. 840. In deciding whether it is just and equitable to wind up a company under S. 162 (vi) the decisive question is whether at the date of the presentation of the petition there is any reasonable hope that the object of trading at a profit is attainable. The onus of proof is on the petitioning creditor or contributory. It is not the function of the Court to determine the question of the prospects of the company in future on its own views as to probable success or failure, but to form the best opinion it can upon the evidence of persons given with a practical knowledge of the trade in question and the legal conditions where these affect the matter. If at the relevant time, there is a reasonable hope of tiding over a period of difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, there is no sufficient reason why the Court should wind up the company under class (vi) of S. 162. Where there is no evidence of persons with practical knowledge of the business in question, the fact that a public officer, whose duty it is to intervene in cases where a company's affairs are not conducted in a sound manner, has not taken action to wind up the company is, of course, not a deciding factor in determining whether a petition for winding up by a contributory should be granted or not, but it is a fact which is deserving of consideration under the just and equitable clause. 20 Pat. 538=1941 Pat. 603. A company is said to be commercially insolvent when its assets are such, and its existing liabilities are such, as to make it reasonably certain—as to make the Court feel satisfied—that the existing and probable assets would be insufficient to meet the

existing liabilities. The decisive test is whether at the date of the presentation of the winding up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained. It is for the applicant to prove and to satisfy the Court that there is no such reasonable hope. 44 Bom.L.R. 387=A.I.R. 1942 Bom. 231.

"JUST AND EQUITABLE", CONSTRUCTION OF.—This term is not to be construed *eiusdem generis* with the preceding clauses of the section. 48 M. 448=48 M.L.J. 118=1925 M. 489; 30 Bom.L.R. 1509=114 I.C. 349=1929 B. 8. But the Courts will yet require grounds of a like magnitude before acting under this clause, and it is only in extreme cases that the Court will act on the suggestion of the minority disregard the wishes of the domestic forum and condemn the company to extinction. 13 Bur.L.T. 51=59 I.C. 524. In the case of a *non-trading private* company the object of which was to pay off family debts and the shareholders of which were mainly the members of that family, to bring the company within 'the just and equitable' clause of this section, it must be shown that the substratum of the company, (*i.e.*, the family property) has gone, or that a deadlock has arisen in the sense that it is now impossible for the company to carry on the objects for which it was formed. 58 C. 716=132 I.C. 321=1931 C. 692. Where the company is in a moribund condition and has sustained heavy losses, and is unable to pay its creditors, and its assets have considerably fallen in value: 11 L. 80=1929 L. 651. Where the company's business was at a standstill and it was unable to pay its debts or the salaries of its employees for several months, and had no cash nor credit to raise money, and where there was no prospect of work being resumed for an appreciable time: 126 I.C. 185=1930 L. 777. Where a person who had been adjudicated insolvent transferred large estate to a private limited company in which he had 90 per cent. of shares and over which he had complete control: 5 R. 685=107 I.C. 860=1928 R. 36. Where there was a lack of confidence in the conduct and management of the company owing to the management being held in one family which was in a position to dominate the other shareholders and monopolise the company's affairs for its own benefit. 48 M.L.J. 232=21 L.W. 36=86 I.C. 914. A press which was a limited concern was leased to a certain person who subsequently subleased it to another at large profits. Numerous shareholders had also to file suits against the company for recovering the dividends due to them. The Chairman of the press was found not authorised by the persons whose names appeared in the dividend warrants to give an acquittance or receipt on their behalf. *Held*, that under the circumstances it was just and equitable

that the company should be wound up. 53 M. 38=1930 M. 240=57 M.L.J. 426. Where there was no properly constituted directorate, nor had a single balance sheet been issued during five years of the company's existence, and the cash balance was alleged to have dwindled to nothing. 13 L. 603=1932 L. 571. Where the substantial part of the business of the company was illegal and constituted an offence under S. 294-A, I.P.C. although the object of the company was to benefit some charities. 56 M. 26=63 M.L.J. 554=1933 M. 16. See also 66 M. L.J. 76; 57 M. 844. In the following cases it was held that there were no just and equitable grounds for ordering a winding up.—

(i) Where the ground of the application was only an *ultra vires* transaction on the part of the directors; and where there were other remedies open to the aggrieved shareholder in respect of it. 55 M. 180=61 M.L.J. 783=1932 P.C. 1=58 I.A. 416 (P.C.).

(ii) Mere misconduct of directors. Re *Gold Company*, (1879) 11 Ch. D. 701, C. A. No doubt the mere misconduct of directors or of managing agents or the fact that the business of the company has not resulted in profit is not *per se* a ground for winding up. But where the cumulative effect of these facts does demonstrate that the company is insolvent, that its affairs have been mismanaged from the very outset, that debts have been recklessly incurred and never paid; that the provisions of the Companies Act as regards the maintenance and publication of the true balance sheets have been deliberately contravened, and the information necessary to keep the shareholders cognizant of the true state of affairs has been studiously concealed from them all through, the company ought to be compulsorily wound up. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

(iii) The mere fact that the business is carried on at a heavy loss (where the company is not insolvent) especially when the loss was due to previous mismanagement and it was shown that it would be in a sound position under the new management. 30 Bom.L.R. 1549=114 I.C. 840=1929 B. 8.

(iv) That the company has acted dishonestly in its dealings with outsiders especially when such dealings are not connected with the promotion or formation of the company and are not dealings with the shareholders as regards their membership in the company. Re *Medical Battery Co.* (1894) 1 Ch. 444.

(v) The mere fact that there has been a fraud in the promotion of the company or fraudulent representation in the prospectus, would be insufficient to found a winding up order on, as the majority of the shareholders may waive the fraud. 49 C. 399=69 I.C. 241=1922 C. 365.

(vi) A mere apprehension on the part of C. C. M.—192

the applicants that loss may occur from a further working of the company, where there has been no fraud in the conception of the company and where its substratum had not gone. 39 A. 334=15 A.L.J. 193=39 I.C. 570.

(vii) The mere fact that a majority of shareholders in meeting directed to be held by Court voted in favour of the winding up of the company either under the supervision of the Court or by the Court compulsorily, where there was no valid resolution for voluntary winding up. 49 C. 399=69 I.C. 241=1922 C. 365.

(viii) The mere fact that the managing director had a preponderating voice in the company by reason of his owning or controlling a large number of shares or that dividends had not been paid regularly, in the absence of other circumstances to prove a lack of confidence in the conduct and management of the company's affairs. 55 M. 180=61 M.L.J. 783=1932 P.C. 1=58 I.A. 416 (P.C.).

(ix) Where a minority of creditors seek a compulsory winding up order, while the majority of the creditors are opposed to the winding up by the Court and prefer voluntary liquidation with a view to reconstruction. 10 R. 143=1932 R. 75. Where the report of the auditors shows that there had been defalcation of certain funds of the company and that attempts were made to cover up the defalcation by various devices, and the contributories level charges of dishonesty and mismanagement against each other, the case is one in which the conduct of some officers of the company would require investigation which can only be obtained in winding up by the Court. In such circumstances considerations of justice and equity are more in favour of a compulsory winding-up than voluntary liquidation. 168 I.C. 185=1937 O.W.N. 627=1937 Oudh 377.

PETITION BY CREDITOR FOR WINDING UP—OPPOSITION BY DEBENTURE-HOLDERS—WHEN SUSTAINABLE.—The debenture-holders who oppose a petition by a creditor for the winding up of the company must show that there is no possibility of any benefit accruing to the unsecured creditors from an order for the winding up. Otherwise their opposition to the petition is without substance. The unsecured creditors are entitled to ask the Court to pass a winding up order so that the question whether the debentures were *bona fide* issued for value may be enquired into and they may, before it is too late, be able to realize, if not the whole, at least a portion of their unsecured debts. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

Costs.—Where on the presentation of a winding-up petition, some of the creditors appeared to support it, in answer to a notice issued under R. 27 of the Companies Act rules of the Original Side of the Madras High Court and where neither the peti-

Company when deemed unable to pay its debts.

163. <sup>1</sup>[(1)] A company shall be deemed to be unable to pay its debts—

#### LEG. REF.

<sup>1</sup>S. 163 was re-numbered as sub-S. (1) of that section by S. 88 of the Act XXII of 1936.

tioning creditor nor any of the supporting creditors was willing to continue the petition, the petition was dismissed. *Held*, that the supporting creditors are not entitled to costs as against the petitioning creditor. 1937 M. W. N. 1106=46 L.W. 768=(1937) 2 M.L.J. 825.

SEC. 163: AMENDMENT BY ACT XXII OF 1936.—(i) In cl. (i) for the words 'by leaving the same' the words 'by causing the same to be delivered by registered post or otherwise' have been substituted; (ii) The present sub-section (2) has been newly added 'transmission by post'. The present sub-the manner of serving on a company a demand for payment of debts, has been made with a view to avoid disputes as to whether there was due service or not. In fact in a case in Calcutta it was doubted whether the words 'by leaving the same' included transmission by post'. The present sub-section (2) has been inserted on account of the trouble created by the use of the words 'under his hand' in the section. In 54 C. 345 the phrase was construed to mean 'under the signature of the creditor himself'; and it was held in fact that a notice signed by an agent was not a valid notice within the meaning of this section. The necessary consequence of this decision was that where the creditor was a partnership firm the notice had to be signed by all the partners individually. Similarly, in the case of foreign creditors, the signature by the constituted attorney would not have been sufficient. The practical inconveniences and difficulty of such requirements are obvious, and they were never intended by the legislature. Hence, the explanation of the phrase: 'under the signature' has been added by the amendment.

APPLICATION OF SECTION.—The statutory notice under this section is a highly formal and important document and to give rise to the presumption afforded by the section, the provisions of the Act as to its service upon the company must be strictly observed. 58 C. 716=1931 C. 692. The company to be served with notice must be in default at the time of service, and it is to be served with the demand under special precautions so that if it makes a further default for a period of 3 weeks the question of its inability to pay its debts may be set at rest. 54 C. 345=103 I.C. 629=1927 C. 625. But once a notice is properly given and default is made it is not open to the company to show that, in spite of the non-payment of the debt, the company is in a position to pay the debts as, e.g., where on account of temporary embarrassment it was unable to

meet the particular liability, though it has had ample assets in its hands. The default will be treated as conclusive evidence of the company's inability to pay its debts. 5 R. 483=105 I.C. 534=1927 R. 306. *See also* 1936 A. 840. It does not follow from the fact that all the three clauses of S. 163 are mutually exclusive of each other, that cl. (i) of the section does not apply to a judgment-debt. Cl. (i) is general in its terms and has application to all sorts of debt, be it a simple money debt, a mortgage debt, or a judgment debt. In the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the Court is, in accordance with cl. (ii) of S. 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not barred from making a demand for the payment of the judgment-debt by a notice in accordance with cl. (i) without having recourse to execution proceedings. In such a case, if the demand remains unsatisfied for three weeks, the presumption enjoined by S. 163 necessarily follows. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

Where it is by no means clear that there are debts due by a Company to persons applying for winding up, and the question as to whether there are debts or not depends upon many factors which are not admitted or undisputed, such matters cannot be gone into on a winding up petition based on the neglect of the Company to pay its debts under S. 163 (1) of the Companies Act. When there is a *bona fide* dispute as to liability and a *bona fide* dispute as to the nature of liability, if such liability be ever found to exist, the refusal on the part of the Company to pay in such circumstances cannot be regarded as a mere neglect to pay its debts, and it cannot be held that the Company is insolvent by reason of its neglect to pay under S. 163. A petition for winding up in such a case will not lie and must be dismissed. 1944 Comp. Cas. 224.

'UNABLE TO PAY ITS DEBTS'.—This term includes commercial insolvency, i.e., inability to pay debts as they become due, although when all the assets of the company should be realised they may be found to be in excess of the liabilities of the company. 143 I.C. 135=1933 L. 301.

'DEMAND'.—The demand must be for a debt that is due, i.e., the debt must be presently payable and the title of the petitioner must be complete. It is not open to the applicant to show that some other debts besides the one for which the statutory demand was made was due. 62 C. 294. In the case of a petition by a creditor of the company for winding up, on the ground that his statutory demand for payment was not complied with by the company, and the company contested that the claim made by

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, <sup>1</sup>[by causing the same to be delivered by registered post or otherwise] at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

<sup>2</sup>[ (2) The demand referred to in clause (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm.]

164. Where the High Court makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent

Winding up may be referred to District Court. proceedings to be had in a District Court; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "by leaving the same," Act XXII of 1936.

<sup>2</sup> Sub-S. (2) was added by S. 88 of Act XXII of 1936.

the creditor was fraudulent and unsustainable in law, the Court has to see whether the plea of the company is *bona fide* or merely a cloak to screen its real inability to pay its debts. The Court should also see whether the creditor was acting *bona fide*, and has not filed his petition with a view to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which the company desires to dispute in civil Courts. 39 B. 47 = 16 Bom. L.R. 692 = 27 I.C. 44. A notice of demand by the solicitors, advocates, or agents of the creditors was held in some cases, as not being sufficient compliance with the provisions of this section. But now the sub-section (2) has been added by the Amending Act, explaining the term 'demand'. The provisions in cl. (i) of S. 163 that the notice by the creditor must be a "demand under his hand" asking for the payment of the debt must be strictly complied with, otherwise, the demand, though followed by neglect of the company to pay the debt demanded cannot be made the basis of presumption that the company is unable to pay its debts. Clause (i) of S. 163 imposes a penal obligation upon the company; and has therefore, to be strictly construed. A demand by a limited liability company under the hand of its

manager must be deemed to be a demand by the company under its hand. 166 I. C. 238 = 1936 A.W.R. 1113 = 1936 A. 840. No doubt the mere service of a notice by a creditor on a solvent company does not entitle the creditor to a winding up order if the company *bona fide* disputes the existence of the debt. But this principle has no application where the denial by the company of its liability is *mala fide* and dishonest. 166 I.C. 238 = 1936 A. 840 = I.L.R. (1937) All. 210.

'NEGLECTED'.—If omission to pay the debt is on account of a *bona fide* dispute, it would not amount to 'neglect' within the meaning of this section. 2 R. 575 = 84 I.C. 1021; 1929 M. 265 = 106 I.C. 423; 58 C. 716 = 1931 C. 692.

SEC. 164: JURISDICTION OF DISTRICT JUDGE.—Under this section, the District Judge has, for the purpose of winding up a company, all the jurisdiction and powers of the High Court, and he can therefore order attachment before judgment of property situated beyond his jurisdiction. 106 I. C. 809 = 1928 L. 376. The Additional District Judge also has jurisdiction to make all the orders which the District Judge can make in the winding up of a company. 47 M.L.J. 322 = 27 C.W.N. 509 = 69 I.C. 356 (P.C.).

PROCEDURE.—Where applications are made by the official liquidator to the High Court for an order directing the District Court within whose jurisdiction the property of the contributory may be situated, to enforce the payment orders made by another High Court in the matter of the winding up of a company, it is not competent for the High Court to authorise the official liquidator to apply

165. If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more

Transfer of winding up from one District Court to another.

conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

166. An application to the Court for the winding up of a company shall be

Provisions as to applications for winding up.

by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately <sup>1</sup>[, or by the registrar] ;

Provided that—

(a) a contributory shall not be entitled to present a petition for winding up a company unless—

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 89, Act XXII of 1936.

to the District Court concerned for enforcing the orders under this section. 25 L.W. 113=100 I.C. 744=1927 M. 271. But a contrary view has been taken by the Allahabad High Court in 54 I.C. 384. According to the Madras High Court the proper procedure in such a case would be as indicated by the conjoint effect of Ss. 199 and 200 of the Act, *viz.*, that the order of another High Court filed in this High Court should be treated in the same manner as a decree passed by this High Court in which it is filed, and transferred for execution to the respective District Courts concerned. 25 L.W. 113=1927 M. 271.

SEC. 166: AMENDMENTS BY ACT XXII OF 1936.—(i) After the words 'together or separately' the words 'or by the Registrar' have been inserted. (ii) Cl. (aa) has been newly added. The first amendment makes provision for enabling the Registrar of Joint Stock Companies also to present a petition for the winding up of any company. The second amendment defines the circumstances and conditions in which the power may be exercised by the Registrar.

'CREDITOR'.—In cases decided under the corresponding S. 170 (1) of the English Act, the following persons have been included under the term 'creditors': (i) The assignee of a debt, provided the assignment has not been made while the creditor's petition is pending; (ii) The equitable assignee of part of a debt; (iii) The executor of a creditor, even before probate; (iv) a creditor; in respect of a debt incurred by voluntary liquidators; (v) A secured creditor; (vi) A judgment-creditor; (vii) The holder of a debenture including a bearer debenture; and (viii) The holder of an investment bond (of an insolvent company which has not yet matured for payment). (See *Halsbury*, Vol. V, 549.).

THE FOLLOWING PERSONS WILL NOT BE CREDITORS UNDER THIS SECTION, ENTITLED TO PETITION:—(i) A person claiming unliquidated damages; (ii) A judgment-creditor who has attached a debt due from the company to his judgment-debtor; (iii) A surety in respect of a mortgage-debt of another company which has assigned the equity of redemption to the company petitioned against, on the terms that the latter indemnifies the former; (iv) A creditor who has so charged or dealt with his debt as to pass the real interest therein to another person; and (v) A person whose debt is *bona fide* disputed by the company. (*Halsbury*, Vol. V, p. 550.).

'CONTRIBUTORIES'.—A person who has fully paid up his shares is included in the term 'contributory' and he is entitled to present a petition for winding up. 53 M. 38=57 M. L.J. 426=1930 M. 240; 91 P.R. 1917=36 I. C. 980. Also person holding power of attorney from executors under a will of deceased contributory, 1937 O.W.N. 627=1937 Oudh 377. Persons who do not cease to be members of the company for one year or more before the commencement of the winding up proceedings are also contributories within the meaning of this section and they are entitled to apply for winding up if the shares were held by them and registered in their names for more than six months before the commencement of the winding up proceedings. 13 L. 603=1932 L. 571. The provision contained in the proviso to cl. (a) (ii) is for the purpose of preventing shares being transferred to any body; *e.g.*, the nominee of a rival in trade, to qualify him to present a petition. The circumstances in which a contributory can file a petition for winding up are set forth in cl. (a).

SECS. 166 AND 287.—Applicability—Life Assurance Company—Policy holder—Right to apply to wind up as contributory or creditor. 40 Bom. L. R. 52=1938 Bom. 182.



(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven ; or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder ;

<sup>1</sup>[ (aa) the registrar shall not be entitled to present a petition for winding up a company—

(i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and

(ii) unless the previous sanction of the <sup>2</sup>[Central Government] has been obtained to the presentation of the petition :

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.]

(b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held ;

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

167. An order for winding up a company shall operate in favour of all the

Effect of winding up orders. creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Commencement of winding up by Court.

168. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

#### LEG. REF.

<sup>1</sup> This clause was inserted by S. 89 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "Local Government" by A.O., 1937.

SEC. 167.—When once a winding up order is made, the company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court. 59 M.L.J. 826.

SECURED CREDITOR.—A secured creditor will not be affected by an order for winding up so far as his security is concerned. He may proceed in any manner that may be open to him to realise his amount from the security. If that should not be sufficient to satisfy his debt in full, he may also like the other creditors of the company prove in the liquidation proceedings in respect of the outstanding balance. The remaining assets will be liable for such principal and interest as was due on the day of the winding up order. 3 L. 59=74 I.C. 187.

LIMITATION.—As regards the application of the statute of limitation there is no analogy between the position of a debtor to, and creditor of, a company in liquidation. The winding up does not prevent the statute from running in favour of persons indebted to the

company. 54 A. 1067=64 M.L.J. 403=1933 P.C. 63=60 I.A. 13 (P.C.) ; 55 A. 912. But now see the amended S. 235, which provides a period of three years from the date of the appointment of the first liquidators, in respect of various claims mentioned therein.

SEC. 168: "COMMENCEMENT OF WINDING UP".—The date of commencement of the winding up order is important to decide several matters. (*Vide* Ss. 156, 157, 227, 230, 232, 233 and 234). Any contract entered into by the company without the sanction of the Court after the presentation of the petition is not valid. 59 M.L.J. 826=129 I.C. 40=1930 M. 1012. So also all dispositions of property and payments made by the company. 59 M.L.J. 826. But a contract for purchase of goods made honestly and in the ordinary course of business may be sanctioned by the Court. 59 M.L.J. 826. Where a company went into voluntary liquidation while a petition by the creditors for winding up was pending in Court, the appointment of the liquidator by the company being *pendente lite* he would not be entitled to contest the order directing the compulsory winding up, in pursuance of the petition. 73 P.R. 1914=25 I.C. 553.



169. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before Court may grant injunction. making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.

170. (1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court, shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the statutory report in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

(3) Where the Court makes an order for the winding up of a company it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver.]

171. When a winding up order has been made [or a provisional liquidator has been appointed] no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 91, Act XXII of 1936.

SEC. 169: APPLICATION AND SCOPE OF SECTION.—The power of Court under this section to stay the execution of a decree may be exercised even in cases of voluntary liquidation. 28 O.C. 197=91 I.C. 1053=1925 O. 630. The Judge conducting the liquidation has power to recall a wrong order, and rectify a mistake. 13 P.L.R. 1919=51 I.C. 723. But he will not be justified on the ground of discovery of fresh matter and of expediency to pass a fresh order in the place of the old one. (*Ibid.*) This section does not bar an application to set aside an *ex parte* order. 72 I.C. 106=1923 A. 429.

SEC. 170: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) now provides for notice of a Court's order for winding up being sent to the official receiver. (*See also* notes under S. 171-A amendment, *infra*.)

APPEAL.—An appeal lies from an order refusing to wind up a company. 39 B. 47=16 Bom.L.R. 692=27 I.C. 44.

SEC. 171: AMENDMENT BY ACT XXII OF 1936.—After the words 'has been made' the words 'or a provisional liquidator has been appointed' have been added. Under the law as it stood before this amendment, it was only after the winding up order was made, that all proceedings against the company were stayed and that proceedings could not be commenced or continued without the leave of the Court. In the interregnum between the presentation of a petition for the wind-

ing up and the order for winding up, the Court to which the petition has been presented had no power to stay proceedings in a proper case. Provincial liquidators were often appointed to protect the assets, but their appointment did not operate as a stay of proceedings. A stay under such circumstances could not possibly prejudice any party as matters would only be kept *in statu quo ante*. There are provisions in the English law for stay under such circumstances, and the present amendment follows the English Act and provides that the appointment of a provisional liquidator should operate as a stay.

POWERS OF COURT.—Leave of liquidation Court must be taken before unsuccessful claimants can sue the company which is in liquidation. 70 P. R. 1919=50 I. C. 645. Leave to continue an action should be given only where there arises some question which cannot be determined satisfactorily in the winding up proceedings. 93 P.R. 1919=47 I.C. 1005. Under this section the Court has very wide powers. It may grant leave unconditionally or it may grant it on terms, or it may refuse it absolutely. But in the exercise of its discretion, the Court cannot act arbitrarily or capriciously. Thus leave to sue should ordinarily be granted to a secured creditor, unless there are special grounds to refuse the grant; and the Court will not be justified in forcing him to prove his debt in liquidation. 139 I.C. 504=1932 L. 475. *See also* 51 A. 695=1929 A.L.J. 811=1929 A. 353 (F.B.). There is nothing in S. 171 of the Companies Act which precludes action being taken against servants

of the Company in as much as they are not the Company itself. 1943 O.W.N. 339=1943 O.A. (C.C.) 214=1944 Oudh 147.

**SCOPE AND APPLICATION.**—The provisions of this section apply both to liquidation by the Court itself and liquidation under the supervision of the Court. 50 A. 419=26 A. L.J. 131=1928 A. 165. Once a winding up order is made, the provisions of this section would automatically apply. 58 C. 946=133 I.C. 186=1932 C. 76. Where the original proceedings have been begun by a company, as the plaintiff and decree-holder, no permission of the liquidating Court as required by this section is necessary for appeals or revisions which may be presented by the unsuccessful defendants or judgment-debtors against orders passed in the proceedings. 1936 Pesh. 97; 62 P.R. 1918=47 I.C. 392 (F.B.). "Proceeding" in S. 171, Companies Act, is not confined to an original proceeding but covers execution proceedings also. Execution proceedings were started under a mortgage decree by the decree-holders. A Bank, which was a limited company was impleaded as a party to the suit as well as the execution, as it was a puisne mortgagee, and went into liquidation subsequent to the filing of the execution proceedings. *Held*, that the Bank, though a puisne mortgagee, was not a mere *pro forma* party, but was a party liable to pay the amount of the mortgage debt, and sanction of the Court which passed the order of winding up was necessary under S. 171, for the purpose of continuing the execution proceedings. 56 L.W. 644=A.I.R. 1944 Mad. 84=(1943) 2 M.L.J. 448. Where a company in liquidation itself files execution proceedings, it cannot invoke the aid of this section to prevent the defendants from defending their property in the execution proceedings. Objections under O. 21, R. 58, can be raised during the proceedings and the Court is bound to hear the objections; and if it refuses to hear them on the ground that the objectors have not obtained leave of the liquidation Court, it would fail to exercise the jurisdiction vested in it by law, and its order would be open to revision. 164 I.C. 1012=1936 Pesh. 185. An appeal or an application for revision arising out of an action brought by a company does not come within the purview of S. 171 and such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court. 1938 Lah. 754. But *see* 1941 All. 154; 1941 Lah. 392. Leave under this section means leave by the winding up Court. When once leave is granted it includes all subsidiary legal proceedings, and therefore an application by the transferee of a decree for substitution has to be made to the execution Court and not to the winding up Court. 41 A. 432=17 A. L.J. 464=50 I.C. 115. Where a decree was assigned by a company which has since gone into liquidation, the execution proceedings are maintainable at the instance of the assignee even though leave of Court had not

been obtained. The only person who can object to the same is the assignor company. 37 C.W.N. 909=1933 C. 809. When once an action by the company in liquidation has been proceeded with, and is successful, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf, as the defendants cannot be said to proceed with or commence any legal proceedings against the company. 1937 Lah. 926. The word "suit" in S. 171, means a proceeding which is instituted with the presentation of a plaint in a Court of original jurisdiction. The expression "legal proceeding" in this section is coupled with "suit" and obviously means proceedings *ejusdem generis*, that is to say, original proceedings in a Court of first instance, analogous to a suit initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit, nor proceedings arising from the suit and continued in a higher Court, like an appeal from an interlocutory order or final order passed in the suit. 43 P.L.R. 505=1941 Lah. 392=I.L.R. (1941) Lah. 760 (F.B.) *See also* 1941 All. 154. Where in execution of a decree obtained by a company in liquidation, certain property has been attached as belonging to the judgment-debtor, and a third person has unsuccessfully objected to the attachment on the ground that the property belonged to him and not to the judgment-debtor, such person cannot bring a suit under O. 21, R. 63, C. P. Code, against the company for a declaration of his title without having first obtained under S. 171 leave of the Court which had passed the winding up order. 43 P.L.R. 505=1941 Lah. 392 (F.B.).

**SUIT COMMENCED AFTER WINDING UP—IF LEAVE CAN BE GRANTED.**—Under S. 171, Companies Act, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been initiated prior to the winding up order. A Court has no jurisdiction to give a plaintiff leave to continue a suit instituted without leave subsequent to the winding up order. 40 C. W.N. 312. But a contrary view has been taken in 1936 L. 401, where it was observed that if a suit by a company in liquidation has been instituted without leave of Court under S. 171, Companies Act, but such leave has been obtained within the period of limitation, it would obviously be useless to dismiss the suit and to compel the plaintiff to bring another suit after obtaining the leave. *See also* 1930 A.L.J. 373=1930 A. 503; 13 P.R. 1917=37 I.C. 791.

**SUITS NEWLY INSTITUTED—LEAVE SHOULD BE OBTAINED BEFORE LIMITATION PERIOD.**—But even in such a case the suit can be allowed to be proceeded with only if leave is obtained within the period of limitation fixed for the suit. 1936 L. 401.

**LEAVE WHEN GRANTED BY COURT.**—An unregistered mortgage or charge is void under S. 109 against all creditors irrespective of the date on which the debts accrued. The fact that the charges have been merged in a decree obtained by the mortgagee or chargeholder prior to the application for winding up proceedings cannot make S. 109, inapplicable; and the decree-holder cannot, on that ground, claim to stand outside the winding up and realise his security. An application by such a decree-holder under this section (S. 171) for leave to execute his mortgage decree should not be allowed. 40 C.W.N. 1171. A suit instituted against a company in liquidation without leave should not be dismissed on that ground alone. If leave is subsequently obtained, limitation should be calculated in the same way as if the suit had originally been instituted with leave. It is immaterial whether the leave is granted before or after the period of limitation prescribed for the institution of the suit has expired. I.L.R. (1942) Lah. 517=A.I.R. 1942 Lah. 289 (F.B.)=(1943) Comp. Cas. 1.

**SECURED CREDITORS.**—Secured creditors are not obliged to prove their debts, and can stand wholly outside the winding up proceedings if they so elect. They may rely upon their security or their decree, if they have obtained one, and proceed to realise the amount due to them. But in this case, they must obtain the leave to proceed from the winding up Judge. 51 A. 695=1929 A. L.J. 811=1929 A. 353 (F.B.). Where leave has once been granted to the secured creditors to prosecute their claim by suit, the suit should not afterwards be stayed pending the adjudication on priority among the creditors by the winding up Court. 29 C.W.N. 715=88 I.C. 754=1925 C. 916. The winding up Court cannot annul or modify a secured creditor's security or decree. Leave should be refused absolutely only in exceptional cases. Ordinarily, leave should be refused only for such time as may be necessary for him to determine whether leave should be granted or not. 51 A. 695 (F. B.) (*supra*).

**UNSECURED CREDITORS.**—An unsecured creditor cannot be turned into a secured creditor after winding up by granting him specific performance of an agreement to create a charge. A rigid line is drawn at the winding up, and creditors should not be allowed to change their position after that date. 29 Bom.L.R. 253=101 I.C. 144=1927 B. 167.

**RECOVERY OF CROWN DEBTS IF EXEMPTED FROM SECTION.**—The provisions of this section apply also to Crown debts; and therefore, Crown has no right to recover its debts in priority which it might possess on account of its prerogative. 59 C. 327=137 I.C. 870=1932 C. 430 (not following, 53 C. 328=96 I.C. 37=1926 C. 781). The leave of the Court is essential to an application for exe-

cution, even if it is by the Government. 134 I.C. 429=1932 P. 1.

**PROCEEDINGS UNDER S. 145, C. P. CODE.**—The provisions of this section are not meant to override S. 145, Cr. P. Code. So, if a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, he is bound to call on the parties to attend his Court and put in their claims as regards actual possession. 37 C.W.N. 932=143 I. C. 795=1933 C. 433.

**INSOLVENCY PROCEEDINGS.**—The provisions of S. 171 are very wide and though an application for discharge may not start independent proceedings, the section would seem to require leave of the High Court even for the continuation of the insolvency proceedings already taken. 169 I.C. 625=39 P.L.R. 717.

**PRACTICE.**—Leave to sue under this section is never given on an *ex parte* application. The grant of leave *ex parte* is against the usual practice. 39 C. W. N. 1259. An objection as to want of leave under this section, which was not taken in the Court of first instance, should not be allowed to be raised in appeal. 37 C.W.N. 909=146 I. C. 502=1933 C. 809. In the case of a heavy contested claim against the company and its agents, where the allegations were that the large debt in question was really a personal debt of the agents which they fraudulently attempted to foist on the company, and that the company was not liable for that debt, the usual practice is to leave the matter to be decided by a suit in the ordinary way and not in proceedings in the winding up. 29 Bom. L. R. 253=101 I. C. 144=1927 B. 167. In a suit on a promote in favour of a liquidated bank but endorsed in favour of another bank, where the latter Bank wanted to implead the former Bank also as a party to the suit, permission should be granted to do so, irrespective of the fact whether any relief could be granted or not in the suit against the bank in liquidation. 36 P.L.R. 217=150 I.C. 670=1934 L. 328. If after an order for the winding up of a company is passed, a suit is instituted against the company without obtaining leave to sue under S. 171, the Court has inherent jurisdiction to dismiss the suit as incompetent; on an interlocutory application under S. 171, the winding-up Court has no jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order. 1. L. R. (1939) 2 Cal. 425=1940 Cal. 166.

**WAIVER.**—The liquidators cannot waive the bar created by this section in such a way as to require them to admit a claim under decrees rendered inoperative by that bar. 50 A. 410=26 A.L.J. 131=1928 A. 168.

**LIMITATION.**—The liquidator of a company being a trustee for the creditors, time to recover a debt due from the company does not run after an order or resolution for winding up. The date for testing the

[171-A. (1) For the purposes of this Act, so far as it relates to the winding up companies by the Court, the term 'official receiver' means the official receiver attached to the Court, or, if there is no such official receiver, then such person as

## LEG. REF.

<sup>1</sup> This section was inserted by S. 92, Act XXII of 1936.

liability is the commencement of the winding up. 49 A. 520=25 A.L.J. 277=1927 A. 161 (F.B.).

**APPEAL.**—An objection as to the propriety or otherwise of the grant of any leave under this section, by the company Judge, can be made only on appeal against the grant, preferred in the appellate Court. 1930 A.L.J. 373=124 I.C. 28=1930 A. 503. The Court in which proceedings are taken in pursuance of that leave, cannot question the propriety of the same. 1930 A. 503. Leave to commence an appeal cannot be granted under S. 171, when such leave is applied for at a time beyond that at which the commencement of the appeal would become time-barred. 1941 All. 335=1941 O. W.N. 838=1941 A.L.J. 385.

**SECS. 171 AND 229.**—The official liquidator represents all the unsecured creditors and it is their right to challenge through him a transfer of property belonging to the Bank, if the transfer is believed to be fraudulent, and either voidable under S. 53 or void under S. 54, Provincial Insolvency Act. Where an assignee of a mortgage decree from a bank who was an unsecured creditor applied for leave to continue proceedings under S. 171 of the Companies Act on the bank going into liquidation, it was held that in such an application it was open to the liquidator to challenge the transfer. 1942 O.A. 227=A.I.R. 1942 Oudh 417=18 Luck. 110.

**SECS. 171 AND 230-A.**—Where the Managing Director of a limited company which is being wound up by Court under a compulsory winding up order presents a claim against the company and asks that his application should be treated as an application to file a suit against the Official Liquidator or under S. 171 to prove his claim, and he is allowed time for the purpose of filing a suit, if he fails to file the suit within the time granted to him for the purpose, and the Court refuses to grant him a further extension of time, such refusal amounts to a dismissal of his claim, and he cannot turn round and ask the Court to change the procedure which he himself considered proper and to inquire into his claim and adjudicate on it in the liquidation proceedings. 54 L. W. 275=(1941) 2 M.L.J. 417.

**SECS. 171 AND 232.**—"Other legal proceeding" in S. 171—Meaning of—Crown debts—Preference in winding up. See I.L.R. (1945) All. 352.

**SECS. 171, 230 AND 232:** Assessment made after winding up order—Competency of Income-tax Department to proceed under S. 46 of the Income-tax Act for its recovery

without leave under S. 171 of the Companies Act—Crown debts—Preference in the winding up—"Other legal proceeding" in S. 171—Meaning of. *Held*, in S. 230 of the Act a modified priority is expressly provided for a certain limited class of Crown debts. The priority expressly so given to Crown debts is not confined solely to Crown debts. The Crown is bound by the provisions of the Indian Companies Act, and is bound, in regard to the provisions relating to the liquidation of companies, "to a statutory scheme or administration wherein the prerogative right of the Crown to priority no longer exists." The Crown is accordingly not entitled to any prerogative priority, or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by S. 230 and sub-S. (2) of S. 232. The particular arrears of income-tax which the Income-tax authorities had endeavoured to collect through the machinery of S. 46 of the Income-tax Act do not come within the prescribed class of taxes for which the Crown can claim even the limited priority given by S. 230 of the Companies Act. In respect of them, the Crown ranks as an ordinary unsecured creditor. S. 171 of the Companies Act must be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. No narrow construction should be placed upon the expression "or other legal proceeding" in that section. It need not and therefore should not be confined to "original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to plaint." The words can and should be held to cover distress and execution proceedings in the ordinary Courts. Accordingly the words "other legal proceeding" in section 171 comprise any proceeding by the revenue authorities under section 46 (2) of the Income-tax Act and before forwarding the requisite certificate under S. 46 (2) to the Collector, which would put the machinery for the collection of the arrears of income-tax as arrears of land revenue into motion, the Income-tax authorities should have applied in the liquidation under S. 171 of the Companies Act for leave of the winding up Court. S. 226 of the Constitution Act applies to the jurisdiction conferred on the Allahabad High Court by the Companies Act. 1946 I.T.R. 248=1946 M.W.N. 292=50 C.W.N. (F.R.) 10=(1946) F.L.J. 29=A.I.R. 1946 F.C. 16=(1946) 1 M.L.J. 415 (F.C.).

**SEC. 171-A: AMENDMENTS BY ACT XXII OF 1936.**—This section has been added so as to see that the office of liquidator is not left vacant on a winding up. Previously, it was

the <sup>1</sup>[Central Government] may, by notification in the Official Gazette, appoint for the purpose.

(2) On the making of a winding up order, the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court.

(3) The official receiver shall as such official liquidator, forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled to such remuneration as the Court shall fix.]

172. <sup>2</sup>[(1) On the making of a winding up order it shall be the duty of the

Copy of winding up order  
to be filed with registrar.

petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the

order.]

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the Official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

173. The Court may at any time after an order for winding up, on the appli-

Power of Court to stay  
winding up.

cation of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

#### LEG. REF.

<sup>1</sup>These words were substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup>This sub-section was substituted by S. 93 of Act XXII of 1936.

found in many cases that the office of the official liquidator was allowed to remain vacant for an inordinately long time after the order for winding up has been made. The party at whose instance the order for winding was made, on many an occasion, apprehending that the assets may not be sufficient to yield any dividends to the creditors, ceased to take any further interest, and at times never got any official liquidator appointed at all. The result was that the affairs of the company were hopelessly neglected, and the funds of the company used to be often misapplied. It was thought, therefore, essential that some provision should be contained in the Act for some public official being automatically appointed the liquidator of every company which is ordered to be wound up, until some other person is appointed by the Court to act as permanent official liquidator, so that the properties and assets of the company may be properly protected in the meanwhile. Hence the insertion of the present section, by the Amending Act.

NOTICE UNDER S. 80, C. P. CODE.—The official liquidator like the official receiver appointed in insolvency cases is an official of the Court and has got definite powers conferred on him by this Act. He is

therefore a public servant, and as such is entitled to notice under S. 80 of the C. P. Code. 11 O.W.N. 398=1934 O. 158; 44 B. 895 (40 C. 894, Dist.).

SEC. 172: AMENDMENT BY ACT XXII OF 1936.—The present sub-section (1) has been substituted in the place of the old one. Under the previous sub-section (1) the duty was cast only on the company to file a copy of the order with the registrar and giving an option to the petitioner to do so if he chose; and, further, there was no time-limit fixed within which it had to be done. As a matter of fact, the provisions of the section were rarely complied with, and, if at all, only after unreasonable delay. The present sub-section (1) makes the filing compulsory both on the petitioner and the company, and also prescribes a time-limit within which it has to be done.

SEC. 173: SCOPE AND APPLICATION.—The Court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interest of the public at large. 24 P. W. R. 1919=49 I.C. 412. The Courts in India have the power to make an order for stay of the proceedings even under a voluntary winding up. 49 I.C. 412. A petition was filed by a creditor of a company for compulsory winding up. The petition was opposed by the company and certain other large creditors on the ground that the company, though involved, had since the petition, entered into an agreement for sale of its property to a

Court may have regard to wishes of creditors or contributories.

174. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

#### Official Liquidators.

175. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons <sup>1</sup>[other than the official receiver] to be called an official liquidator or official liquidators.

Appointment of official liquidator.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up <sup>2</sup>[but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.]

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 94 of Act XXII of 1936.

<sup>2</sup> These words added by *ibid*.

new company to be formed and the order, if made, would cause loss to the creditors and the shareholders. Under the circumstances the Court properly ordered the petition to stand over and allowed time upon the company undertaking not to part with any portion of the purchase money except for preliminary expenses. The company was also allowed to complete the sale, liberty being given to the parties to apply in the meantime. 1924 R. 108=88 I.C. 138.

SEC. 174: SCOPE.—Although a creditor who is unable to obtain payment of his debt is entitled *ex debito justitiæ* to an order for the compulsory winding up of the company, still that right is not an individual right but a representative right. His application is not on his individual behalf alone but it is in fact on behalf of the entire body of the creditors. So, it is but fair and reasonable that the wishes of the majority of creditors should be given much value by the Court. 10 R. 143=1932 R. 75. Where a scheme of reconstruction suggested by a majority of the creditors was entirely illusory and unpractical, and was in essence but a scheme for the voluntary liquidation of the company without the intervention of the Court, the Court is not bound to accept it when the company is in a hopelessly involved condition and its liquidation must be made officially. 126 I.C. 185=1930 L. 177.

CONTRIBUTORIES.—In the case of a solvent company, the Court and also the official liquidator should have particular regard to the wishes of the contributories as to all matters affecting them as a class. 58 I.A. 416=55 M. 180=61 M.L.J. 783=1932 P. C. 1 (P.C.).

FULLY PAID UP SHAREHOLDERS.—For the purpose of this section, a fully paid up shareholder is in an entirely different position from a creditor or contributory. And consequently he has a right to appear and to be heard upon any application to wind

up the company; and this right is not curtailed by the use of the word "contributories" in S. 174. 58 C. 62=1931 C. 391.

SHAREHOLDER NOT TO BE IDENTIFIED WITH COMPANY.—Where any shareholder is refused a hearing by the Court, the party aggrieved is only that shareholder and not the company. It would be improper to allow the company to come in and fight the battle or the grievances of the individual shareholder, as there is a great difference between the company opposing an application for winding up and a person coming with a right to be heard merely as a shareholder. 58 C. 62=1931 C. 391.

SEC. 175: AMENDMENT BY ACT XXII OF 1936.—The amendment in sub-section (1) has been consequential on the amendment of S. 171. The amendment in sub-section (2) adds a provision requiring notice to be normally given to the company before the Court appoints a liquidator. The absence of any provision as to notice in the Act as it previously stood resulted in the provision of the section being abused in many cases where a creditor or a contributory who had maliciously presented a winding up petition had followed it up by an *ex parte* application for the appointment of a provisional liquidator. Statements were generally made which the company had no opportunity of rebutting. An order for appointment of a provisional liquidator, in these circumstances led very often to disastrous results, and many companies became practically ruined because of the appointment. The remedy ordinarily available in cases of such malicious petitions, would hardly be sufficient to compensate the loss caused to the credit of the company by the appointment of the provisional liquidator. The decided cases in England also have laid down under an analogous section that although the Courts had jurisdiction to make an order appointing a provisional liquidator *ex parte*, it ought not to be made except in cases of very great urgency and unless the application was by the company itself. With a view to protect the company from the abuse of the provisions of the Act, the present amend-

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

Resignations, removals, filling up vacancies and compensation.

176. (1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court <sup>1</sup>[and until the vacancy is so filled up the official receiver shall be and act as the official liquidator.]

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

#### LEG. REF.

<sup>1</sup> These words were added by S. 95 of Act XXII of 1936.

ment requiring notice, has been made in the section.

CONSTRUCTION OF SUB-SECTION (6).—The intention of sub-section (6) is to avoid any question of competition between a receiver and an official liquidator. To construe it in such a way as to give preference to a receiver appointed in a suit brought by a secured creditor would result in defeating its apparent object. 58 C. 940=1932 C. 76. The word 'assets' in this sub-section (6) means the assets of the company and includes property which is subject to a charge. 58 C. 940. Where, therefore, there is a question of competition between a liquidator and a receiver appointed by the Court at the instance of debenture-holders or mortgagees, the Court will ordinarily in the exercise of its discretion give preference to the liquidator. 58 C. 940.

DISCRETION OF TRIAL COURT.—The appointment of a liquidator is a matter which is purely in the discretion of the trial Court, and the appellate Court should not interfere in the matter except under very special circumstances. 5 R. 685=1928 R. 36; 5 Bur. L.T. 193=17 I.C. 835.

SEC. 176: AMENDMENT BY ACT XXII OF 1936.—The amendment in sub-section (2) has been consequential on the amendment of S. 171. The words, "on due cause shown" in S. 176 (1) of the Indian Companies Act govern the words may resign or may be removed by the Court. The acts of resignation or removal are linked together and subject to the same condition. An Official Liquidator can therefore resign on due

cause shown. An Official Liquidator cannot be expected to carry on the affairs of the company at his own expense when there is no prospect whatever of recovering costs from the petitioner in the winding up proceedings who cannot be traced. In such circumstances he must be permitted to resign and should not be compelled to continue against his will. 1.L.R. (1942) Kar. 501=A.I.R. 1943 Sind 84.

RESIGNATION.—An official liquidator cannot resign at will without securing the concurrence of the liquidating Court out of mere caprice or resentment at inquiries regarding the nature of his past operations. If he does so, he is liable to forfeit his pay. 51 P.R. 1919=53 I.C. 649. Where an official liquidator fails to maintain a position of complete impartiality as between all the individuals whose interests are involved in the winding up and shows unusual partisan activity, the Court will be justified in removing him and appointing another in his place. 55 M. 180=61 M.L.J. 783=58 I.A. 416 (P.C.).

REMOVAL.—"Due cause" for removal of a liquidator under S. 176 (1) of the Companies Act is to be measured by the real, substantial, and honest interest of the liquidation and to the purpose for which the liquidator is appointed. Fair play to the liquidator himself is not to be left out of sight. Although the liquidator has been found to be negligent in carrying out the specific orders of the Court and the specific rules laid down in the Rules of Court, the Court will not remove the liquidator, if it appears that it is not in the "real, substantial, honest interest of the liquidation" that he should be removed from his post. 40 C.W.N. 857.



177. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

Official liquidator.

<sup>1</sup>[177-A. (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless

the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely :—

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any :

(b) the debts and liabilities ;

(c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given ;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date, the secretary, manager or other chief officer of the company, or by such of the persons hereinafter in this sub-section mentioned as the official liquidator, subject to the direction of the Court may require to submit and verify the statement, that is to say, persons—

(a) who are or have been directors or officers of the company ;

(b) who have taken part in the formation of the company at any time within one year before the relevant date ;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required ;

(d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year, was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the

#### LEG. REF.

<sup>1</sup>This section was inserted by S. 96 of Act XXII of 1936.

Sec. 177.—The Official Liquidator representing a company is in no different position from any one else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim to admit, and if he thinks it an inadmissible claim to reject it; and accordingly he is not bound to call on the claimant to appear before him and make enquiry. 180 I.C. 69=1939 Rang. 46.

Sec. 177-A: AMENDMENT BY ACT XXII OF 1936.—This section and S. 177-B now added adopted Ss. 181 and 182 of the English Act. This section gives a slightly extended time for submission of the statement referred to in sub-section (3), and it has been

necessitated on account of the difficulty which the liquidators have been often put to owing to the apathy and negligence of the directors in furnishing to the liquidators the necessary particulars as to the affairs of the company. It also makes it obligatory upon the directors and other persons who are ordinarily in charge of the company and its assets before its liquidation to disclose to the liquidator full particulars as to the assets and liabilities. This also obviates the examination which liquidators have had very often to resort to, to find out the details of the assets, etc., from unwilling and obstructing directors and other officers of the company, and enables them to get along with work expeditiously. A penalty also has been provided in respect of non-compliance with the provisions of this section.

statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall, on the application of the liquidator or of the official receiver, be punishable accordingly.

(8) In this section the expression "the relevant date" means, in a case where a provisional liquidator, is appointed, the date of his appointment and, in the case where no such appointment is made, the date of the winding up order.]

<sup>1</sup>[177-B. (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement by liquidator. ment to be submitted under section 177-A, and not later than four, or with the leave of the Court, six months from the date of the order, or in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

(a) as to the amount of capital issued, subscribed, and paid up and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of—

- (i) cash and negotiable securities ;
- (ii) debts due from contributories ;
- (iii) debts due to and securities, if any, available to the company ;
- (iv) moveable and immoveable properties belonging to the company ;
- (v) unpaid calls ; and

(b) if the company has failed, as to the causes of the failure ; and  
(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of the business thereof.

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and, whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court ]

178. (1) The official liquidator <sup>2</sup>[whether appointed provisionally or not]

Custody of company's pro- shall take into his custody, or under his control, all  
perty. the property, effects and actionable claims to which  
the company is or appears to be entitled.

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 96 of Act XXII of 1936.

<sup>2</sup> These words were inserted by S. 97 of Act XXII of 1936.

SEC. 177-B: AMENDMENTS BY ACT XXII OF 1936.—This section adopts S. 182 of the English Act. The making of the preliminary report will give the creditors and contributories and also the winding up Court a general idea as to the affairs of the company and the length of time which is likely

to be taken in completing the winding up.

SEC. 178: AMENDMENT BY ACT XXII OF 1936.—The amendment in sub-section (1) enables the provisional liquidator also to take into his custody the assets of the company automatically on his appointment. The substitution of sub-section (2) is consequential on the amendment of S. 171. A sale of the assets of the company after the winding up order in execution of a decree passed before that order, if it was without the leave of the winding up Court is voidable at the instance of the liquidator. 2 Pat. L.

<sup>1</sup>[ (2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.]

<sup>2</sup>[178-A. (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection shall be appointed to act with the liquidator, and who are to be members of the committee, if appointed.

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in the case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times.

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

#### LEG. REF.

<sup>1</sup> This sub-section was substituted by section 97 of Act XXII of 1936.

<sup>2</sup> This section was inserted by S. 98, *ibid.*

J. 77=38 I.C. 91. Under S. 178, the Official Liquidator should take into his custody or under his control all the assets of the company, but the company's property does not vest in the liquidator. I.L.R. (1941) Lah. 680=1941 Lah. 134.

SEC. 178-A: AMENDMENT BY A39 XXII OF 1936.—This section is based on S. 199 of

the English Act. It adopts the provision contained in the Bankruptcy laws for the appointment of a committee of inspection to be chosen from among the creditors of the bankrupt by the official assignee. In the case of companies also it has been thought desirable to enable the creditors and contributories of the company which is being wound up compulsorily to have a right through their chosen representatives to supervise the administration of the affairs and properties of the company by the liquidators.

(12) The continuing members of the committee, if not less than two, may act, notwithstanding any vacancy in the committee.]

179. The official liquidator shall have power, Powers of official liquidator. with the sanction of the Court, to do the following things :—

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;

(c) to sell the immoveable and moveable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;

(d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary the company's seal ;

SEC. 179: PROCEEDINGS BY LIQUIDATOR.—NATURE OF.—The proceedings started by a liquidator are not initiated in his personal capacity but in the name and on behalf of the company, and it must be deemed as if the proceedings are being continued not only in the interest of the company but actually by the company through its liquidator. 55 A. 912=1933 A.L.J. 1203 (F.B.). The liquidator should not appeal in any case without the permission of the winding up Court, and if he does so, he runs considerable risk, in the event of failure, to pay the costs out of his own pocket. 43 A. 433=19 A.L.J. 262=60 I.C. 763. An offer to take a mortgage with possession of a mill belonging to the company, in the course of the winding up, when accepted by the Court is binding on the party offering, as the acceptance by the Court should be deemed to have been on behalf of the official liquidator, especially when the official liquidator had acted upon the offer and has changed his position. The party who has made the offer will be estopped from withdrawing the same. 1930 A.L.J. 305=127 I. C. 428=1930 A. 330.

OFFICIAL LIQUIDATOR—GENERAL DUTIES AND POWERS.—Generally all ordinary questions arising in the liquidation of a company are decided by the official liquidator himself. He ordinarily applies to the Court only when some special question of law arises or when he wishes a direction from the Court on a general question of policy. If this procedure is followed, an application under S. 183 (5) of the Companies Act will lie from the order of the official liquidator to the Court instead of the Court itself deciding the matter in the first instance. S. 179 of the Act lays down what powers may be given to the official liquidator. 1943 A.M.L.J. 21. Pursuant to an order of Court for sale by tender of a business which was a limited concern and which had been ordered to be wound up, the Official Receiver caused an advertisement to be published in the newspapers inviting tenders for the purchase of the business. The advertisement directed that the tenders should reach the Official Receiver on or before a specified date but it

was not stated that the highest tender would be accepted and there was no reserve price fixed. The appellant was found to have submitted the highest tender. Subsequently in an application made by the Official Receiver to Court the Court was informed that other persons were willing to raise their offers to amounts higher than that offered by the appellant and the Court thereupon directed that a week's further time might be given for receipt of fresh offers or for increase of offers already made. It was also directed that the offers should be made in sealed covers to be opened in court. The appellant feeling aggrieved by this order appealed. *Held*, that as the advertisement did not state that the highest tender would be accepted and as the sale had not taken place at the time when the official Receiver took out the application for directions, it was competent for the court to pass the order in question calling for fresh tenders. [Proper procedure for sale by official Receiver under orders of Court indicated.] I.L.R. (1943) Mad. 790=1943 Comp. C. 133=56 L.W. 41=1943 M.W.N. 58=A.I.R. 1943 Mad. 365=(1943) 1 M.L.J. 123.

SUITS AGAINST CONTRIBUTORIES.—As soon as the company goes into liquidation, the shareholders are saddled with a new liability in respect of unpaid calls. 16 L. 1055=1935 L. 335; 155 I.C. 16=1934 L. 1015. The cause of action for the liquidator to realise contributions from the contributories arises only on the appointment of the liquidator. 48 A. 580=24 A.L.J. 691=1926 A. 550; 23 A.L.J. 473=1925 A. 519. The fact that the calls are barred by time as against the company and that the company could not realize them on account of lapse of time is no answer to the liquidators' claim for contribution. 10 P. 249=12 Pat.L.T. 215=1931 P. 44; 38 A. 347; 31 M. 66; 22 Bom. 654.

'LEAVE TO BID' TO LIQUIDATOR.—The Court in which winding up proceedings are pending has jurisdiction only to sanction the liquidators applying to the executing Court either in a particular case or generally in all cases in which it thinks it desirable, for leave to bid as a decree-holder under O. 21,

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors ;

(f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business ;

(g) to raise on the security of the assets of the company any money requisite ;

(h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company ; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself : Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General ;

(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

180. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

181. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties : Provided that, where the official liquidator is an attorney he shall not appoint his partner, unless the latter consents to act without remuneration.

R. 72, C. P. Code. It has no jurisdiction itself to make an order giving the liquidator 'leave to bid'. The liquidator has to apply to the executing Court for 'leave to bid' at the sale, and the granting or refusing the same is entirely a matter for the executing Court to decide. 25 A.L.J. 891=1927 A. 681.

SEC. 179 (F).—The power given to the liquidator under S. 179 (f) to indorse a promissory note is a statutory power and it cannot be delegated in the absence of a statutory provision permitting such delegation. *Held*, that the indorsements of certain promissory notes by the agents appointed by the liquidators conveyed no title in law to the assignees. No subsequent ratification of such indorsements by the liquidator could make them valid as they were void *ab initio*. 52 L.W. 342=1940 Mad. 882=(1940) 2 M.L.J. 309.

SECS. 179 AND 183 (5).—Any sales or contracts of sale effected by the official liquidator of a company which has gone into liquidation in pursuance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court. Once the Court has sanctioned the sale of the company's property and has fixed a reserve price, the matter is closed so far the Court is con-

cerned and the liquidator is free to dispose of the property provided he observes the conditions previously imposed by the Court under S. 179 of the Act, the liquidator can finally dispose of the property once he has got the sanction of the Court. It is not as if he has power merely to invite offers and to submit them to the Court for approval. Where the Court has given the official liquidator a general permission to sell the property of the company (provided that a certain price was obtained) and has expressly sanctioned a contract of sale entered into by him for a sum considerably in excess of the stipulated price, the Court cannot, by passing an order purporting to revoke its own sanction, nullify the contract of sale. Neither S. 179 nor any other provision in the Companies Act gives any authority to the Court to revoke the sanction granted by it. S. 183 (5) of the Act is also of no avail, because S. 183 (5) clearly cannot apply to a case in which the act or decision of the official liquidator has been performed or made in pursuance of the Court's express sanction. Nor has the Court any inherent power to revoke its own sanction after the sanction has been acted upon. 50 L. W. 879=1940 Mad. 179=(1940) 1 M.L.J. 107.

SEC. 181: PRACTICE.—The usual practice for the Court is to appoint the petitioning

182. <sup>1</sup>[(1)] The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court,

Liquidator to keep books containing proceedings of meetings and to submit account of his receipts to Court.

personally or by his agent inspect any such books.

<sup>1</sup>[(2)] Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.]

<sup>1</sup>[(3)] The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.]

<sup>1</sup>[(4)] The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator.]

<sup>1</sup>[(5)] When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested.]

183. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall,

Exercise and control of liquidators' powers.

in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting <sup>2</sup>[or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.]

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

#### LEG. REF.

<sup>1</sup> S. 182 was re-numbered as sub-S. (1) of that section and sub-Ss. (2) to (5) were added by S. 99 of Act XXII of 1936.

<sup>2</sup> Inserted by *ibid.*

<sup>3</sup> These words were added by S. 100, *ibid.*

creditor's attorneys as attorneys for the official liquidator, and it is based on sound reasons. Where the proceedings have been complicated and have gone on for some time, the petitioning creditor's attorneys who are acquainted with the proceedings ought to be preferred to a new firm of attorneys who would require considerable time and labour before getting themselves familiar with the proceedings. 37 Bom.L.R. 401=157 I.C. 1093=1935 B. 337.

SEC. 182: AMENDMENTS BY ACT XXII OF 1936.—The added sub-sections make specific provisions for keeping of proper books of

accounts; and if the winding up continues for more than a year, for the making of proper statements periodically, as also rendition of accounts and for the auditing of such accounts.

SEC. 183: AMENDMENTS BY ACT XXII OF 1936.—The insertion of words in sub-S. (1) has been consequential on the enactment of S. 178-A.

SEC. 183, SUB-SEC. (1).—See notes under S. 174, *supra*. Where a company was compulsorily wound up by order of Court and the liquidators felt a certain asset in the shape of a decree in favour of the directors of the company should be sold by auction and accordingly applied to the District Judge for directions under S. 183 of the Companies Act and having obtained sanction sold the decree to the highest bidder and executed a deed assigning the decree to him, but the sale was later attacked by

(5) If any person is aggrieved by any act or decision of the official liquidator that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

*Ordinary powers of Court.*

184. (1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company, to be collected and applied in discharge of its liabilities.

Settlement of list of contributories and application of assets.

one of the liquidators on the ground of some irregularity in the conduct of the sale and the District Judge set aside the sale. *Held*, that in the absence of fraud the District Judge had no power to set aside the sale, as the official liquidators with the sanction of the Court assigned the decree to the person who became the purchaser. The principles of O. 21, R. 90, C. P. Code, do not apply, but even if they do, there would be no ground for setting aside the sale. 46 L.W. 925=(1937) 2 M.L.J. 926. *See also* 1940 Mad. 179=(1940) 1 M.L.J. 107.

SEC. 183, SUB-SEC. (5).—The petitioner-creditor is interested in the appointment of solicitors for the official liquidator, and he is a person aggrieved if the official liquidator should obtain an *ex parte* order appointing a particular firm of attorneys to act for him. The petitioner-creditor will be entitled to apply to the Judge who passed the order to have it set aside, and he will certainly do so if proper grounds exist therefor. 37 Bom.L.R. 401=1935 B. 337. Where the prospectus issued by a company is a false and misleading document and contained untrue statements and representations, a person who has agreed to take shares in such a company has a right to repudiate or avoid the contract, provided he does so within a reasonable time and before the commencement of proceedings for the winding up of the company. But an application under S. 183 (5) after the list of contributories had been settled, and nearly eleven years after the agreement to take the shares, is too belated an application to be allowed. I.L.R. (1938) All. 301=1938 A. L.J. 94=1938 All. 193. Act or decision of liquidator in pursuance of express sanction of Court cannot be cancelled. *See* 1940 Mad. 179=50 L.W. 879=(1940) 1 M.L.J. 107. Cited under S. 179 *supra*.

SEC. 184: COURT'S POWER TO RECTIFY THE REGISTER OF MEMBERS.—The powers of the Court to rectify the register in winding up proceedings will be governed by the same principles which apply to its powers to rectify while the company is a going concern. The Court has power to decide any question relating to the title of the aggrieved party whose name has been omitted from the register, and generally to decide any question necessary or expedient to be decided for rectification of the register. The exercise of the power is, however, discretionary, having regard to the person who is the ap-

plicant before the Court, and to all the facts and circumstances of the case. 37 Bom. L.R. 904=160 I.C. 638=1936 B. 24.

FINALITY OF ORDER.—Any order passed by the Court bringing the name of a person as a contributory on the list of contributory is a final order, if not appealed against; and the question as to the liability of such person as contributory cannot be re-opened. 95 I.C. 252=1926 L. 414.

BURDEN OF PROOF AND COSTS OF CONTEST.—The burden of proving that his name was entered in the register fraudulently or without sufficient cause under S. 38 (1) of the Act, is upon the applicant under this section who applies for removing his name from the register of shareholders; and if he fails to discharge the same, he will be mulcted with the costs of the contest except under very special circumstances. 37 Bom.L.R. 904=160 I.C. 638=1936 B. 24.

SUBSCRIBER TO MEMORANDUM OF ASSOCIATION, WHEN CEASES TO BE MEMBER.—A subscriber to the memorandum of association of a company remains a member until such time as either the company, which is authorized by its Articles of Association to do so, accepts surrender of the shares for valid reasons or the subscriber himself pays for the shares and validly transfers them to somebody else. The mere fact that the subscriber did not pay the share amounts and the managing agent thereupon struck off the name of the subscriber from the list of directors and communicated to the Registrar that he had ceased to be not only a director but also ceased to be a member, will not have the effect of ceasing his membership. Hence, when the company went into liquidation, the Official Liquidator was held entitled to have such person included in the list of contributories. 133 I.C. 424=1931 A. 701. If such member is dead, his legal representatives would be liable, but in this case if the parties had acted for a long time on the footing that the member had ceased to be a member, the legal representatives, though made liable as contributories, would not be charged with interest. 1931 A. 701. It is well-settled that the signatories to the memorandum of association of a company become the first members of the company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have become members of the company, and, on its registration, to



(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

he entered as members on its register of members. But neither this entry in the register nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the company the number of shares placed opposite his signature unless all its share capital has already been allotted to other persons. The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time would not relieve him from liability as a member and to be included in the list of contributories settled under S. 184. 32 S. L.R. 167=1938 Sind 187. Where a father applied for shares in a company for his minor sons, signed the application form on their behalf, paid the purchase-money by his own cheque out of the Bank accounts opened by him in their names, and dividends were credited to those accounts and the balance in those accounts was drawn out by the minors when they became of age. *Held*, that the father, when he signed the applications on behalf of his minor sons, must be taken to know that the sons were incapable of contracting being minors, that therefore, he must be treated as the owner of the shares, and that consequently he, and not his sons, was liable to be put upon the list of contributories. I.L.R. (1939) Lah. 299=1939 Lah. 515. An application was made by one P, as guardian of the minor daughter for shares in a company and the company issued shares to and registered shares in the name of the daughter, describing her as a minor. When the company went into liquidation, the Official Liquidator claimed against the minor for contribution, but she, through her father and guardian, set up her minority and disclaimed personal responsibility. The Official Liquidator then claimed that her father, P who signed the application must be deemed to have contracted for the shares and should be placed on the list of contributories. There was no suggestion that the company were unaware of the daughter's minority; on the other hand they knew that they were being invited to contract with a minor and thought fit to contract with the minor. There was nothing on record to show that the father had at any time intended to become a subscriber of the company and there was no evidence that any of his money was used for the purpose. *Held*, (1) that the contract was void in law. On the face of it, the contract was made by both sides under complete misapprehension as to the law, but no misapprehension as to the facts. The father P could not be held to have contracted under an *alias* and could not therefore be placed on the list of contributories. I.L.R. (1942) Mad. 875=A.I.R. 1942 Mad. 470=55 L.W. 200=(1942) 1 M.L.J. 425. A limited

company by its very constitution is prohibited from purchasing its own shares, whether such purchase is authorised by the memorandum of its association or not, the purchase is void and illegal. The legal incapacity of a company to purchase its own shares is not dependent upon the fact of the purchase being made either within or outside the territorial limits of the place where the company is incorporated, but it is beyond the scope of its constitution. If a company therefore purchases its own shares, no matter where, a member who has sold his shares to the company cannot claim to be removed from the register of shareholders under S. 184 of the Companies Act, because the purchase by the company must be deemed to have been not validly made as it is *ultra vires* of the company. On the strength of such a transaction the vendor is not entitled to have his name removed from the register and to have the vendee's name put instead. If a company purchases its own shares, the effect is that in law the vendor does not cease to be the legal owner of the shares, and his liability as a member contributory in respect of unpaid calls is not thereby extinguished, even if the sale and purchase be effected outside the state or territory where the company is incorporated. Nor is the company estopped from pleading the invalidity of the purchase or that the purchase was for itself and not for a constituent by reason of representations made by its officers to the vendor, even if it be a foreign company. A company cannot be bound by estoppel to do something beyond its powers. In such a case, the remedy, if it all, can only be against the officers who made, the representation on the faith of which the contracts were entered into. 55 L.W. 653=1943 Mad. 111.

**PLEDGER OF SHARES.**—Where shares are pledged with the company, the legal owner thereof is the shareholder and not the company and it is the shareholder alone that will be held liable for the unpaid calls thereon. 24 I.C. 236=69 P.R. 1914.

**RECTIFICATION, WHEN ORDERED.**—When a shareholder's estate has been taken over by the Court of Wards (this case was in U. P.), the register may be rectified by placing the name of the Estate Collector in the place of the shareholder. 1930 A. 617=124 I.C. 726. A person cannot be included in the list of contributories, if before the winding up proceedings he has not only repudiated his shares but has also asserted his right in an action by the company to enforce calls upon him; and he will also be entitled to have the register rectified by removing his name therefrom. 1926 L. 414=95 I.C. 252.

**WHEN RECTIFICATION NOT ORDERED.**—If a person has been treated as a shareholder and he has acted as such, though there may

185. The Court may, at any time after making a winding up order, require

any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

186. (1) The Court may, at any time after making a winding up order,

have been some irregularity in the issue of shares to him, he will be estopped from denying his membership, and he will not be entitled to the removal of his name from the register. 54 P.R. 1915=28 I.C. 53. A person purchased some shares on condition that he would be appointed chairman of the Local Board, and he was allotted shares and was also appointed chairman. But subsequently there was a breach of the condition by his dismissal from chairmanship. The remedy of such a person is only by an action for damages and not by getting his name removed from the register of shareholders. 1936 L. 700.

SEC. 185: SCOPE OF SECTION.—Apart from this section, the Court possesses ample powers *ex debito justitiæ* to pass interim orders for protection and preservation of the subject-matter in dispute, pending the result of the litigation. 14 L. 68=1933 L. 437. S. 185 only applies when it can be shown that the money or property covered by the order is, at the time of the order, in the hands of the party ordered to deliver them up. 41 C.W.N. 975. The Court is not authorized to come to any final decision as to title under this section. 163 I. C. 378=1936 L. 408. That may subsequently be done under S. 186 or S. 235. 1936 L. 408. The section applies even where a lien is claimed on the property of the company, and the Court can order the property to be put into Court before adjudicating the truth or validity of the lien claimed. 1936 L. 408. The Court cannot, by a summary order under this section, order the refund of money realized by a creditor of the Bank under liquidation before the order of winding up was passed but after the Bank had passed a resolution stopping payment of debts. 46 P.R. 1915=29 I.C. 265. The proper course for the liquidator will be to file a regular suit like other claimants to recover the amount realized by such a creditor. 29 I. C. 265. S. 185 does not of course contemplate an elaborate enquiry, but the Court has a discretion to decide whether any particular claim made can or cannot be conveniently dealt with under the section. An application by the Official Liquidator under the section against an ex-managing agent of the company for payment of sums overdrawn by him while he was managing agent is maintainable and not excluded by the mere fact that he had ceased to be an agent before the commencement of liquidation proceedings. If in such application, the agent prays, that his claims to

credit as against the company in respect of arrears of salary due to him and in respect of expenses of suits against him as agent it will not be proper to disallow the claims and to drive him to a separate suit, it is only fair that his claims against the company must be considered in the application itself. Nor will the Court be justified in treating an application under the section as if it were an ejectment suit and seeking to ascertain the rights of the parties only as on the date of the initiation of the proceedings. The proper course would be to take an account in respect of such of the items as the agent would be entitled to retain either under S. 217 of the Contract Act or under the terms of the agreement between the parties and of the Articles of the Association of the company; and the balance of the amount claimed by the liquidator would be the amount *prima facie* payable by the agent to the liquidator. 45 L.W. 119=(1937) 1 M.L.J. 219.

EX PARTE ORDERS—PRACTICE.—It should not be laid down as a rule of procedure that *ex parte* orders should be passed ordinarily where proceedings are taken under this section. *Ex parte* orders should be granted with the greatest caution and where rapid action is desired, it is always possible under the rules of the Court to serve with leave, short notice of any application to the Court. 6 Bom.L.R. 790.

SECS. 185 AND 188: DIRECTION TO REFUND MONEYS PAID—JURISDICTION OF COURT—LIMITS.—Where an application was made by the liquidators, asking the Court to direct certain persons to refund sums paid to them by the managing agents, after winding up petition, it was *held* that S. 185 empowered the Court exercising jurisdiction under the Act to require contributories and certain others to deliver up money, etc., in their hands to the liquidator and that neither S. 185 nor S. 188 gave the Court any power to pass orders against persons other than those mentioned in S. 185 of the Act, and that hence the Court had no jurisdiction to pass orders for the payment asked for by the liquidators. 1940 A.L.J. 739=I.L.R. (1940) All. 730=1940 All. 514.

SEC. 186: SCOPE OF SECTION.—This section as well as S. 235 empowers the Court to make an order against the person complained against, but neither of them professes to confer a new right on the person applying. The power of the Court is, however, restricted from proceeding *suo motu*. 55 A. 912=1933 A.L.J. 1203=1933 A. 789

Power to order payment of debts by contributory. make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(F.B.). This section does not create new liabilities or confer new rights on the liquidator but merely provides a summary procedure in the winding up Court against debtor-contributories for enforcing existing liabilities. The power of the Court under this section is discretionary, and it is not bound to pass an order for payment under this section and may order the liquidator to file a separate suit. 54 A. 1067=64 M.L.J. 403=1933 P.C. 63=60 I.A. 13 (P.C.); 59 P.R. 1915=31 I.C. 54; 4 L. 109=74 I.C. 600. Though the jurisdiction under this section is permissive, it ought not to be refused in the absence of cogent reasons, when a fit case is made out for its exercise. 36 P.R. 1916=31 I.C. 746. When there has been a valid call prior to liquidation and the date for its payment has passed, it becomes a debt due from the shareholder to the company and is just like any other debt. When subsequently the company goes into liquidation, that debt, becomes an asset of the company which have to be realised by the liquidator. It has lost its character as a call has become a debt and as such is realisable by the liquidator as any other debt or asset. The Court has no jurisdiction at all to question the propriety of a liquidator seeking to get in a debt due to the company prior to the liquidation under S. 186 of the Companies Act. 1942 A.W.R. (H.C.) 4.

APPLICATION OF SECTION.—It is not competent to a transferee of the debts and calls due from contributories to obtain an order under this section. An application by such a person, not being one on behalf of the company or for its benefit, is not maintainable. 59 I.C. 538. An order passed under this section in any person's favour is executable by him. But if he transfers the order in favour of any other person, that other person (the transferee) should first apply to the Court to get himself substituted in the place of his transferor, and it is only then that he would be entitled to apply for execution. Ss. 200 and 201 of this Act are subject to the provisions of O. 21, R. 15, C. P. Code. 92 P.R. 1918=47 I.C. 907. Where the Memorandum of Association shows that one of the objects of the company is to manage estates, it entitles the company to act as a liquidator of another company; and once the company having been appointed a liquidator and having accepted the position the legality of the appointment cannot be questioned in proceedings of a payment order under S. 186. 1936 L. 276=162 I.C. 306. When there has been a valid call prior to liquidation and the date for its payment has passed, it becomes a debt due from the shareholder to the company and is

just like any other debt. When subsequently the company goes into liquidation, that debt becomes an asset of the company which have to be realised by the liquidator. It has lost its character as a call has become a debt and as such is realisable by the liquidator as any other debt or asset. The Court has no jurisdiction at all to question the propriety of a liquidator seeking to get in a debt due to the company prior to the liquidation under S. 186. I.L.R. (1942) A. 26=1942 A.L.J. 47=A.I.R. 1942 A. 136.

DEFENCE.—In summary proceedings instituted under this section, every objection is just as open to the person sought to be charged as it would have been if a suit had been brought by the liquidator in the company's name for the same money. Thus, if at the date of the application by the liquidator under this section to recover certain monies, a suit by him in the name of the company for the recovery of the said monies would have been dismissed as barred by the Limitation Act, the Court would have no power to order payment of such monies to the liquidator under this section. 54 A. 1067 (P.C.) (noted *supra*). But it is not open to a shareholder who has been settled on the list of contributories to plead, in proceedings taken against him under this section, that he was improperly so settled. 41 P.L.R. 1915; 71 I.C. 724=1923 A. 85. By virtue of S. 186 (2), it is wholly discretionary in a Court whether any set-off can be allowed. It is now clear beyond any doubt and as a fixed judicial principle that the Court never allows a person to whom the company is indebted to set-off that indebtedness against what is due from him as a contributory in respect of calls. It is otherwise where the two debts are of a purely commercial nature. But where the debt of the company is in respect of calls, the set-off is never available to a contributory. I.L.R. (1942) A. 26=1942 A.L.J. 47=A.I.R. 1942 A. 136. Under the law of set-off which is applicable in the winding up of a company, where there are two amounts, one in the account of A and the other in the account of A and B, if it is shown that the latter account, though standing in the name of A and B was really in trust for A, the amount due under one account can be set-off against the amount due under another account. (1942) 1 M.L.J. 161=55 L.W. 252=1942 Mad. 351. Under the law prevailing in India a deposit by a husband in the name of himself and his wife payable to either or survivor, in the absence of evidence to the contrary must be presumed to belong to the husband. 55 L.W. 252=1942 Mad. 351=(1942) 1 M.L.J. 161. Where a husband deposits his salary

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

187. (1) The Court may, at any time after making a winding up order, and

Power of Court to make calls. either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

in a bank in current and savings banks accounts in the name of himself and his wife payable to either or survivor, and takes a loan from the bank in his own name only, the amount standing to his credit in the joint account can be set-off against the money due under the loan account in the winding up of the bank, as the money is really his. 55 L.W. 252=1942 M.W.N. 211=A.I.R. 1942 Mad. 351=(1942) 1 M.L.J. 161.

"MONEY DUE", MEANING OF.—The words "money due" in S. 186 refer to money due and recoverable in a suit instituted by the liquidator in the company's name at the date of the application under the section. 54 A. 1067 (P.C.) (noted *supra*). This meaning has been given to the expression on the basis that the section deals only with procedure for enforcing payment and does not purport to impose any liability. The term "money due" in its primary sense denotes an existing debt whether or not the right to recover the same is barred under the Limitation Act. Under the Limitation Act the debt is not extinguished but only the remedy to recover it is barred. The term used in the articles of association or any contract may be taken to include a barred debt also, if the context permits. 36 Bom.L.R. 32=1934 B. 97.

"AT ANY TIME".—The use of the words "at any time" in the section was not intended to over-ride the provisions of the Limitation Act. The Court cannot order payment of a time-barred debt under this section. The words can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding up order. 4 L. 109=174 I.C. 600=1924 L. 53.

CONTRIBUTORY, PARTNER OF FIRM.—Where the principal partner of a firm had signed the promissory notes in favour of the company which went into liquidation subsequently, and the principal partner has been settled on the list of contributories and not

the firm, still it is open to the liquidator to select him from among the partners and call upon him as contributory to liquidate the whole debt. 4 L. 239=77 I.C. 338.

SEC. 186 (2): CONTRIBUTORY OF LIMITED COMPANY, IF ENTITLED TO SET-OFF.—Sub-S. (2) to S. 186 permits a limited right of set-off to a contributory only when the company is unlimited. 1938 A.L.J. 925=1938 All. 613; 1942 A.W.R. (H.C.) 4. There is nothing in S. 186 which can reasonably be construed as a general deprivation of contributories to companies in liquidation of the right of set-off. 1940 A. L. J. 826=I. L. R. (1941) All. 153=1940 All. 544 (F.B.). See also 1942 A.W.R. (H.C.) 4.

LIABILITY OF REPRESENTATIVE CONTRIBUTORY.—EXTENT OF.—The contributory who is called on to pay as the representative of a deceased shareholder is liable to contribute only to the extent of the assets, which may have come into his hands. 10 P. 249=12 P.L.T. 215=1931 P. 44.

JURISDICTION.—A District Judge, under S. 3 of the Act, has jurisdiction to order payment even if some of the contributories reside outside British India. 15 L. 302=1934 L. 362. The provisions of S. 186 (1) are not mandatory and the Court exercising jurisdiction in the winding up may grant or reject an application. If the Court refuses the liquidator must proceed by way of a civil suit. 1940 A.L.J. 826=I.L.R. (1941) All. 153=1940 All. 544 (F.B.). Order under S. 186 not a decree within S. 73, C. P. Code. See 15 Luck. 332=1940 Oudh 237=1940 O. W. N. 132.

SEC. 187: SCOPE OF SECTION.—The section is not restricted to original calls but includes also unpaid calls before the winding up. 67 P.B. 1911=12 I.O. 958. So, the balance of the price of shares for which a call has been made before liquidation can be recovered by a summary action by the official liquidator. 12 I.O. 958. A contri-

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

188. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same <sup>1</sup>[\* \* \* \*] the account of the official liquidator <sup>2</sup>[in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934] instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

189. All moneys, bills, hundies, notes and other securities paid and delivered into <sup>3</sup>[the Bank where the liquidator of the Company may have his account], in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

#### LEG. REF.

1 The words "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to" were omitted by S. 101 of Act XXII of 1936.

2 These words were inserted, *ibid*.

3 These words were substituted for the words "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, or any branch thereof, respectively" by S. 102, *ibid*.

butory who has paid before the settlement of the list of contributories, need not pay once again after settlement of the list. 50 C. 1049 = 36 C.W.N. 409 = 1932 C. 691.

**LIABILITY OF MEMBERS.**—The right enforced by a Court in making calls is a statutory right of the creditors to enforce against the shareholders of the company on its insolvency, and not a right of the company being enforced by the liquidator. 38 A. 347 = 14 A.L.J. 349 = 35 I.C. 159. The calls are recoverable by the liquidator though they may have been barred under Art. 112 of the Limitation Act. A claim which might be held to be barred by the C.P. Code if brought by the company can be preferred by the official liquidator under the Companies Act. 50 A. 476 = 26 A.L.J. 256 = 1928 A. 272.

**CALLS AND PREFERENCE SHAREHOLDERS.**—Uncalled share money upon issued shares at the date of the winding up of a company forms part of the assets or capital of the company. The preference shareholders being entitled in winding up to return of capital in priority to other shares, unpaid ordinary share capital can be called up to meet the amount required to pay the preference share capital, and the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Where the memorandum of association of a company provides that "No dividend shall be payable except out of the net profits arising from the business of the company", there can be no dividend payable to the preference shareholders from the amount of the share capital

when there have been no profits, although under the articles of association preference shares confer the right to a fixed cumulative preferential dividend. 1941 Mad. 806 = (1941) 2 M.L.J. 94.

**JURISDICTION.**—The only Court which can enforce an order passed by a High Court under this section against property of the contributory situated in a mofussil is the High Court and not the District Court. 57 M.L.J. 723 = 30 L.W. 849; 6 P. 132. In a personal action, a decree pronounced by a Court of a foreign state *in absentem*, the defendant not having submitted to its authority, is by international law a nullity. Where the defendant, who is a shareholder in a company registered in an Indian State and is a resident of British India, does not appear before the State Liquidation Court, before which the liquidation proceedings are started, and does not submit to the jurisdiction of the Liquidation Court, a call order made against him by the Liquidation Court, in absence of an express agreement in the Articles of Association that the disputes with the shareholders should be settled by the State Court, is without jurisdiction and cannot be enforced as such in British India. It is necessary that the liquidator suing the defendant in British India should prove all necessary facts to establish his liability. It is also necessary, in order to allow the plaintiff to succeed, that the call order for the particular amount was necessary and just. 40 P.L.B. 819 = 1938 Lah. 599.

**SEC. 188: SCOPE OF SECTION.**—A company judge has no jurisdiction to pass an order against a person who has entered into a contract with the liquidator during the course of the liquidation for payment of the money due from him in a bank and to direct the execution of the order as a simple money decree. S. 188 does not give jurisdiction to a Judge to enforce an order against persons other than contributories, or persons mentioned in S. 185. The word "purchaser" in S. 188 means the purchaser of the interest of a contributory. The words "or other persons from whom money is due," refer to a person from whom money is due under S. 185 so far as it is intended that an

190. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.
- Order on contributory conclusive evidence.
- (2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.
191. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.
- Power to exclude creditors not proving in time.
192. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.
- Adjustment of rights of contributories.
193. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.
- Power to order costs.
194. (1) When the affairs of a company have been completely wound up, the Court shall make an order, that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.
- Dissolution of company.
- (2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.
- (3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.
- Extraordinary powers of Court.*
195. (1) The Court may, after it has made a winding up order, summon

order enforcing payment should be made. 1936 A. 808=1936 A.L.J. 741; *see also* 1940 A.L.J. 739=1940 All. 514.

SRC. 191: PROOF BEFORE APPOINTMENT OF LIQUIDATOR.—The Court cannot pass an order in the winding up proceedings admitting the proof of any debt due to any particular creditor, before a liquidator is appointed. 9 A. 180.

SECURED CREDITOR, PROOF BY.—*See* 16 A. 53; 55 P.W.R. 1907.

SECS. 191 AND 229.—So long as justice can be done to a creditor without disturbing the dividend already declared or paid, there is no reason why he should be prevented from getting his dividend merely because of failure to file proof of claim within the time limited by the notice under R. 83 of the Rules framed by the Madras High Court under the Companies Act. The delay in filing the affidavit of proof of a claim can be excused. On a literal reading of R. 91, as it now stands, it would seem that unless a creditor satisfies the Court that owing to ignorance or want of notice he did not file proof of his debt, his claim cannot be admitted. It is desirable that R. 91 should be amended on the lines of R. 65 of the English Bankruptcy Act or S. 72 of the Presidency Towns Insolvency Act. 55 L.W. 99=1942

C. C. M.—195

M.W.N. 347=A. I. R. 1942 Mad. 349= (1942) 1 M.L.J. 182. *See also* 27 Mad. 496. When declared, a dividend is a debt arising out of a contract payable by the company to a shareholder. The persons entitled to receive the dividend are only the duly registered shareholders when the dividend is declared. This is the usual position in the absence of any provisions to the contrary in the Articles of Association. 48 C.W.N. 693.

SRC. 194.—An assignee of a payment order from the liquidation Court can get relief from the Court even after the dissolution of the company. 67 I.C. 443; 40 P. R. 1915=28 I.C. 386. The liquidator may, although he becomes *functus officio* in liquidation, complete a formal act like giving a transfer in writing for a decree which has already been transferred, even after dissolution. 54 M.L.J. 663=1928 M. 478.

DISSOLUTION MAY BE DECLARED VOID.—It is open to the Court under S. 243 of the Act to declare the dissolution to be void, and thereupon all proceedings may be taken as might have been taken if the company had not been dissolved.

SEC. 195: SCOPE OF SECTION.—An order under this section will be made only if it



Power to summon persons suspected of having property of company.

before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company or any person whom the Court deems capable of giving information concerning the date, dealings, affairs or property of the company.

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed

is likely to lead to some benefit to the creditors. It is in the discretion of the Court, although such discretion has to be exercised judicially. 40 P.R. 1915=28 I.C. 286.

SCOPE OF SECTIONS 195 AND 196.—The scope of an examination under S. 195 is to seek information on matters which may be just or beneficial for the winding up of the company. If the conduct of persons connected with the formation or management of the company is to be investigated, that must be done under S. 196. The first one is intended to be used for the purpose of promoting the liquidation proceedings while the second section is primarily intended to investigate the conduct of those who have been charged with its affairs. 130 I.C. 409=1931 L. 8.

POWER OF COURT.—The powers of the Court are very wide and it is not necessary that the Court must first determine that the person called upon to furnish information does actually possess that information. If the Court has reason to think or even if an allegation is made that a certain person is in possession of information which would be useful for the purposes of the winding up of the company, the Court may call upon him to appear in Court and to examine him. If a party is entitled to take part in or to conduct an examination, the ordinary rule is that he is entitled to do so with the help of counsel. There is nothing in this section which bars the assistance of counsel for the Official Liquidator for an inquiry under this section. 130 I.C. 407=1931 L. 8.

RIGHT OF PETITIONING CREDITOR TO ATTENDANCE AND CONDUCT OF EXAMINATION.—Where the liquidator refuses to act or where he has not the means to act, the Court can give the conduct of the examination to a petitioning-creditor; and the Court has a discretion also to allow a creditor to attend, even while the official liquidator has the conduct of the examination. As to the examination under this section is a private one, it would be an invasion of this privacy if petitioning creditors and others were allowed to attend. 1924 R. 24=

1 R. 384=83 I.C. 3. The depositions made under the provisions of S. 195, and obtained by the Liquidator under R. 174 of Ch. XXXI of the Original Side Rules under the Companies Act, are private documents and the Liquidator is not entitled to refer to them in any other proceedings. I. L.R. (1940) 1 Cal. 28=44 O.W.N. 512=1940 Cal. 488. In a suit filed by the Liquidator of a company for setting aside the purchase of the stock-in-trade and assets of the company by one of the defendants, the Liquidator applied for the appointment of a receiver of the assets of the company and referring to the examination under S. 195, alleged a conspiracy to defraud the creditors of the company. The defendants who had been examined under S. 195 of the Act at the instance of the Liquidator applied for obtaining copies of their depositions.

Held, that they were entitled to copies upon counsel for each defendant undertaking to prevent communication of his deposition to his co-defendants or their solicitors or counsel. I.L.R. (1940) 1 Cal. 28=44 O. W. N. 512=1940 Cal. 488.

INSPECTION BY PUBLIC OFFICE.—Public officers charged with the investigation of criminal offences, such as the Deputy Superintendent of Police, may be allowed by the Court to inspect the depositions made under this section and to take notes, but not copies. 57 I.C. 424=1930 C. 521.

APPEAL.—An order on the directors of a company to appear before the Court for examination is not a judgment within Cl. 15 of the Letters Patent, and hence is not appealable. 55 C. 262=109 I.C. 704=1928 C. 295. However, when a District Judge disallowed the objections of the managing agents and ordered their examination, it was held that this final order was appealable. 10 L. 806 (F.B.)=117 I.C. 985=1929 L. 707; 1931 L. 8. But the appeal will lie against the final order only, and not against the preliminary order merely issuing the summons. 10 L. 806.



by it), the Court may cause him to be apprehended and brought before the Court for examination.

196. (1) When an order has been made for winding up a company by the Court, and the official liquidator has applied to the

Power to order public examination of promoters, directors, etc.

Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examinations shall be taken down in writing and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

SEC. 196: SCOPE OF THE SECTION.—See 130 I.C. 407=1931 L. 8; noted under S. 195, *supra*. See also 98 I.C. 599=1926 L. 385 to the same effect.

DUTY OF COURT.—The Court should consider the matter judicially and pass order only on being satisfied that there is reasonable ground for the allegation of fraud upon the facts stated in the application. It is not, however, necessary that the charge of fraud should be specified in the application with the same precision and particularity as may be necessary in a criminal complaint under the I.P. Code. 56 A. 496=1933 A.L.J. 229=1933 A. 366.

EX PARTE ORDER.—Order for public examination can be made *ex parte* without notice. 56 L.W. 648=1944 Mad. 87=(1943) 2 M. L.J. 499. When the Court has passed an *ex parte* order for the public examination of an officer on an application of the liquidator, the only objection that can be raised by the officer for his examination is one of jurisdiction. He will not be entitled at that stage (*i.e.*, before his public examination) to show that the charge of fraud is incorrect. 56 A. 496.

APPEAL.—An order passed for the public examination of an officer of the company is appealable. I.R. 1932 L. 658. An order refusing an application for inspection under sub-section (7) is also appealable. 96 I.C. 755=1926 L. 246.

SEC. 196: CL. (5): EXAMINATION, SCOPE OF.—When once the official liquidator has made out a *prima facie* case of fraud against an officer, the examination need not be confined to the particular fraud mentioned in the application of the liquidator. 56 A. 496=1933 A.L.J. 229=1933 A. 366.

SEC. 196: CL. (7).—The use of the words 'in civil proceedings' show that the statement of the person examined is *unconditionally* admissible in evidence in civil proceedings only; and that in criminal proceedings also against him it would be admissible *but only subject to* S. 132 of the Evidence Act. Such statements are not entirely excluded in criminal proceedings against him. 98 I.C. 599=1926 L. 385. Where the lending of monies on the shares of a banking Company is expressly prohibited by the Articles of Association, the allotment of shares in consideration of promissory notes executed by

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

197. The Court, at any time either before or after making a winding up

Power to arrest absconding contributory.

order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and moveable property to be seized and him and them to be safely kept until such time as the Court may order.

198. Any powers by this Act conferred on the Court shall be in addition to,

Saving of other sums.

and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

#### *Enforcement of and Appeal from Orders.*

199. All orders made by a Court under this Act may be enforced in the same

Power to enforce orders.

manner in which decrees of such Court made in any suit pending therein may be enforced.

200. Any order made by a Court for or in the course of the winding up of a

Order made in any Court to be enforced by other Courts.

company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

the shareholder is a contravention of the provisions of the Companies Act and contrary of the Articles of Association. It suggests fraud and would therefore justify the public examination of the Directors of the Company. 56 L.W. 648=A.I.R. 1944 Mad. 87=(1943) 2 M.L.J. 499.

**RIGHT TO INSPECT.**—The right of inspection is confined to the creditors and contributories and the parties to the proceedings which are pending. 96 I.C. 755=1926 L. 246.

**SEC. 199: POWER OF COURT.**—The company judge has jurisdiction to enforce compliance with the provisions of the Act, though there is no express power conferred on him by the Act. Thus, he may order a company to deliver a copy of the register of members to a shareholder even though there may be no express provision in the Companies Act, empowering him to do so. 1936 A. 568. The Court has also power to issue a mandatory injunction for enforcing compliance with the provisions of the Act, even though the proceedings are of a summary nature. 1936 A. 568.

**SECS. 199 AND 202.**—S. 202, clearly dif-

ferentiates between appeals against orders and applies against decision and S. 199 applies only to orders. 1945 Lah. 146 (F. B.). A decision to overrule preliminary objections and proceed with the case on the merits and a refusal to grant leave to proceed with a suit in another Court are decisions and not orders coming within the ambit of S. 199, and therefore the memo of appeal therefrom under S. 202 has to be stamped under Sch. II, Art. 11, Court-Fees Act. 1945 Comp.C. 60=A.I.R. 1945 Lah. 146 (F.B.).

**SEC. 200: EXECUTION OF ORDERS OF HIGH COURT IN DIFFERENT PROVINCE.**—An order made by the High Court of one province can be enforced in another province, only by the High Court of that province; and the order cannot be sent to a District Court of that province directly. 6 P. 132=8 Pat. L.T. 577; 53 M. 147=57 M.L.J. 723=1930 M. 74. Where an application is made by the official liquidator to the High Court for an order directing the District Court within whose jurisdiction the property of a contributory is situated, to enforce the payment order made by the High Court of

201. Where any order made by one Court is to be enforced by another

Mode of dealing with orders  
to be enforced by other Courts.

Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

202. Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the

Appeals from orders.

Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

another province the High Court cannot authorize the official liquidator to apply to the District Court concerned for enforcing the order. 38 M.L.J. 377=1927 M. 271. See contra, 54 I.C. 384. According to the Madras High Court, the proper procedure to be adopted on such an application would be to treat the order passed by another High Court in the same manner as a decree passed by this High Court; and to transfer it for execution to the District Court concerned. 25 L.W. 113.

SEC. 201: SCOPE.—S. 201 provides its own special procedure and has to be followed. The procedure prescribed by S. 39, C. P. Code, is not applicable; an order made by a Court under the Companies Act can be enforced by another Court on the production of a certified copy of the order in the Court which is asked to enforce it. It is not necessary that the order should be transferred by the Court which made it to the Court which is asked to enforce as in the case of decrees under S. 39, C. P. Code. Where special provisions is made in a special statute, that special provision excludes the operation of a general provision in the general law. I.L.R. (1942) Kar. 504=1943 Sind 89=1943 Comp. C. 83.

SEC. 202: SCOPE OF SECTION.—This section is wide enough to cover appeals against any order made in the matter of winding up of a company; provided such an order finally decides a dispute between the parties or deprives the appellant of an important and substantial right and is not a mere formal or an interlocutory order. 10 L. 806=1929 L. 707 (P.R.); 1926 L. 246; 130 I.C. 407=1931 L. 8. An order refusing copies of certain documents to the appellants was held appealable in 10 L. 806. So also in respect of an order passed for the examination of a director. 28 I.C. 280=40 P.R. 1915; and in respect of an order passed against the managing agents for their examination being conducted by the Official Liquidator through a counsel. 130 I.C. 407=1931 L. 8. The terms of S. 202, are wide enough to cover an order directing public examination of the directors of a Company in liquidation and hence such an order is appealable. 56 L.W. 648=1943 M.W.N. 716 (2)=A.I.R. 1944 Mad. 87=(1943) 2 M.L.J. 499. See also

1945 Lah. 146 (F.B.) cited under S. 199, *supra*.

RE-HEARING.—The re-hearing of any order made in the matter of winding up can only take place before a Court of appeal. But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the Court which made it. 1 L. 187=55 I.C. 820. See also 72 I.C. 106=1923 A. 429. A liquidating judge may recall a wrong order and rectify a mistake. 13 P.L.R. 1919.

RIGHT OF APPEAL.—There is no right of appeal under this section to persons who were neither auditors nor contributories of the company under liquidation, but who had only a prospective interest to be appointed as secretaries and agents if the company should be revived. Nor does it matter that they were the persons who originally propounded the scheme and were parties in the lower Court. 33 Bom.L.R. 1495. Where the directors of a company wish to prefer an appeal against an order directing the winding up, they should, notwithstanding the official liquidator's appointment in the meanwhile, prefer the appeal in the company's name. If a majority of the contributories concur in the filing of the appeal, the appeal is, in truth, that of the contributories. 38 C.W.N. 54=61 M.L.J. 788=55 M. 180 (P.C.). An appeal against a compulsory winding up order is not incompetent merely because the company as such has not been impleaded as a party, when it is in fact substantially represented before the Court by its director shareholders, all of whom are parties to the appeal. I.L.R. (1941) Lah. 680=1941 Lah. 134. The Official Liquidator is not a necessary party to an appeal against a compulsory winding up order, though it is desirable that he should be made a party in order to prevent possible collusion amongst interested parties and to ensure that all necessary facts are laid before the Court. I. L. R. (1941) Lah. 680=1941 Lah. 134. An order fixing the remuneration payable to an advocate for legal services performed by him to the Liquidators of the company is not an order made or given in the matter of the winding up of

*Voluntary Winding up.*

Circumstances in which company may be wound up voluntarily.

203. A company may be wound up voluntarily—

(1) when the period if (any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily ;

the company within the meaning of S. 202 of the Companies Act, and no appeal lies. It is of the nature of a ministerial order settling a dispute arising in the establishment employed under the Liquidators. 1. L.R. (1942) Kar. 496=A.I.R. 1943 Sind 82.

ONLY SINGLE APPEAL AGAINST ORDER OF DISTRICT JUDGE.—There is only one appeal against the decision or order of a District Judge, in cases which are within his ordinary original jurisdiction, and, hence, there can be only one appeal against any decision or order passed by him in the winding up. 34 P.R. 1913=22 I.C. 250.

APPEAL FROM ORDERS IN WINDING UP UNDER SUPERVISION OF COURT.—Under S. 225 orders passed in winding up *under supervision of Court* are placed on the same footing as orders passed in winding up *by the Court*. Hence an appeal is competent from such orders also. 158 I.C. 853=1935 L. 174.

APPEALS WERE HELD TO LIE IN THE CASE OF THE FOLLOWING ORDERS.—(i) An order refusing copies of certain documents to the appellants. 10 L. 806. (ii) An order passed for the examination of a director under S. 196. 28 I.A. 286=40 P.R. 1915. (iii) An order passed against the managing agents for their examination being conducted by the official liquidator through a counsel. 130 I.C. 407=1931 L. 8. (iv) An order passed under S. 237 directing the official liquidator to prosecute certain persons for criminal offence. 1931 C. 12=132 I.C. 474. (v) An order of Judge sitting on the original side of the High Court, declaring that certain proxies, used in the statutory meeting held under S. 153 for the purpose of approving a scheme of arrangement, were invalid, and that another meeting should be held. 10 R. 189=137 I.C. 444=1932 R. 96. (vi) An order rejecting a scheme. 10 R. 438=1932 R. 154; 10 R. 189; 27 Bom.L.R. 655. A creditor who is aggrieved by an order sanctioning a scheme could also apply to the Court for leave to appeal against the order. 41 C.W.N. 599=1937 Cal. 667. (vii) An order passed by the Court bringing or refusing to bring the name of a person as a contributory in the book. 41 P.L.R. 1915=28 I.C. 95. See also 79 P.R. 1919.

APPEALS WERE HELD NOT TO LIE IN THE CASE OF THE FOLLOWING ORDERS.—(i) The framing of issues by a Court in a petition for the winding up of the company is not an "order" and is not appealable. 16 I.C.

794. (ii) An order of the liquidating Judge reducing the remuneration of an employee of the official liquidators sanctioned by the predecessor of the Judge. 1 L. 73=55 I.C. 928.

REVISION.—Where the Registrar declared a certain company dissolved; and an application for restoration of the same was rejected; the order not being one passed in winding up proceedings was held open to revision only, and an appeal against the rejection was treated as a revision petition. 86 I.C. 652=1925 L. 443.

SECS. 202 AND 235.—The last part of S. 202 which lays down that 'appeals will be had in the same manner, etc.' merely regulates the procedure to be followed in the presentation and hearing of such appeals. Where on a Petition under S. 235, the High Court holds the application to be maintainable its order is not of a merely formal or ministerial character, but finally decides points between the parties relating to substantial and important rights and is appealable under Cl. 10 of the Letters Patent. 1938 Lah. 658.

SEC. 203: AMENDMENTS BY ACT XXII OF 1936.—In clause (3) the words "and the expression . . . of this section" have been inserted by the Amending Act. This is a mere consequential amendment.

NO VALID RESOLUTION FOR VOLUNTARY WINDING UP, POWER OF COURT.—Where there was no valid resolution for voluntary winding up and no valid ground for making a winding up order, but the Court passes the order for the compulsory winding up of the company on the ground that the majority of the shareholders at a meeting were in favour of the winding up, it was held that it did not constitute sufficient ground for the compulsory winding up order. 49 C. 399=69 I.C. 241.

DEFECTIVE EXTRAORDINARY RESOLUTION, EFFECT.—If an extraordinary resolution passed under the section does not provide that, by reason of its liabilities, the company cannot continue its business and that it is advisable to wind up, the defect is very serious. 35 P.R. 1917=36 I.C. 943. If any irregularity is discovered in the passing of the extraordinary resolution, after the supervision order was passed, the order may be discharged on application to the appellate Court. 36 I.C. 943. See also 115 I.C. 987=1934 R. 271 (an extraordinary resolution passed for voluntary winding up was con-

(2) if the company resolves by special resolution that the company be wound up voluntarily;

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up;

<sup>1</sup>[and the expression 'resolution for voluntarily winding up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section.]

Commencement of voluntary winding up.

204. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution <sup>2</sup>[for voluntarily winding up.]

Effect of voluntary winding up on status of company.

205. When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

206. (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by

Notice of resolution to wind up voluntarily.

the company within ten days of the passing of the same by advertisement in the official Gazette, and also in some newspaper (if any) circulating in the district

where the registered office of the company is situate.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

<sup>3</sup>[207. (1) Where it is proposed to wind up a company voluntarily, the

Declaration of solvency.

directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, <sup>4</sup>[\*] make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having

#### LEG. REF.

<sup>1</sup> These words were added by S. 103 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "authorising the winding-up" by S. 104, *ibid.*

<sup>3</sup> Sections 207 to 218 were substituted for the original Ss. 207 to 219 by S. 105 of Act XXII of 1936.

<sup>4</sup> The word "to" was omitted by S. 2 and Sch. I of Act XXXIV of 1939.

sidered invalid on the ground that the notice calling the general meeting at which the resolution was discussed did not specify the intention to propose the resolution as an extraordinary one, and an order for public examination under S. 196, held incompetent because the company was not in liquidation in accordance with law).

RESOLUTION FOR WINDING UP ALONG WITH OTHER *ultra vires* RESOLUTIONS—EFFECT OF.—A resolution passed properly for winding up voluntarily will not become inoperative

merely because other *ultra vires* resolutions also were passed at the same meeting. See 28 Bom.L.R. 987=1925 B. 49, where the resolution for voluntary winding up was mixed up with other matters relating to the agreement of amalgamation with another company.

SEC. 207: AMENDMENT BY ACT XXII OF 1936.—For Ss. 207 to 219 of the previous Act, the present Ss. 207, 208 to 208-E, 209 to 209-H, 210 to 218 have been substituted. S. 207 deals with the declaration as to the solvency of the company by the directors. Ss. 208 to 208-E lay down the provisions regulating the members' voluntary winding up. Ss. 209 to 209-H lay down the provisions regulating the creditors' voluntary winding up. Ss. 210 to 218 contain provisions common both to the members' as well as to the creditors' voluntary winding up. The present Ss. 207 to 218 are copied from Ss. 230 to 255 of the English Act, the only changes made in this Act being that (1) in S. 208-D, a time period of 90 days has been

so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up.

(2) Such declaration shall be supported by a report of the company's auditors on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in subsection (1) of this section.

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as 'a member's voluntary winding up,' and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditor's voluntary winding up.']

*Member's Voluntary Winding up.*

Provisions applicable to a member's voluntary winding up.

<sup>1</sup>[208. The provisions contained in sections 208-A to 208-E, both inclusive, shall apply in relation to a member's voluntary winding up.]

Power of company to appoint and fix remuneration of liquidators.

<sup>1</sup>208-A. (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof.]

<sup>1</sup>208-B. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the

Power to fill vacancy in office of liquidator.

company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

LEG. REF.

<sup>1</sup>See footnote 3, page 1559.

fixed, and in S. 215-E, the provisions of the corresponding S. 253 of the English Act, have been slightly expanded in form. Under the Act as it previously stood, no distinction was made between a members' voluntary winding up and a creditors' voluntary winding up. The distinction between them has been introduced by this amending Act. In the English Act also, this distinction was introduced only by the Consolidating Act of 1929. Companies going into voluntary liquidation may be either solvent or insolvent. In the former case the matters connected with the winding up are primarily the concern of the shareholders themselves, and in the latter case they are primarily the concern of the creditors. Hence it was thought necessary to introduce separate provisions regarding each of these cases. To enable creditors to secure control of any winding up in which the directors of the company cannot guarantee that the company will be solvent at the expiration of 3 years from the commencement of the winding up, Ss. 209 to 209-H have been enacted. Under the Act as it previously stood, the provisions relating to the participation and control by the creditors in the matter of the winding up proceedings were very ineffective, and in

practice, the shareholders usually retained control over a voluntary winding up, except where the creditors were so prejudiced by the voluntary winding up as to justify the Court in making an order for the winding up compulsorily or subject to the supervision of the Court. The present sections enable the creditors, in circumstances clearly affecting them, to have practically effective control of the voluntary winding up of the company. So also in the case of clearly solvent companies, the winding up proceedings being essentially in the interests of the members themselves the interference of the creditors would be unnecessary and sometimes will prove also inconvenient. It is the shareholders themselves that must have to appoint the liquidators and have the control of the liquidation proceedings. It is in view of these above-mentioned different considerations which will have to be taken into account in cases of clearly solvent companies and companies which cannot be said to be so, that different sections have been enacted in the case of each. No doubt there will be several matters which will be common to both, and in respect of these matters Ss. 210 to 218 have been enacted and made applicable both to the members' voluntary winding up and to the creditors' voluntary winding up.

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may on application by any contributory or by the continuing liquidators, be determined by the Court.]

<sup>1</sup>[208-C. (1) Where a company is proposed to be, or is in course of being wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

#### LEG. REF.

<sup>1</sup> Substituted by S. 105 of Act XXII of 1926 *Fide* footnote 3, page 1559.

SEC. 208-C: POWER OF LIQUIDATOR NOT TO BE RESTRICTED BY RESOLUTION.—Where at the time of the amalgamation of a company with another, the shareholders of the former passed a special resolution under this section appointing liquidators for the purpose of carrying the same into effect, under supervision of directors of both the companies, powers of directors of one of which were to continue for carrying agreement into effect, the resolution is illegal to the extent of the restrictions imposed on the statutory powers of the liquidators. 52 B. 571=55 I.A. 274=82 C.W.N. 1038=55 M. L.J. 697 (P.C.).

APPLICATION TO CREDITORS' VOLUNTARY WINDING UP.—The provisions of this section apply to the case of a creditors' voluntary winding up with the modification that the

liquidator in the latter case can exercise the powers only with the sanction either of the Court or of the Committee of Inspection. (*Fide* S. 209-F.)

RESOLUTION FOR AMALGAMATION.—A resolution for amalgamation even though it may be mixed up with other matters is not illegal and void. 26 Bom.L.R. 987=93 I.C. 580=1925 B. 49. It is sufficient if the resolution authorises the liquidator to adopt the agreement and to carry it into effect, and it is not necessary that the authorization should be in the words of this section. 1925 B. 49.

TRANSFER COMPANY MUST BE EMPOWERED BY ITS MEMORANDUM.—Every company has, under this section, a right of amalgamation with another company irrespective of its own constitution in the memorandum and articles, but the amalgamation will not bind the transferee company unless its constitution empowers it to effect such an acquisition. 52 B. 571 (P.C.).



(6) The provisions of the <sup>1</sup>[Arbitration Act, 1940] other than those restricting the applications of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.]

<sup>2</sup>[208-D. (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.]

<sup>2</sup>[208-E. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.

(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twenty-one days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and

#### LEG. REF.

<sup>1</sup> Substituted by Act XXXII of 1940.

<sup>2</sup> Substituted by S. 105 of Act XXII of 1936. *Id.* footnote 3, page 1559.

SEC. 208-E: MEANING OF TERMS.—The words “are fully wound up” whenever used in this section must not be construed so narrowly and so strictly as to bring about a deadlock in the proceedings. The insertion of the words “from the registration of the return” in Cl. (4) of the section can only mean that time runs from that date and not from the date of filing of the return before the registrar. If the registrar does

not do his duty, or the necessary preliminaries which would justify registration have not been observed and he insists on some thing more being done before he can take action, time does not begin to run until he does take such action. If the liquidator is not satisfied with the decision of the registrar, or if any contributory or creditor is dissatisfied with the conduct of the liquidator, either can go under S. 215, and claim that in the exercise of the powers conferred by that section the Court shall take whatever action may be necessary. 13 L. 190=1931 L. 500.

if that persons fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.]

*Creditor's voluntary winding up.*

Provisions applicable to a creditor's voluntary winding up.

<sup>1</sup>[209. The provisions contained in sections 209A to 209H, both inclusive, shall apply in relation to a creditor's voluntary winding up.]

<sup>1</sup>[209-A. (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next

Meeting of creditors. following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company.

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid; and

(b) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

(6) If default is made—

(a) by the company in complying with sub-sections (1) and (2);

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4);

the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty.]

<sup>1</sup>[209B. The creditors and the company at their respective meetings mentioned

LEG. REF.

<sup>1</sup> See footnote 3 on page 1559, *supra*.

SECS. 209 AND 209-A TO H: CREDITORS' VOLUNTARY WINDING UP—PROVISIONS NOT COMPLIED WITH—PROCEDURE TO BE FOLLOWED.

—S. 209 and Ss. 209-A to H of the Companies Act make provision for the procedure to be followed in a creditors' voluntary "winding up". If owing to an oversight these provisions have not been followed in the winding up, the best course to adopt will be for the Court to order that a meeting of the creditors should be held and that notices of the meeting should be sent by post to the creditors forthwith, and the company should cause notice of the meeting of the creditors to be advertised in the manner specified in S. 206 (1) for the publication of a notice under that sub-section, and the directors of the company should cause a full statement of the position of the company's affairs

together with a list of the creditors of the company and the estimated amount of their claim to be laid before such meeting of creditors, and the directors of the company should appoint one of their number to preside at the said meeting. At such meeting the creditors should consider the question of nomination of a liquidator under S. 209-B, and the appointment of a committee of inspection under S. 209-C, and other questions dealt with in Ss. 209-D to H. 1941 Cal. 30—I.L.R. (1940) 2 Cal. 325.

SEC. 209-A (1): OMISSION TO CONVENE CREDITORS' MEETING—IF VITIATES RESOLUTION WINDING UP COMPANY.—An omission to convene the creditors' meeting as provided by S. 209-A (1) of the Companies Act is only an irregularity which can be cured and not an illegality which vitiates the resolution winding up the company. 223 F.C. 52.

Appointment of liquidator. in section 209A may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator :

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.]

<sup>1</sup>[209-C. The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number :

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.]

<sup>1</sup>[209-D. (1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof.]

<sup>1</sup>[209-E. If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by or by the direction of, the Court, the creditors may fill the vacancy.

<sup>1</sup>[209-F. The provisions of section 208C shall apply in the case of a creditor's voluntary winding up as in the case of a member's voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.]

<sup>1</sup>[209-G. (1) In the event of the winding up continuing for more than one

#### LEG. REF.

<sup>1</sup> See footnote 3 on page 1559, *supra*.

SEC. 209-C: OBJECT OF COMMITTEE.—The Committee of inspection is intended to watch and supervise the proceedings of the liquidator. No member of the Committee

can directly or indirectly purchase any of the company's assets or derive any profit from any transaction arising out of the winding up, or receive out of the assets payments for services rendered or goods supplied to the liquidator. In *re Gallard*, (1896) 1 Q.B. 68.

Duty of liquidator to call meetings of company and of creditors at end of each year.

year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement on the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with the section, he shall be liable to a fine not exceeding one hundred rupees.]

[209-H. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted

and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

(2) Each such meeting shall be called by advertisement specifying the time, place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues :

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting, the liquidator shall in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall in respect of that meeting, be deemed to have been complied with.

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved :

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.]

#### *Members' or creditors' voluntary winding up.*

[210. The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary winding up whether a members' or a creditors' winding up.]

Provisions applicable to every voluntary winding up.

#### LEG. REF.

1 See footnote 3 on page 1559, *supra*.

SECS. 210 AND 211.—A shareholder applying for an order winding up a company is under no disability as compared with a contributory and he is under no obligation to

satisfy the Court that on a winding up there would be surplus assets. But in exercising its discretion in winding up a company on the petition of a shareholder, the Court constantly bears in mind that the internal management of the company is its own concern, and it is a much better judge of business

<sup>1</sup>[211. Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application shall unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.]

Powers and duties of liquidator in voluntary winding up.

<sup>1</sup>[212. (1) The liquidator may—

#### LEG. REF.

<sup>1</sup> See footnote 3 on page 1559, *supra*.

prospects of a trading venture than the Court can ever hope to be. If, therefore, the majority of the shareholders show confidence in the management of the company and have faith in its future prospects, the Court will rarely interfere. It is not right for the Court to intervene because one shareholder is dissatisfied. 44 Bom.L.R. 387=1942 Bom. 231. An applicant for winding up has got to make out a case for winding up on his petition, and he cannot be allowed to fish out a case by cross-examination of the deponents who have made affidavits on behalf of the company or by inspecting the accounts. 44 Bom.L.R. 387=A. I. R. 1942 Bom. 231.

SEC. 211: CREDITORS' RIGHT IN VOLUNTARY LIQUIDATION.—When a company goes into liquidation, though a voluntary one, the right of the creditor is only to take what he can take under the scheme of liquidation and nothing more. A creditor who obtains a decree against the company going into liquidation cannot recover the whole amount due under the decree but only a share of the decree in the terms of the scheme of liquidation. 118 I.C. 387=1930 L. 299; 1925 O. 483. Executing Court cannot stay or avoid execution proceedings and it is only the Court having jurisdiction under the Company Law that can order stay of execution and enable equal distribution of assets. 1931 C. 569. S. 171 of the Companies Act provides that when a winding up order has been made by Court, no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. S. 222 provides that in the case of winding up under the supervision of Court, any attachment, distress, or execution put in force without the leave of the Court against the estate or effects of the company after the commencement of the winding up shall be void. But no such corresponding provision is to be found in the case of 'voluntary winding-up'. It is no doubt laid down in S. 21 that the assets of the company in voluntary liquidation shall be applied in satisfaction of its liabilities *pari passu*. But this is intended for the guidance of the private liquidator as the Legislature did not like to leave him with an unlimited power so as to enable him

to give unfair or fraudulent preference to a particular creditor. This provision does not by itself oust the jurisdiction of any subordinate Court to continue execution against the assets of the company by any creditor, and the subordinate Court has no jurisdiction to dismiss an execution petition pending before it merely on the ground that the Company had gone into voluntary liquidation. If the liquidator is confronted with a decree which has to be satisfied out of the assets of a company before the distribution of the assets among the creditors he should apply under S. 215 of the Act to the Court for stay of any action, or execution against the company and unless such an order is passed the executing Court cannot refuse execution. 58 C. 913=35 C.W.N. 299=1931 C. 569; 38 A. 407=14 A.L.J. 513=36 I.C. 397. An Insurance Company governed by the new Insurance Act (IV of 1938) which came into force on 1st July, 1939, failed to obtain a certificate of registration within three months from the commencement of the Act and was obliged under S. 3 to stop carrying on its business from 1st October, 1939. Its directors were, however, endeavouring to bring the company into line with the Insurance Act, and set apart all contributions received after 30th September, 1939, in a suspense account, and opened a separate account in the names of the President and Secretary of the company. A question arose whether these sums could be claimed by the liquidator as part of the company's assets. *Held*, that they could not be, and that S. 211 of the Companies Act did not apply to these sums because they did not form part of the company's legitimate assets, and that as they had been wrongfully received and had not become mixed up with other funds, they must be refunded in tact to the contributors' less legitimate charges. As it was prohibited by S. 3 from receiving contributions, if it continued to receive these moneys in spite of this prohibition, it could not claim the moneys as its own. 223 I.C. 52.

COURT GENERALLY ORDERS STAY OF EXECUTION.—Even in cases of voluntary liquidation, the Court generally stays execution of the decree obtained against the company. To allow the execution to be proceeded with in such a case would be going against the provisions of this section. 131 I.C. 379=1931 A. 559.

SEC. 212: POWER OF LIQUIDATION.—The

(a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d), (e), (f) and (h) of section 179 to a liquidator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers ;

(b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given to the liquidator in a winding up by the Court ;

(c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories ;

(d) exercise the power of the Court of making calls ;

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two.]

Power of Court to appoint and remove liquidator in voluntary winding up.

<sup>1</sup>[213. (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator.

(2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.]

Notice by liquidator of his appointment.

<sup>1</sup>[214. (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.]

#### LEG. KFF.

<sup>1</sup> See footnote 3 on page 1559, *supra*.

powers of the liquidator in a voluntary winding up are more liberal than those of an official liquidator, inasmuch as he can exercise many of the powers mentioned in S. 179 of the Act without the sanction of the Court which the latter cannot do. He may also settle the list of contributories, make calls, summon meetings, and do several acts without reference to the Court at all.

**SUIT TO RECOVER CALLS—JURISDICTION.**—A suit brought by the liquidator for the recovery of calls in liquidation is one which can be entertained by the Court of a Subordinate Judge. Neither S. 187 nor S. 212 presents any bar. 9 Bom.L.R. 825.

**DUTIES OF LIQUIDATORS TO CREDITORS.**—The liquidator occupies more or less the position of a receiver in insolvency, and is entitled to ask the Court ordering liquidation, to go behind a judgment against the company, and to determine whether any particular debt in respect of which the judgment had

been obtained was binding on the company. It is not necessary for him to allege or prove fraud, and it is sufficient if he shows that there ought not to have been a judgment, e.g., that the mortgage on which an *ex parte* decree was obtained was one that the managing agents had no power to execute or that it is void against the liquidator for not having been registered under S. 109 of the Act. 34 Bom.L.R. 411=138 I.C. 442=1932 B 253.

**JOINT LIQUIDATORS.**—Where two persons are appointed liquidators jointly, the refusal of one of them to act renders abortive the resolution appointing them. 50 A. 419=266 A.L.J. 131=1928 A. 165.

**SEC. 214: NOTICE.**—When a person is appointed liquidator, however imperfect he may consider his appointment to be, he must carry out the duties or exercise the rights of the liquidator, and the filing of the notice of his appointment is one of such duties; and if he fails to do so, he becomes liable to the penalty provided in the section. 39 A. 412=39 I.C. 478=15 A.L.J. 346.

<sup>1</sup>[215. (1) Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.]

<sup>1</sup>[216. (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

#### LEG. REF.

<sup>1</sup>Sec footnote 3 on page 1559, *supra*.

SEC. 215: SCOPE OF SECTION.—The provisions of this section are mandatory. Where they are not complied with, parties cannot seek to enforce the transaction by invoking the doctrine of part performance. Where the original composition deed was modified at a meeting of the debenture-holders but it appeared that the resolution was not acceded to by 3/4 in number and value of the creditors, the resolution was held not binding on the creditors. 1930 A.L.J. 1157=1930 A. 59.

SEC. 216: SCOPE OF SECTION.—COURTS' POWERS TO DECLARE WINDING UP BAD.—S. 216 is exhaustive of the persons who are entitled to make applications and the Registrar of Joint Stock Companies has no *locus standi* to make an application to the Court. 42 Bom.L.R. 1031=I.L.R. (1941) Bom. 39=1941 Bom. 25. A creditor has no *locus standi* under S. 216 to ask for a declaration that the winding up is void. The powers of a Court under that section are strictly limited. The exercise of such powers must be, under the second sub-section, in cases which are just and beneficial, not only just and beneficial to the petitioner but just and beneficial to all parties. 162 I.C. 218=1936 P. 468. But a contrary view has been taken in Lahore High Court. *See* 1931 L. 500=131 I.C. 747, where it was held that the powers of Court described in this section are exactly the same as those of which the Court is seised in a case of compulsory liquidation as given in S. 194, and include the declaration of the *factum* of dissolution, and that the word "where" in this section was used to designate a class of cases rather than the stage of the proceedings at which the action is contemplated.

POWER TO ORDER PAYMENT OF CALLS.—The Liquidator may apply to the Court for an order directing the defaulting contributory to pay the unpaid calls, whether made by

himself or by the directors before the winding up. *Stone v. City and County Bank*, (1877) 3 C.P.D. 282 (A.C.) It is open to the alleged contributory to resist the call on the ground that his name was improperly included in the list of contributories, although he may not have raised the objection till then. 3 C.P.D. 282 (C.A.). This section does not take away the ordinary power of the liquidator to enforce calls by means of suits. 51 A. 406=1929 A.L.J. 103=1928 A. 675.

POWER TO ORDER PUBLIC EXAMINATION UNDER S. 196.—The liquidator may apply for the public examination of directors and other persons, provided for under S. 196 of the Act in the case of a winding up by Court. 44 L. 659=22 Bom.L.R. 219=55 I.C. 831.

NO POWER TO COURT TO DECLARE COURT AUCTION SALE INVALID.—When once an auction sale of the company's properties has been held by a competent Court in execution of a decree against the company, the liquidating Court has no power to declare the sale invalid and to set it aside at the instance of a liquidator in voluntary liquidation. 1935 L. 991.

POWER OF COURT TO STAY EXECUTION.—A purely voluntary winding up does not by itself prevent a person who holds a money decree against the company from taking execution proceedings against it, but under this section the Court has the power to stay the same, if it is satisfied that the exercise of such power will "be just and beneficial". The invariable practice of the Court is to stay execution of the decree unless there are very exceptional reasons for exercising its discretion otherwise. The reason is that the execution if followed would necessarily interfere with the distribution of the assets *pari passu*. The mere attachment of the properties of the company does not render the person a "secured creditor". Until the property is actually sold the position of the attaching creditor is not higher than that of



(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

Such application shall be made—

(a) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court, and

(b) if the attachment, distress or execution is levied or put into force in any other Court, to the Court having jurisdiction to wind up the company.

(3) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.]

<sup>1</sup>[217. All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority

Cost of voluntary winding up.

to all other claims.]

<sup>1</sup>[218. The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.]

Saving for rights of creditors and contributories.

<sup>1</sup>219.

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220. Where a company is being wound up voluntarily, and an order is made for winding up by the Court, the Court may, if it thinks

Power of Court to adopt proceedings to voluntary winding up.

fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

#### LEG. REF.

<sup>1</sup> See footnote 3 on page 1559, *supra*.

one who has a mere money claim against the judgment-debtor. 131 I.C. 379=1931 L. 589.

**JURISDICTION TO GRANT STAY.**—The High Court alone has jurisdiction to grant stay of execution of a decree obtained against the company before it went into a voluntary liquidation. 38 A. 407=14 A.L.J. 513=36 I.C. 397. So, where after the passing of a decree against the company, it went into voluntary liquidation, and the decree-holder subsequently applied to the lower Court for execution, and obtained the attachment of certain properties belonging to the company, an application for stay made to the *lower Court* by the liquidator was held to be incompetent. 58 C. 913=35 C. W.N. 299=1931 O. 569. But note now the amendment made in the section.

**APPEAL BY AGGRIEVED CREDITOR.**—An order depriving a creditor, who has a claim which has been duly proved and admitted by the liquidator, of the benefit of the winding up of the company, deprives him of a substantial and important right, and such an order is appealable. 31 C.W.N. 894=103 I.C. 659=1927 O. 689.

**SEC. 217.**—Where a mortgagee of the machinery of a company agreed to the liquidator selling the machinery without waiver of the security, on a question as to whether

the landlord of the premises was entitled to a priority in respect of the rent due, it was held that as the mortgagee had invoked the assistance of the liquidator he must bear the expenses incidental to the assistance he had received and that rent was payable in priority. 1938 A.M.L.J. 100.

**SEC. 218: SCOPE OF SECTION.**—In the absence of proof that the rights of the creditors or contributories will be prejudiced by the voluntary winding up the application for compulsory voluntary winding up must be dismissed. But the question whether the company should be allowed to go into voluntary liquidation or whether the Court should wind it compulsorily, depends upon the facts of each particular case. 1930 S. 71=119 I.C. 539. For the Court to order compulsory winding up it is necessary to show that the rights of creditors or contributories are prejudiced by reason of the voluntary winding up. 6 L. 340=89 I.C. 613=1925 L. 527. A creditor who would otherwise be entitled to a compulsory order for winding up may apply to the Court for such an order though the company is at the date of such application in the process of being wound up voluntarily. But a voluntary liquidator cannot seek to compulsorily wind up the company. I.L.R. (1938) All. 945=1938 A.L.J. 898=1938 All. 623.

**SEC. 219.**—The Amending Act, XXII of 1936, deleted the old Ss. 207 and 219 and

*Winding up subject to supervision of Court.*

221. When a company has by special or extraordinary resolution to wind up voluntarily, the Court may make an order that the Power to order winding up voluntarily winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

222. A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving Effect of petition for winding up subject to supervision. jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

223. The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters, relating to the wishes of creditors and contributories. the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

224. (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator. Power for Court to appoint or remove liquidators.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy, occasioned by the removal or by death or resignation.

225. (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by Effect of supervision order. the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings,

substituted in their place, the present Ss. 207 to 218.

SEC. 221: ORDER FOR SUPERVISION.—WHEN CAN BE MADE.—An order for supervision by the Court can be made only where there is a valid winding up of the company. Where the whole case of the petitioner is that the winding up proceedings are *ultra vires* and void, his petition cannot be treated as one for an order for supervision. 162 I.C. 218=1936 P. 468. Mere irregularity in the form of the petition is not sufficient ground for the Court but it is to be dealt with by the majority of the shareholders; and it will not justify an order for supervision under this section. 47 B. 915=25 Bom. L. R. 1083=1924 B. 102. The Courts will interfere only if the rights of the shareholders are infringed or if a case of fraud or *ultra vires*, is made out. 47 B. 915; 46 P.R. 1911=101 I.C. 515. In making order for supervision under this section, all transactions between the date of the presentation and the winding up order if done in the ordinary

course of business, will be confirmed by the Court. 59 M.L.J. 826=1930 M. 1012.

SEC. 222: OBJECT AND SCOPE OF SECTION.—The object of this section is to enable the Court to pass the necessary orders that all unsecured creditors may be paid *pari passu*. 54 B. 718=32 Bom.L.R. 953=1931 B. 2. This section is wide enough to cover appeals against any order made in the matter of winding up of the company, provided such an order finally decides a dispute between the parties and deprives the appellant of a substantial right and is not a mere formal or interlocutory order. 130 I.C. 407=1931 L. 8.

SEC. 225: SCOPE OF SECTION.—Under this section, the orders passed by the Court in winding up proceedings under supervision of Court, stand on the same footing as orders passed in winding up by Court and hence an appeal is competent from an order passed therein. 158 I.C. 853=1935 L. 174 (1).

be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

226. Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

#### Supplemental Provisions.

227. (1) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up shall be void.

Avoidance of transfers, &c., after commencement of winding up.

(2) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

SEC. 227: APPLICATION OF SECTION.—It is within the jurisdiction of the Court at any time after the transfer of the shares, to order that the transaction is a good one and should stand. It does not mean that the transfer without previous sanction should be necessarily void. Complete discretion is left with the Court. 1934 A.L.J. 195=1934 A. 161. If it is found that the Court has not used its discretion in a just and proper manner it is open to the appellate Court to interfere in appropriate cases and to prevent the working of injustice to the company by this section. 54 B. 718=32 Bom.L.R. 953=1931 B. 2.

SEC. 227 AND SEC. 57: PRESIDENCY TOWNS INSOLVENCY ACT—DISTINCTION—NOTICE—RELEVANCY.—The difference between S. 57, Presidency Towns Insolvency Act, and S. 227, Companies Act, is that while *bona fide* payments to creditors by an insolvent, subject to the provisions of the Insolvency Act are valid, payments to creditors of a company from the moment of the presentation of a winding up petition become void. While payments by an insolvent made *bona fide* to his creditors may be regarded as payments made in the ordinary course of business, payments by a company of debts existing at the time of the presentation of a petition for winding up, made after the presentation of the petition, cannot be so regarded. For the purposes of S. 227, it is immaterial whether the person making or receiving the payment had or did not have notice of the presentation of the petition for

winding up, whereas a person claiming the protection of S. 57, P. T. I. Act to show that the transaction was without notice of the presentation of any petition. I.L.R. (1939) Kar. 460=1939 Sind 196.

"UNLESS THE COURT OTHERWISE DIRECTS".—The Court, in the exercise of its discretion will not generally order the annulment of transaction *bona fide* entered into in the ordinary course of trade, and completed before the date of the winding up order, such as calls made or debentures issued *bona fide*, to avert the ruin of the company. 54 B. 718=32 Bom.L.R. 953=1931 B. 2; 59 M.L.J. 826=1930 M. 1912. And mere knowledge of the presentation of the petition is not necessarily conclusive to show want of *bona fides*. 54 B. 718. A petitioning creditor cannot utilize his petition, to gain pecuniary benefit to himself in the interval between the petition and the winding up order. 54 B. 718.

TRANSACTION IN FAVOR OF CREDITOR DIRECTOR.—A director of a company is a trustee for the company and is a trustee for the creditors of the company only to the extent of applying all the assets for the benefit of all the creditors so far as they will extend. If a director-creditor of the company knows that the company is in a state of insolvency, and obtains a hypothecation of the stock-in-trade and outstandings of the company and thereby obtains undue preference to other creditors, his transaction is tainted with fraud, and liable to be set aside. 40 C.W.N. 769.

228. In every winding up (subject in the case of insolvent companies to the

Debts of all descriptions application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

SEC. 227 (2): SCOPE OF.—Transactions made after the commencement of a winding up which a Court would validate under S. 227 (2), are transactions *bona fide* entered into by a company for the benefit of the company and those interested in the assets of the company for preserving the business of the company as a going concern and not to the detriment of other creditors. I.L.R. (1939) Kar. 460=1939 Sind 196. Where an insurance company makes payments between the commencement of the winding up and the date of the winding up order, to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by company to its creditors clearly amount to dispositions of property within the meaning of S. 227 (2) and are not only void but cannot be validated. I.L.R. (1939) Kar. 460=1939 Sind 196.

VALIDATION OF PAYMENTS—PRINCIPLES UPON WHICH COURTS SHOULD ACT.—As regards the validation of payments under S. 227 (2) the Court will usually validate payments made in good faith in the ordinary course of business. In deciding what are such payments, the principle to be kept in mind is that all creditors to whom money is due at the date of the petition for winding up, should be treated equally, with certain exceptions in favour of those who have priority under the express provisions of the Act. Where preferential payments are made to some creditors by the company or its officers, it is acting against this rule. Where on the other hand the business of the company is continued in good faith either because it is hoped that it may not be necessary eventually to wind up the company or because in the interests of all concerned it is better that the company should on being wound up be transferred as a going concern, it is necessary for the company to enter into various transactions and it would be impossible for it to do so if it was not able to make any transfers. 1940 A.L.J. 739=1940 All. 514=I.L.R. (1940) All. 730. See also 1939 Sind 196. Where during the pendency of winding up proceedings a Bank agrees to employ a cashier and to transfer his unsecured deposit with the Bank into a security deposit and does so transfer it, the whole transaction is void under S. 227 (2) as a disposition by the Company of its property made after commencement of winding up.

Inasmuch as the cashier obtained an undue advantage over his fellow creditors, the Court would not validate the disposition by giving it its sanction. I.L.R. (1942) A. 86=1942 A. 141.

SEC. 228: LIQUIDATOR'S POSITION AND DUTY.—The Official Receiver, and the official liquidator of an insolvent company, stand on the same footing. They are not the representatives of the insolvent, the individual or the company. On the one hand they represent the estate of the insolvent, and on the other hand they represent the interest of the whole body of creditors. The duty of the trustees in bankruptcy or the official liquidators is to distribute the assets of the insolvent, individual or the company, among such of their creditors as have a *just claim*. 49 A. 728=25 A.L.J. 450=1927 A. 426.

CLAIM BASED ON DECREE.—The decree that may be valid and binding on the insolvent is not necessarily valid or binding against the trustee in bankruptcy or the official liquidator. Under S. 34 (2) of the Provincial Insolvency Act, the debts have got to be "proved" by claimants before they can be entered in the schedule of creditors, and the same rule applies also in the liquidation of a company. Nobody has a right to claim more than what is *justifiably* due to him, on the mere ground that the insolvent, the individual or the representatives of an insolvent company had agreed to pay to the claimant more than what was justly and properly due to him. Liquidators are not the company nor the representatives of the company. The official liquidator is not bound to receive the decree as *conclusive evidence* of the liability of the company. Where there has been a genuine contest between a claimant or a creditor on the one hand and the company and the parties have fought out the case *bona fide*, it would not be open to the liquidator to re-open the case. But where the decree is found to rest on something less than a real trial on the merits of the case, the official liquidator would be justified in calling for independent proof of the claim based on it, *i.e.*, may ask for what has been called "the consideration for the judgment". So also in the case of compromise decrees, where the genuineness of the compromise is doubtful, the official liquidator may call for independent proof of the claim apart from the decree. 49 A. 728=25 A.L.J. 450=1927 A. 426.

229. In the winding up of an insolvent company the same rules shall prevail

Application of insolvency rules in winding up of insolvent companies. and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

SEC. 229: CONSTRUCTION OF SECTION.—The expression "rules . . . under the law of insolvency" in S. 229, should not be widened so as to include the whole "law of insolvency" but the expression should be narrowed so as to include only "rules" as given in S. 229. This section and S. 228 do not import all the provisions of the Provincial Insolvency Act, into company law, and in particular S. 28 (2) of the latter Act is not so imported. 160 I.C. 908=1936 Pesh. 57. But a different view has been taken by the Allahabad High Court. See 51 A. 695=1929 A.L.J. 811=1929 A. 353. (See also notes under S. 230, *infra*, as to the construction of this section and the different view, held by the Lahore and the Bombay High Courts on this point.) Where an assessment under S. 23 (4) of the Income-tax Act has been made in respect of a company and it had also become final as against the firm and the company subsequently goes into liquidation, the assessment cannot be re-opened ordinarily. There could be an interference with the assessment only, if there is reason to think that the assessment was vitiated by fraud. 16 Luck. 599=1941 O.W.N. 118=1941 Oudh. 260.

REMEDIES OPEN TO A SECURED CREDITOR.—It is not necessary for the secured creditor to prove his debt in liquidation. He may rely upon his security and proceed to realise his debt in the ordinary course of law. If after exhausting the security anything more remains to be paid to him, he may prove in liquidation for the deficient amount. Or, he may value his security without instituting a suit, and prove for the balance of the debt after deducting the assessed value. In this case, the liquidators may redeem the security at the value assessed; and when not redeemed, the secured creditor will not be allowed to prove for more than the balance, even when the security realises less than the assessed value. A third course also may be adopted by him, i.e., by surrendering his entire security and proving for the whole debt. 51 A. 695=1929 A.L.J. 811=1929 A. 353. A cheque was handed over to the Bombay Branch of the T. N. and Q. Bank by a company which had a current account with the Bank's branch at N in the Travancore State for collection and remission to the branch at N. The Bombay branch collected the cheque, but before it could send the amount to the branch at N, the Bank suspended payment and went into liquidation.

Held, that as the money had not got into the company's account at N, the Bank's position was that of an agent holding his principal's moneys and not that of debtor and creditor. Although the branches might be the agencies of one principal firm, they might be regarded as distinct trading bodies for certain special purposes of banking business. As the money never got to the branch at N, it belonged to the company and the company's money could not be used for paying the Bank's creditors. The liquidator was therefore bound to pay it over to the company. 55 L.W. 430=I.L.R. 1943 Mad. 187=A.I.R. 1943 Mad. 646=(1942) 2 M.L.J. 128.

ATTACHING CREDITOR NOT SECURED CREDITOR.—Attachment creates no charge in favour of the attaching creditor but it merely prevents and avoids alienation and confers no right on him. Hence he cannot be treated as a secured creditor. However it is open to him in the winding up to obtain the leave of the Court to continue his execution. 31 Bom.L.R. 1029=122 I.C. 836=1930 B. 16. See also 21 Pat. 287.

INTEREST, CLAIM TO, BY SECURED CREDITOR AFTER DATE OF LIQUIDATION.—A secured creditor can claim interest up to the date of payment, when he seeks to recover what is due to him from the proceeds of the sale of the secured property. But when such proceeds are insufficient to satisfy his entire claim, and he seeks to prove against the other property as an unsecured creditor, he must confine his claim to the principal and interest which have accrued up to the date of adjudication or liquidation, as the case may be, deducting therefrom the amount realised by the sale of the property. He will not be allowed to deduct the interest which has accrued due after liquidation, from the amount realised by the sale of the security in the first instance and afterwards apply the balance to the principal and interest due up to the date of liquidation and then to prove for the balance. 1930 R. 20=7 R. 514=120 I.C. 702; 1930 R. 47; 1922 L. 281.

INTEREST SUBSEQUENT TO WINDING UP re UNSECURED CREDITORS.—Where a company has been ordered to be wound up, interest on debts which carry interest ceases to run from the date of the winding up (i.e., under S. 168, from the time of the presentation of the petition for the winding up)

unless the assets are enough to pay all debts in full. Where the estate is insolvent nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, i.e., where there is a surplus. In the latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the company and the creditors in the ordinary way, i.e., by applying each dividend in the first place to the payment of interest due at the date of such dividend, and the surplus, if any, to the reduction of the principal. 32 L.W. 950=1930 M. 1012=59 M.L.J. 826. Where certain cash deposit is made with a Bank as security for the good behaviour of an employee, the amount is received by the bank on a specific understanding to be applied for a specific purpose and is trust money in the hands of the Bank and not assets of the Bank divisible among creditors. 1940 O.W.N. 1022. Where interest is payable on such deposits the agreement to pay interest could not destroy the character of trust moneys. Trust moneys could be followed so as to reach the assets of the bank from whatever source they might come. The assets of the bank coming into the hands of the Liquidator would have to be earmarked first of all to the discharge of the claim by the depositors. 47 L.W. 153=178 I.C. 428=1938 Mad. 651. See also 1939 M.W.N. 1069; 1940 Mad. 178; 1939 M.W.N. 1066; 53 L.W. 512=(1940) 2 M.L.J. 559=I.L.R. (1941) Mad. 125; 49 L.W. 181=1939 Mad. 337=(1939) 1 M.L.J. 209. Whenever money is paid by one person to another it can be said it is remitted for a specific purpose, e.g., when a buyer pays to a seller of goods or a hirer for the hire of an article; but because money is paid that does not *ipso facto* make the recipient a trustee. A trust would exist when a banker is to collect and remit, but not when he is to use and repay. 1941 M.W.N. 1067=(1941) 2 M.L.J. 910. Payment of arrears of premium to insurance company by assignee of policy for revival of lapsed policy—Condition as to production of medical certificate not fulfilled—Company ordered to be wound up before production—Assignee has no right to rank as preferential creditor—Trust not created. 1941 M.W.N. 1067=(1941) 2 M.L.J. 910.

**CROSS-CLAIMS AND SET-OFF.**—Though a debt due by a company is not presently payable, it can be set-off against money owing to the company in liquidation. If a debtor of a company takes an assignment of a debt due by the company, before it goes into liquidation, a set-off of the one against the other can be allowed in liquidation proceedings, and it would not amount to a fraudulent preference. 50 L.W. 759=1940 Mad. 157. A debtor of an insolvent company in

respect of whose debt there is a surety is entitled to set-off against the money owing by the debtor to the company, moneys due to the debtor from the company, and a surety is entitled to set-off in respect of his obligation to the company moneys owing to him from the company. A debtor having a cross-claim which can be set-off against the company does not lose that right because the company has obtained a safeguard by a surety. The moneys due to the surety on the one hand and from him to the company on the other in respect of the surety debt, are mutual dealings, and he has the right to set-off against his indebtedness to the company the moneys due to him. Both the debtor and the surety who are under an obligation to pay moneys to the company but who themselves are creditors of the company may therefore set-off one debt against the other. 1939 M.W.N. 1231=1940 Mad. 266; 1941 Mad. 622=(1941) 1 M.L.J. 818. Where a person agreed to supply cotton to a company's mill for being spun into yarn and to advance sums of money for various expenses and the arrangement was that the creditor should deduct his advances from the spinning charges and the company was later on wound up, it was held, that the liquidators can recover only if the balance on such accounting is in their favour. 1940 A.L.J. 626=1940 All. 490. The effect of S. 3 of Limitation Act is to bring about the automatic dismissal of suits, founded upon causes of action which are time barred. It is only the remedy that is destroyed, but the debt remains. Such a debt can be set-off by a liquidator in winding up proceedings against debts by the company to the debtor. The right of set-off exercisable in winding up proceedings is distinguishable from the set-off provided for under the C.P. Code, O. 8, R. 6; for the condition of being legally recoverable does not attach. I.L.R. (1941) All. 415=1941 All. 278. If a debt is incurred by the members of a partnership they are jointly and severally liable. If A and B, members of a firm, sue C, C cannot set-off a debt due by A alone, whereas if C sues A and B, A can set-off a debt due by C. Where the liability of the partners is joint and several in a claim to enforce that joint and several liability, it is open to the partners to set-off a debt due to them. The rule of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties, because the principle is wider. 53 L.W. 560=1941 M.W.N. 358=1941 Mad. 654. It is no doubt true that where there is an amount due to a bank payable by A in his individual account, and an amount due by the bank payable to A and B in their joint account, the two accounts cannot be set-off; but if it could be shown that, though the account is in the name of A and B, A is solely entitled to the amount, a set-off has always been allowed.



Preferential payments.

230. (1) In a winding up there shall be paid in priority to all other debts—

(a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date ;

Whether the property belongs solely to A can be found on evidence. 51 L.W. 680= 1940 Mad. 436=(1940) 1 M.L.J. 115.

**SECURITY GIVEN BY THIRD PARTY TO BANK IN SHAPE OF FIXED DEPOSIT IN BANK—RIGHT TO CLAIM SET-OFF.**—There can be no set off of claims under S. 229 of the Companies Act when there are no mutual dealings. A Bank lent Rs. 2,000 to the applicant on a promissory note. As the bank was not willing to lend without security, S, the mother-in-law, gave as security a sum of Rs. 4,300 which she had in fixed deposit in the Bank along with a letter authorising the Bank to set-off the whole or any portion of the said deposit and interest accrued thereon towards the loan granted to the applicant. Before the fixed deposit matured, the Bank went into liquidation and the applicant claimed to set-off the amount due by the Bank to S against the amount due by him. S also filed an affidavit expressing her willingness to the set-off. *Held*, (1) that there were no mutual dealings in the case which would entitle the applicant to claim a set-off under S. 229, Companies Act; (2) that though the Bank had a right to set-off, the applicant could not say that he had a right to claim a set-off; (3) that the Bank should adjust the dividend payable under the deposit receipt towards the amount due and recover only the balance. 1941 Mad. 622=(1941) 1 M.L.J. 818. On a contention that a charge in respect of certain trust monies extends only to the assets in the hands of a Bank on the date of its liquidation and that the subsequent realisations of assets of the Bank were replenishments of the Bank's funds, but not necessarily of trust funds, it was held that where the subsequent realisations are only the previously existing assets changed into a different form, and not fresh funds which were not part of the previous assets, the charge would extend to those realizations also. 1940 O. W.N. 1022. If a security deposit made by an employee or by a selling agent of a company can be regarded as impressed with a trust, the depositor would, on the liquidation of assets of the Bank were replenishments get it back from the assets. Otherwise the relation would be that of creditor and debtor, and the former would have no preference. Where there is a written contract, the question would have to be decided on a construction of that instrument. The money would be regarded as trust money, unless

there are terms creating relationship of creditor and debtor. The mere stipulation for payment of interest on the deposit money, or a right given in certain contingencies to liquidate its claim from the deposit would not establish the relationship of creditor and debtor. If it is trust money the right of the depositor would not be affected simply because it has not been kept by the company as an ear-marked fund but has been mixed up with other funds of the company. I.L.R. (1943) 1 Cal. 813=76 C.L.J. 74=47 C.W. N. 245=A.I.R. 1943 Cal. 105. *See also* 1942 All. 119.

**SECS. 229 AND 230: SCOPE—CROWN DEBTS—PRIORITY—IF EXTENDS TO TRADE DEBTS.**—The provisions of S. 49 of the Presidency Towns Insolvency Act are not incorporated by S. 229 of the Companies Act and the priority of Crown debts in winding up proceedings is limited to those specifically mentioned in S. 230 of that Act. Priority regarding Crown debts does not extend to trade debts payable to the Crown. 41 C.W.N. 458=I.L.R. (1937) 1 Cal. 684. *See also* 1931 L. 351. It is not in accordance with justice, equity and good conscience to apply the rule enunciated in (1899) 2 Q.B.D. 145, to India even if that case be regarded as correctly decided in accordance with English law. I.L.R. (1943) Lah. 706. A liquidation Court can in proper cases go behind assessments though the latter are *prima facie* evidence that certain income was earned and that an amount of tax is due. I.L.R. (1943) Lah. 706. The onus of proving that the assessment does not represent the real taxable income rests, however, on the liquidator. I.L.R. (1943) Lah. 706=A.I.R. 1943 Lah. 228 (S.B.).

**SEC. 230: AMENDMENT BY ACT XXII OF 1936.**—It was thought inequitable to treat compensation payable to workmen under the Workmen's Compensation Act, provident fund, pension fund, gratuity, and other similar funds for the welfare of the employees of the company, as ordinary debts provable in the winding up; and hence this amendment gives them priority as under the English law. Under S. 137, if the Registrar finds anything unsatisfactory in the conduct of the company, he may report to the local Government; and the Government may appoint inspectors to investigate and report under S. 138 (iv). This investigation being in the interests of the company, it is proper that the expenses of the investigation should be not only borne by the company but also



that preference should be given to payment thereof over the other liabilities of the company. Accordingly, this section and S. 141, have been amended. S. 141 as now amended provides for the payment of the expenses out of the assets of the company and for their recovery as an arrear of land revenue, and this section (S. 230), gives priority to them.

**CONSTRUCTION AND SCOPE OF Ss. 229 AND 230.**—S. 229 makes the rules of insolvency law applicable as far as may be in respect of winding up proceedings; where, however, there is a conflict between the Companies Act and the Insolvency Act the provisions of the Companies Act should be given effect to. Where the Local Government claimed priority in respect of the amount spent by it for the purpose of investigation of the affairs of a Bank S. 141 (3) and the official liquidator objector, it was held that even if the amount should be deemed as a Crown debt it did not come under S. 230, and was not entitled to priority. 12 L. 678 = 1931 L. 351. *See also* 41 C.W.N. 458. The principle of the above ruling will still hold good, although the actual decision may not be correct in view of the amendment. But *see* 29 Bom.L.R. 1446 = 106 I.C. 27 = 1927 B. 606, has taken a different view in which the Secretary of State, as a judgment creditor of a company in liquidation was given priority in respect of a debt arising out of certain trade or commercial dealings between him and the company. The legislature in amending Ss. 141 and 230 of this Act, appears to have impliedly accepted the correctness of the view of the Lahore Court. *See also* 1936 Pesh. 57 = 160 I.C. 908, which puts a narrow construction on S. 229, and 51 A. 695 = 1929 A.L.J. 811 = 1929 A. 352, which takes a contrary view. The Patna High Court also has taken a view similar to that of Lahore, and has held that the Crown was not entitled to any preferential claim in respect of a decree obtained by it in certificate proceedings under S. 20 of the Bihar and Orissa State Aid to Industries Act, 1923. *Vide* 134 I.C. 429 = 1932 P. 1. The income-tax which does not become due and payable until after the winding up order has been made is not a debt for which priority can be claimed. I.L.R. (1943) Lah. 706 = 46 P.L.R. 1 = A.I.R. 1943 Lah. 228 (S.B.).

**COSTS OF SUCCESSFUL LITIGANT AGAINST COMPANY—PRIORITY.**—A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank *pari passu* as regards the fund available for the discharge of their debts. 43 P.L.R. 648 = 1941 Comp.C. 294. Where a foreign company

is wound up in more jurisdictions than one, the law is that the Court of each jurisdiction will be governed by the forensic rules which govern the conduct of its own liquidation. S. 230 (1) (a) of the Act, as amended in 1936 is a forensic rule in this sense and ought to be applied in the matter of winding up of a foreign company which is an unregistered company under the Act, and that provision would therefore apply to the case of a sum due to any employee from the provident fund account maintained by the company. Where a provident fund is established for the benefit of the employees subscription to which is compulsory, and it is clear from the rules of the fund that the fund is held for a specific purpose, i.e., for payment to the employees or their legal representatives on the termination of their service, that fund is a trust fund and the relationship between the Bank and the employee is that of a trustee and *cestui que trust* and not that of a debtor and creditor. The fact that in certain contingencies the employee may not be paid the amount or the company may have a beneficial interest in the said moneys does not make the fund any the less a trust fund. The employees are therefore entitled in the winding up of the company, to be paid in full the amounts standing to their credit. 1938 M.W.N. 1332 = 1939 Mad. 352. *See also* 1940 Mad. 184; 1939 M.W.N. 1069.

**SEC. 230 (1) (b) AND (2) (b): SALARY OF EMPLOYEE—PRIORITY OVER FLOATING CHARGE.** On the winding up of a company an employee is, by virtue of S. 230 (1) (b) and (2) (b) entitled, in respect of salary to the extent of Rs. 1,000, to priority of payment as against the holder of a floating charge created by a debenture over the book debts of the company. 1941 Mad. 586 = (1941) 1 M.L.J. 577. *See also* 1938 All. 609. The managing agents of a company deposited in the general accounts of the company a sum of money as security for the fulfilment of their obligations under the agreement appointing them. They were to get interest on it, and to have a second charge on the machinery and other assets of the company. Winding up of the company was ordered. The managing agents claimed that their deposit was a trust fund and should be returned to them. In negativing such contention it was held that the fair test whether such a sum of money was to be held as a trust fund or not was to ask whether, in the circumstances, it was intended that it should remain a segregated fund, or whether it should, on payment, become the property of the company and be compensated for by the company's express or implied covenant to repay it. It was held that the circumstances that it passed into the general assets of the company and was utilised by them for their general expenses and that interest was to be paid on it and that it was to be a second charge on the machinery, etc., of the company, clearly

(b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant; <sup>1</sup>[\* \*]

(c) all wages of any labourer or workmen, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date;

<sup>2</sup>[(d) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company;

<sup>2</sup>[(e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and]

<sup>2</sup>[(f) the expenses of any investigation held in pursuance of clause (iv) of section 138 of this Act].

(2) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

#### LEG. REF.

<sup>1</sup> The word "and" was omitted by S. 106 of Act XXII of 1936.

<sup>2</sup> These clauses were added, *ibid.*

indicated that it was never intended to be kept aside in trust for the managing agents. I.L.R. (1942) A. 242=1942 A.L.J. 75 =A.I.R. 1942 A. 119 (F.B.). See also 1943 Cal. 105=47 C.W.N. 245.

REVENUE, MEANING OF.—S. 230 (1) (a).—If the section had read "all taxes cesses, rates and other revenue" the word "revenue" will have to be read *ejusdem generis*, with the preceding words. But in this section "revenue" comes first, and therefore it must not necessarily be taken to be *ejusdem generis* with the words that come after it. Hence the word in this section means only income. The rent of the Government telephone lines and also the charge for trunk calls is the income of the Government and therefore must be taken to be "revenue" within the meaning of S. 230 (a). 53 A. 92=1931 A.L.J. 24=1930 A. 884. Where selling agents deposited with a company certain amount, which was to carry interest and which was to be re-paid on the termination of the period and such persons applied for the return as per their agreement and not succeeding in getting it applied for the winding up of the company and contended that they are entitled to preferential payment, it was held that the agreement between parties did not create a trust or any other fiduciary relationship and the selling agents were not entitled to any preferential payment. I.L.R. (1938) All. 896=1938 A.L.J. 820 =1938 All. 574.

SEC. 230 (1) (c) AND (2): WORKMEN'S WAGES—RULE OF PRIORITY AS TO—EXTENT.—Under the provisions of S. 230 (1) (c) and

(2) the wages of workmen have a priority of claim over the claims of debenture-holders under any floating charge created by the company. I.L.R. (1938) All. 869=1938 All. 609. See also (1941) 1 M.L.J. 577.

CHIT FUND—PRIZE WINNER—SECURITY—POSITION OF.—The principle in equity that a creditor is not entitled to recover the debt for which security has been given when he is not in a position to return the security applies when the debtor and the person giving the security are the same person. Where the holder of a chit in a chit fund conducted by a company bids the chit and gets payment of the prize money on getting other persons to give their own non-prized tickets in the chit fund as security for the future subscriptions payable by the bidder, and the company thereafter goes into liquidation, it is not open to the bidder who has committed default in payment of future instalments to claim a set-off as against the amounts due by him the amounts due to the sureties under their tickets, which the company holds as security, though it has gone into liquidation. 50 L.W. 306=1939 Mad. 915=(1939) 2 M. L.J. 325. See also 1939 M.W.N. 1193.

COMMENCEMENT OF WINDING UP.—The date of the commencement of the winding up in the case of a compulsory winding up which has been preceded by a voluntary winding up is the date of the voluntary winding up. 1934 A.L.J. 476=147 I.C. 332=1934 A. 114.

SEC. 230 (1) (e): APPLICABILITY—CONDITIONS.—The condition precedent to the applicability of S. 230 (1) (e), which was enacted by the Act II of 1936 and came into force on 15-1-1937, is that the employee must be an employee of the company on the date of the winding up of the company. It is immaterial when he entered service. There-

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof :

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order ; and

(b) in any other case, the date of the commencement of the winding up.

<sup>1</sup>[230-A. (1) Where any part of the property of a company which is being

Disclaimer of property. wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property :

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and in the case of a contract, if the liquidator, after such an application as aforesaid does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it.

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 107 of Act XXII of 1936.

is no distinction between employees entering service before 15—1—1937, and those entering service after that date. 1938 M.W.N. 1332—1939 Mad. 352. Crown debts—Preference in the winding. See (1946) F.L.J.

29—(1946) 1 M.L.J. 415 (F.C.).

SEC. 230-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly inserted. This gives the liquidator power, corresponding to that of a trustee in bankruptcy, to disclaim land burdened with covenants, unprofitable contracts and property which is unsaleable. Similar provision is contained in S. 267 of the English Act.

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose :

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee except upon the terms of making that person—

(a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up ; or

(b) if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date ;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no reason claiming under the company who is willing to accept an order upon such terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up.]

231. (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed,

SEC. 230-A (5) APPLICATION FOR RESCINDING OF CONTRACT.—Under S. 230-A (5), the Court is given a discretion to make an order rescinding a contract made by a person with a company prior to the winding up on his application to the Court. If the contract has already been rescinded, an application will not lie. 52 L.W. 635=(1940) M.W.N. 1077=(1940) 2 M.L.J. 697.

SEC. 231: PURCHASE BETWEEN WINDING UP APPLICATION AND THE ORDER.—Where the company has contracted to purchase goods between the date of the presentation of the petition for winding up and the winding up order, and has actually taken delivery of these goods, the Court will confirm the transaction if the goods were purchased by the company in the ordinary course of business. 1930 M. 1012=59 M.L.J. 826.

TITLE OF THIRD PARTIES.—A winding up Court cannot take cognizance of and adjudicate on the title of third parties except for the limited purpose mentioned in this section, and S. 232, and if it is necessary, the liquidators must have recourse to regular suits. 51 A. 695=1929 A.L.J. 811=1929 A. 353. The official liquidator was held not entitled to a summary order for refund of the money raised by a creditor of the company before the order for winding up was passed but after the Bank had passed a resolution stopping payment of debts; and he was referred to a regular suit to recover the amount. 26 S.L.R. 102=1922 Q. 106. Where a voluntary winding up is followed by a compulsory winding up by the Court, the former is superseded on account of the inconsistency between the provisions which re-

in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

232. (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects <sup>1</sup>[or any sale held without leave of the Court of any of the properties] of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by <sup>2</sup>[the Crown].

233. Where a company is being wound up a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five percent. per annum.

234. (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them :

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 108 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "the Government" by A.O., 1937.

late to the two forms of winding up. In such a case the crucial date for determining the period of three months under S. 54 of the Provincial Insolvency Act, is the date of the presentation of the petition to the Court for winding up. The presentation of the petition is the act of insolvency and not the prior resolution of the company for voluntary winding up. 55 L.W. 731=1942 M.W.N. 671=A.I.R. 1943 Mad. 54=(1942) 2 M. L.J. 583=I.L.R. (1943) Mad. 353.

SEC. 232: AMENDMENT BY ACT XXII OF 1936.—It was held in 43 A. 433 that the section as it stood then did not apply to sales of any property held after the commencement of the winding up. The real object of the section being to protect the properties of the company in liquidation, the construction put upon it by the Allahabad Court to some extent frustrated the object. With a view to render the section clear and to have the matter of "sales" also expressly included in the section, the present amendment has been made. 43 A. 433 is no longer good law.

APPLICABILITY OF SECTION.—The provisions of this section are applicable only to two kinds of winding up, viz., either by the Court or subject to its supervision, and they do not apply to a case of voluntary

winding-up S 171 of the Act cannot be invoked to apply to a case of voluntary winding up as that section is contained in a chapter specifically headed "*Winding up by the Court*". Hence any attachment, distress or execution put in force against a company without the leave of the Court after a *voluntary winding up* shall not *ipso facto* put an end to the attachment already in force. This is also in accordance with the English law. 1924 O. 406=79 I.C. 968. See also 38 A. 407=36 I.C. 397=14 A.L.J. 513. As to the meaning of the term "*put in force*", see 43 A. 433=19 A.L.J. 262.

"EXECUTION SALE AFTER WINDING UP.—A sale of the assets of a company after the winding up order, in execution of a decree passed before the order, without the permission of the Court, is voidable at the instance of the liquidator. 2 P.L.J. 77=38 I.C. 91. A contrary view was taken in 43 A. 433; but now the Act has been amended, and 43 A. 433 will no longer be good law on this point.

SEC. 233: FLOATING SECURITY.—A floating security is not a future security or a specific security; and it is a present security which presently affects the assets of the company expressed to be included in it. 50 B. 547=28 Bom.L.R. 689=1926 B. 427.

SEC. 234: POWER OF LIQUIDATOR TO REFER TO ARBITRATION.—The powers of liquidators as regards reference of disputes to arbitration are not co-extensive with the powers of directors or managers of a living company.

(i) pay any classes of creditors in full ;  
 (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, to present or future whereby the company may be rendered liable ;

(iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future certain or contingent subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

235. (1) Where, in the course of winding up a company, it appears that any

Power of Court to assess damages against delinquent directors, etc.

person, who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for

any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory [made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer], examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

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#### LEG. REF.

<sup>1</sup> These words were inserted by S. 109 of Act XXII of 1936.

<sup>2</sup> Sub-S. (3) was omitted, *ibid*.

50 A. 867=26 A.L.J. 10=1928 A. 553. A liquidator may, with the sanction of the Court, compromise a debt due to the company in liquidation. But the Court has no jurisdiction to compel an unwilling liquidator to compromise such debt. I.L.R. 1939 Lah. 324=1939 Lah. 497.

**CREDITORS.**—The creditors referred to in S. 230 of the Act are persons entitled to priority under the statute but the Court has under S. 234 a discretion to order payment in full to any class of creditors other than those referred to in S. 230. 1936 O.W.N. 539=163 I.C. 194.

**COMPROMISE.**—Under S. 234, a winding up Court has power to pass a consent order and if such order provides for execution against a guarantor, the Court has jurisdiction to enforce the order by execution. It is not permissible to call into question the correctness of the decisions of the Court in a separate suit. 46 C.W.N. 98. Sanction by extraordinary resolution is necessary in order that a compromise between a liquidator of a company and contributory should

bind the liquidator. 4 L. 239=77 I.C. 338=1924 L. 149. See also 71 I.C. 724=1923 L. 85.

**TRUST MONIES—DISAPPEARANCE—CLAIM ENTERED AS PREFERENTIAL CLAIM UNDER S. 234.—EFFECT.**—Trust monies are entirely outside the liquidation and do not vest in the liquidator as assets. Trust monies never become assets of the company. Where certain G. P. Notes were deposited in a Bank as security for the good conduct of an employee and on liquidation, it was found that the notes in question were not traceable but the liquidator had entered the name of the depositor in the list of preferential claims under S. 234, it was held that it amounted to an admission that the proceeds of those notes were included in the Bank's moneys. 1941 Oudh 126=1940 O.W.N. 1022. On this point see also (1940) 2 M.L.J. 559; 1940 Mad. 184; 1939 M.W.N. 1066; 1939 M.W.N. 1069.

**SEC. 235: AMENDMENT BY ACT XXII OF 1936.**—Sub-section (3) which has been repealed by the Amending Act XXII of 1936, made the limitation period for a suit provided in the Limitation Act applicable to an application against the delinquent directors, etc., made under this section, i.e., the application had to be made within 3 years from



the date of delinquency of the directors, etc. The consequence of this was that the delinquent directors were enabled to evade their civil liability in many cases on the ground of limitation. As a matter of fact, liquidation proceedings are always prolonged and it will not be easy for a liquidator to bring home the liability of directors and officers. The trouble taken practically became waste, so far as the recovery of the moneys from the directors is concerned. As an instance in point, 54 M. 153 may be cited. In order to avoid this unfortunate result, the present amendment has deleted the old sub-section (3), and has inserted the words "made within three years, etc." in sub-section (1). Now the limitation for an application under this section will be 3 years from the date of the appointment of the liquidator, and not as it was formerly, three years from the date of the commission of the offence by the directors, etc. The three years' period provided in this section gives a reasonable and practically sufficient time to the liquidator to determine as to the liabilities of the directors, etc., and to file, if necessary, an application under this section.

**CONSTRUCTION.**—This section has been copied from the English statute and must have the same meaning as in the parent statute. 8 L. 549=1926 L. 624. A representative of an executor can be brought within the purview of this section, only if he were himself capable of being defined or described by any of the words used therein. (*Ibid.*) S. 235 cannot be applied against the personal representatives of a deceased liquidator. It is concerned only with an inquiry into the conduct of the officers of the company in relation to the company's property; it was never intended to involve the Court on an application under the section in an inquiry relating to the estate of a deceased person. Where pending proceedings against a liquidator under S. 235 for misfeasance the liquidator dies, such proceedings cannot be continued against his legal representatives. I.L.R. (1944) Bom. 284=46 Bom.L.R. 391=A.I.R. 1944 Bom. 193. Where a director of a company signed a prospectus without caring to ascertain what the antecedents of the other directors were or how the company was going to be worked or who the partners of the firm of managing agents were, but nearly 12 days before the declaration under S. 103 of the Act was sent to the Registrar of Joint Stock Companies and before the company commenced business he resigned. *Held*, that in the circumstances it could not be said that he was guilty of any misfeasance by reason of which any pecuniary loss was sustained by the company. 55 L.W. 165=A.I.R. 1942 Mad. 365=(1942) 1 M.L.J. 207. Where after the amendment of S. 235 liquidation proceedings are started, the official liquidators are entitled to have the conduct of any promoter, director or manager or officer of

the company concerned examined under that section and to claim compensation for the wrongful act of any such person, proved as a result of such inquiry, notwithstanding that a cause of action on the act would in a suit by the company itself would have been barred. 222 I.C. 148=1946 A.W.R. (H.C.) 21. A proceeding under S. 235 against a director of a company cannot be continued against his heirs after his death during the proceedings. There is nothing in S. 198 of the Act to indicate that the powers of the Court with regard to the estate of a contributory or a debtor can be exercised in a summary proceeding under S. 235 of the Act. 59 L.W. 38=1946 M.W.N. 74 (1)=(1946) 1 M.L.J. 53. *See also* 1938 All. L.J. 1002. The Court should not make all directors jointly and severally liable for all acts of misfeasance without finding which directors are responsible for the various acts charged; and the order should be in respect of each act of misfeasance, and also only against those who are responsible for that act. 29 C. 688. A person who merely signs the memorandum of association and takes shares, but takes no part in the formation of the company does not become a promoter of the company; nor does the fact that the money paid by him for his shares is utilized in the formation of the company make him a promoter. 46 L.W. 887=(1937) 2 M.L.J. 820.

**SCOPE AND OBJECT OF SECTION.**—*See* 1938 Jah. 638 cited under S. 202 *supra*. This section is merely a procedural one and creates no new offence and gives no new rights. It only provides a summary and efficient remedy which apart from the section might have been enforced by the ordinary jurisdiction of the Court. 54 B. 226=32 Bom. L.R. 232=1930 B. 572; 54 M. 153=1931 M. 58=60 M.L.J. 280; 55 A. 912=1933 A.L.J. 1203=1933 A. 789 (F.B.). The summary procedure contained in this section is not applicable to every claim which the company may have against any of its officers, and can be resorted to only when such claims are in the nature of misfeasance or breach of trust in the performance of their duties. *Re Etic, Ltd.*, 1928 Ch. 861=97 L.J. Ch. 460; 5 L. 461=85 I.C. 126=1925 L. 194. Prejudice to the interest of the company by the acts of the directors must be shown before taking any proceedings against them under this section. 23 P.L.R. 1917=39 I.C. 769; 3 A.W.R. 222. Proceedings under this section are domestic proceedings between the company and its officers, and the orders are passed in a special jurisdiction and hence, orders in such proceedings do not bar a suit against a third party whose wrongful act has caused loss to the company. 159 I.C. 977=1935 A. 995. An application under this section is a representative proceeding filed on behalf of a class of persons and not



to enforce any personal remedy or to obtain any exclusive benefit. 55 A. 912=1933 A. 789 (F.B.). If the directors enter into a contract and make a payment on it during the winding up proceedings, they do so at their peril, and excepting those cases in which it would be held that the payment was necessary for the winding up or for the carrying on of the business of the company pending the hearing of the winding up petition, the directors must be aware that there is always a risk of such payments being void under this section. In the sense therefore that the directors were aware that they were making an unauthorized payment, they were disposing of the property of the company wrongfully and therefore guilty of a breach of trust and the absence of dishonesty or fraud is immaterial. The directors, therefore, are not entitled to relief under S. 281, Companies Act. 1937 P. 293=168 I.C. 786. It is not necessary in a petition presented to the High Court under S. 235 to fully and adequately set out the particulars on which the claim is based. The rules framed under S. 235 do not require that an affidavit supporting the facts mentioned in the petition should be filed along with the petition or that if it is not filed it cannot be received at a later stage. 1938 Lah. 658. S. 237 affords no protection to company promoters and directors against prosecutions for breaches of trust. That section is intended to safeguard the interests of the shareholders of a company which has failed to prevent what remains of their money from being wasted by the liquidator on unprofitable criminal prosecutions. But there is nothing which restricts the powers of the police or of any private person to file a complaint of criminal breach of trust against a company director or any other person, and the police do not require sanction to prosecute for criminal breach of trust. 1937 M.W.N. 1122.

**NATURE OF DIRECTOR'S DUTIES AND LIABILITIES.**—In order to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors' and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances and is not inconsistent with any express provisions of the articles. In discharging his duties, a director must not only act honestly but must also exercise some degree of both skill and diligence. But a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; nor is he bound to give continuous attention to the affairs of the company, his duties being of an intermittent nature to

be performed at periodical meetings, and in respect of all duties that may be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. Where the articles of association contain an indemnity clause which protects the directors, protectors, etc., except where loss has been incurred as the result of wilful neglect or wilful neglect on their part, a director cannot be made liable unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless. Any act or omission to do an act is wilful where the person concerned knows what he is doing and intends to do what he is doing. A director is entitled to rely on the judgment, information, and advice of the chairman or general manager or advisory director, as to whose integrity, skill and competence he has no reason for suspicion. 46 L.W. 869=(1937) 2 M.L.J. 848. S. 235 does not *prima facie* exclude non-feasance. The section would apply to every act whether of commission or omission which is a breach of duty to the company in consequence whereof loss to the company results. To become a director of a company by accepting a gift of shares without paying for them is a misfeasance. Where such a person continues to act as a director, and, in spite of the auditor's report exposing the fraud of the company does not make any enquiries or take steps, but joins in a resolution condemning the auditor's report and signs the balance-sheet sanctioning the remuneration to the managing agents, he is guilty of gross and wilful negligence and clearly of misfeasance under S. 235. 55 L.W. 165=A.I.R. 1942 Mad. 365=(1942) 1 M.L.J. 207.

**DIRECTOR'S LIABILITY, WHEN ARISES.**—The directors, who by wilfully shutting their eyes to the acts of the agents or the managing agents and by recklessly sanctioning the acts of such agents consciously aid in the commission of acts of misfeasance, misappropriation, and falsification of accounts and balance-sheets, are themselves guilty of wilful misconduct and are liable to pay compensation if that state of affairs continues over a series of years. 55 M. 226=32 Bom.L.R. 323=1930 B. 572. But where the act of the director is not wilful or reckless, but, only amounts to mere neglect or breach of duty that will not come *ipso facto*, under this section. 1 Luck. 334=1926 O. 234. A director will not be liable for any error of judgment; and as regards imprudence, in order to fix personal liability on him, the imprudence must be so great and manifest as to amount to gross negligence, and he must not at the same time be authorised to do the imprudent act. 2 O.W.N. 920=32 I.C. 50=1926 O. 153. Further, if there is no reason for doubting the fidelity of the officers in the employment of the company, the directors will not be liable if those

236. If any director, manager, officer or contributory of any company being

Penalty for falsification of books.

wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers, or securities, or makes, or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

officers should commit any acts of misfeasance, etc., and the directors trusted them. 1 Luck. 334=1926 O. 243. If the company is being wound up the remedy against a delinquent director whether for negligence, fraud or misfeasance is under S. 235. Where such proceedings have been taken against a director, subsequent suit against him for compensation for fraud or misfeasance is incompetent on the principle of *res judicata*. 40 P.L.R. 883=1938 Lah. 577. Where books of a company which must have some value to the company are found in the possession of the manager of the company, the Court has power to order them to be delivered to the liquidator; it is not necessary that the order should also state the amount for which the person against whom it is passed is liable in the event of non-delivery of the property. I.L.R. (1941) Mad. 120=53 L.W. 503=(1940) 2 M.L.J. 594.

**BROKER.**—A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office; and he is not an 'officer' of the company. 1938 M. 159=I.L.R. 1938 M. 192=(1937) 2 M.L.J. 820.

**ACTS OF MISFEASANCE BY DIRECTORS.**—See 46 L.W. 869=(1937) 2 M.L.J. 848. (i) Allotment of shares made without an application and allotment money not being paid. 154 I.C. 33=1934 A. 855. (ii) The director being a party to a calculated and deliberate fraud in the flotation of the company and in the conduct of its business. 1934 A. 855. (iii) All omission by directors to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board. 143 I.C. 713=1933 S. 103. (iv) Distribution of dividends out of capital and other funds, not being profits. 47 A. 669=23 A.L.J. 473. (v) A wilful contravention of the provisions of S. 101 of the Act. 154 I.C. 33=1934 A. 855.

**LIMITATION.**—Directors of companies are not trustees in whom the properties of the companies have become vested in trust for any specific purpose, so as to bring them within S. 10 of the Limitation Act. 18 B. 119; 54 M. 153=60 M.L.J. 280. See also 1937 P. 293. Hence, the articles of the Limitation Act apply to only claim against them in respect of acts of misfeasance committed by them. (Ibid.) This section is not intended to revive any rights that have already become barred by time. 71 I.C. 899=1923 L. 58. There has been a difference of opinion

among the several High Courts as regards the period of limitation and time from which the period has to be computed; but the matter has been set at rest by the amendment introduced by the Amending Act XXII of 1936, which fixes a period of 3 years, computed either from the date of the misfeasance, etc., or from the date of the first appointment of the liquidator, whichever being longer.

Where in a petition under S. 235, to the High Court, the names of certain persons are added subsequently but documents relating to them which taken together fulfil the requirements of the rule framed under S. 235 are not filed at that time but later, the date of the application against the added defendants is the date on which the documents are filed. 1938 Lah. 658.

**PRACTICE.**—An official liquidator who files an application under this section will not be called upon to furnish security for costs. 55 A. 250=1933 A.L.J. 199.

**PROCEDURE.**—An application under S. 235 is in the nature of a plaint and the proceedings under S. 235 are judicial proceedings; but the provisions of the Code of Civil Procedure are inapplicable to a petition under S. 235 because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder. 1938 Lah. 658. Where in the proceedings under S. 235, instituted in the High Court against certain persons, the matters alleged against some of such persons are entirely different from those which are subject-matter of the investigation against others, the claims against all cannot be tried jointly on principles underlying O. 2, R. 6, C.P. Code; there being no real common unity between them. 1938 Lah. 658.

**SEC. 236: SCOPE—IF EXHAUSTIVE.**—It is not correct to hold that charges of falsification of accounts or forgery against the promoters of a company can only be tried under S. 236 of the Companies Act. A penal enactment in a special Act is no bar to a prosecution under the Penal Code. A prosecution of the promoters of a company under the Penal Code on such charges is perfectly legal. I.L.R. (1937) All. 779=1937 A.L.J. 1073=1937 All. 714. A Bank, which was a limited company having gone into voluntary liquidation, the secretary who was also a director was appointed as the liquidator. As such he had to send periodical returns under S. 244.

<sup>1</sup>[237. (i) If it appears to the Court in the course of a winding up by, or subject

Prosecution of delinquent directors.

to the supervision of, the Court that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.

#### LEG. REF.

<sup>1</sup> This section was substituted by S. 110 of Act XXII of 1936.

He was convicted on charges under S. 236 and S. 282 for falsifying the accounts and for sending false returns. *Held*, (i) that any wrongful act done by him as liquidator was a wrongful act by him as an officer, of the company, so as to render him liable under S. 236, and that by his mere appointment as liquidator he did not cease to be a director so as to escape liability as director; and therefore whether as director or officer, S. 236 would apply to him; (ii) that he was also properly convicted under S. 282, though he may not have been legally appointed as a liquidator owing to want of quorum at the meeting at which he was appointed liquidator. 55 L.W. 410=1942 M.W.N. 433=A.I.R. 1942 Mad. 702=(1942) 2 M.L.J. 140.

SEC. 237: AMENDMENT BY ACT XXII OF 1936.—The present section has been substituted for the old S. 237, and it now contains the more adequate provisions to be found in S. 277 of the English Act. The chief amendments are with reference to prosecutions in the course of *voluntary liquidation* proceedings. The old section merely provided that the liquidator in such cases may prosecute the offender with the previous sanction of the Court. The present section requires a report to be made by the liquidator to the Registrar, so as to enable the Registrar to determine if any prosecution is necessary. If the Registrar thinks that a prosecution is unnecessary he has to inform the same to the liquidator; and thereupon the liquidator may apply for the sanction of the Court. If the Registrar thinks that the matter requires further investigation, he may refer the matter for the Local Government, which can have the matter thoroughly investigated by any person designated by it and approved by the Court. And thirdly if the Registrar thinks that a prosecution is necessary, he may place the papers before the Advocate-General or the Public Prosecutor and, if advised to do so, institute proceedings. In sub-section (5), provision has been made for the Court itself *suo moto*, or on the application of any person interested, to order the liquidator to make a report to the Registrar, when he has not himself done so.

C.C.M.—100

SCOPE OF SECTION.—The fact that one of the members of a firm acting as managing agents of a company was punished in his individual capacity as a director of the company is no ground for not punishing him in his capacity as a member of the managing firm. 18 P.R. (Cr.) 1916=35 I.C. 482. The liquidator has power to take action under this section, in respect of the assets realised after the dissolution of the company, even after such dissolution. 28 P.L.R. 1917=39 I.C. 769. The Official Liquidator of a company wrote to the High Court that on going through the account books and the records of the company he found that the promoters of the company had committed various acts of dishonesty amounting to criminal breach of trust and manipulation of accounts. The Company Judges of the High Court were of opinion that there was a *prima facie* case against the promoters and desired that the matter be investigated. The Registrar of the High Court forwarded the Official Liquidator's letter to the Police under cover of a letter which stated that the Court considered it a fit case for inquiry by the Police. The promoters who were prosecuted pleaded that the prosecution was illegal for the reason that the procedure laid down by S. 237, was not followed. *Held*, that the provisions of S. 237 had been substantially complied with. I.L.R. 1937 All. 779=1937 A.L.J. 1073=171 I.C. 994=1937 All. 714. The whole scheme of S. 237 appears to be enabling rather than mandatory or exclusive. The Court may order the liquidator to prosecute or refer the matter to the Registrar. The Registrar may refuse to prosecute and the liquidator with the previous sanction of the Court may prosecute, but the section is not limited to the criminal liability of directors under the Companies Act, so that the section is not limited to special offences created under the Act. 1942 Sind 9. There is nothing in law to prevent a private person making a complaint to a Court of offences under the Companies Act or the Penal Code against directors or officers of the Company in relation to the company even if the company is being wound up. 1942 Sind 9. Company directors—Prosecution by police for criminal breach of trust—Sanction not necessary—also for complaint by private person. 1937 M.W.N. 1122.

APPEAL TO PRIVY COUNCIL.—An order passed under this section for the official

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the <sup>1</sup>[Central Government] for further inquiry, and the <sup>1</sup>[Central Government] shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the <sup>1</sup>[Central Government] for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate-General or the public prosecutor and if advised to do so institute proceedings, <sup>2</sup>[\* \* \* \* \*]

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

<sup>3</sup>[ (7) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.]

<sup>3</sup>[ (8) ] If any person fails or neglects to give assistance in manner required by <sup>4</sup>[sub-section (7)] the Court, may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup> Certain words were omitted by S. 11 of Act II of 1938.

<sup>3</sup> This sub-section was inserted and original sub-section (7) re-numbered (8), *ibid.*

<sup>4</sup> This word, brackets and figure were substituted for the word, brackets and figure

"sub-S. (6)," *ibid.*

liquidator to prosecute certain persons for a criminal offence comes within the purview of S. 202 and is appealable. But such order being criminal in nature, leave cannot be granted for appeal to the Privy Council under S. 109, C. P. Code. 132 I.C. 474= 1931 S. 120.

not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.]

238. If any person, upon any examination upon oath authorised under

Penalty for false evidence.

this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise, in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

<sup>1</sup>[238-A. (1) If any person, being a past or present director, managing agent,

Penal provisions.

manager or other officer of a company which at the time of the commission of the alleged offence is being wound up, whether by or under the supervision of the Court or voluntarily, or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up—

(a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company; or

(b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up; or

(c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody, or under his control belonging to the company and which he is required by law to deliver up; or

(d) within twelve months next before commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company; or

(e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred rupees or upwards; or

(f) makes any material omission in any statement relating to the affairs of the company; or

(g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof; or

(h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company; or

(i) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to the property or affairs of the company; or

#### LEG. REF.

<sup>1</sup>This section was inserted by S. 111 of Act XXII of 1936.

SEC. 238-A: AMENDMENT BY ACT XXII OF 1936.—This section follows S. 271 of the English Act, in providing for the punishment of offences antecedent to or in the course of a winding up, *e.g.*, non-disclosure of assets, wrongful retention or concealment, or removal of the same, non-delivery to liquidator of the books and papers of the company, falsification, destruction or mutilation of accounts, etc.

SECS. 238-A (1) (b) AND 282-A: APPLICABILITY.—In a prosecution on a charge

under S. 238-A (1) (b), the prosecution has to prove that the accused had in his custody, or under his control, property of the company at the time when the company was being wound up. In the absence of evidence to prove the same, he cannot be convicted. But if there is evidence to show, or an admission by the accused, that property of the company was with him or in his possession, and that he has wrongly withheld them by not delivering them to the Official Liquidator, he is liable to be punished for an offence under S. 282-A. 57 L.W. 276=A.I.R. 1944 Mad. 424=(1944) 1 M.L.J. 390.

(j) within twelve months next before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company ; or

(k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company ; or,

(l) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses ; or

(m) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for ; or

(n) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for ; or

(o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company ; or

(p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up : he shall be punishable, in the case of the offences mentioned respectively in clauses (m), (n) and (o) of this sub-section, with imprisonment for a term not exceeding five years, and, in the case of any other offence, with imprisonment for a term not exceeding two years :

Provided that it shall be a good defence to a charge under any of clauses (b), (c), (d), (f), (n) and (o), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (a), (h), (i) and (j) if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under clause (o) of sub-section (1) every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in such circumstances as aforesaid shall be punishable with imprisonment for a term not exceeding three years.]

239. (1) Where by this Act, the Court is authorised in relation to winding up to have regard to the wishes of creditors or contributories,

Meetings to ascertain wishes of creditors or contributories.

as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

240. Where any company is being wound up, all documents of the company

SEC. 240: BURDEN OF PROOF.—All entries in documents of the company are presumed to be true, and so the *onus* lies heavily upon those who assert that they are false, or fic-

titious. 1935 L. 157. Entries in the books of a company are *prima facie* evidence of the transaction to which they relate and it is for the contributory denying the transac-



Documents of company to be evidence.

and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

241. After an order for a winding up by or subject to the supervision of the

Inspection of documents.

Court, the Court may make such order for inspection by creditors and contributories of the company of its

documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

Disposal of documents of company.

242. (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows

(that is to say) :—

(a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs ;

(b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

243. (1) Where a company has been dissolved, the Court may at any time

Power of Court to declare dissolution of company void.

within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the Company or by any other person who

appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

244. (1) Where a company is being wound up, if the winding up is not

Information as to pending liquidations.

concluded within one year after its commencement, the liquidator shall, <sup>1</sup>[once in each year and at intervals or not more than twelve months ], until the winding up

s concluded, <sup>2</sup>[file in Court or with the registrar, as the case may be] a statement

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "at such intervals as may be prescribed" by S. 112 of Act XXII of 1936.

<sup>2</sup> These words were substituted for the words "file with the registrar," *ibid*.

tion to rebut that evidence and disprove the entries recorded in books of the company and rebut the presumption arising against him. The mere statement of the contributory that he did not enter into the transaction and has repudiated the transaction will not save him from his liability. 39 P.L.R. 136=1937 L. 61.

SEC. 241—This section does not give the right of inspection in cases of voluntary winding up. *Morgan's case*, (1884) 2 Ch. D. 620. S. 241 places the matter of ordering inspection of documents in the discretion of the Court which will not be interfered with merely on the ground that he is

likely to use the information in the interest of directors yet to be examined. 1937 L. 82.

SEC. 243.—Even after the dissolution of a company, the liquidator has power to take action in respect of the assets realised after the dissolution of the company. 26 P.L.J. 1917=39 I.C. 769. The rule in *Morris v. Harris*, 1927 A.C. 252, that the effect of a subsequent declaration of the Court that a resolution for voluntary winding was void is not to invalidate any proceedings taken during the interval between the dissolution and its avoidance does not apply to a case where the resolution is tainted by fraud. I.L.R. (1937) 1 C. 203=1937 C. 129=64 C. L.J. 280.

SEC. 244: AMENDMENT BY ACT XXII OF 1936.—The amendments provide that the *interim* report of the liquidator should be submitted to the Court or the registrar, as the case may be, but that a copy should in



in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

<sup>1</sup>[(4) When the statement is filed in Court a copy shall simultaneously be filed with the registrar and shall be kept by him along with the other records of the company.]

<sup>2</sup>[244-A. (1) Every liquidator of a company which is being wound up by the

Payments of liquidator into bank.

Court shall, in such manner and at such times as may be prescribed, pay the money received by him into a scheduled bank as defined in clause (e) of section 2 of

the Reserve Bank of India Act, 1934 :

Provided that if the Court is satisfied that for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and thereupon those payments shall be made in the prescribed manner.

(2) If any such liquidator at any time retains for more than ten days a sum exceeding five hundred rupees or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent, per annum and shall be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

(3) A liquidator of a company which is being wound up shall open a special banking account and pay all sums received by him as liquidator into such account.]

#### LEG. REF.

<sup>1</sup> This sub-section was added by S. 112 of Act XXII of 1936.

<sup>2</sup> This section was inserted by S. 113, *ibid*.

any case be given to the registrar, and defines the time when the report should be made. The forms and particulars to be contained in these statements are prescribed by the High Courts, which have followed Rr. 193 to 195 of the English Companies 'Winding up Rules' and have prescribed a form similar to the English Form No. 92.

SEC. 244-A: AMENDMENT BY ACT XXII OF 1936.—This section is now based on S. 194 of the English Act. It is but proper monies should not be mixed up with the liquidator's private monies or kept in his private accounts in any bank. The section renders the liquidator not only liable to pay heavy interest in cases where he retains without adequate justification or authority any sum exceeding Rs. 500 for more than 10 days, but also liable to be removed without payment of any remuneration.

MADRAS COMPANY RULES, R. 66—SCOPE AND EFFECT OF.—A cheque drawn on a Bank in favour of "M.R., Official Liquidator in O.P. No. 5 of 1939 or order," was presented to the Bank by M.R. for payment over the counter. The Bank after calling for the order of appointment of the Official Liquidator and perusing the same, paid him the amount of the cheque. M.R. misappropriated the amount and he was removed from the office of Official Liquidator. The new Official Liquidator sued the Bank for recovery of the amount alleging that the Bank was negligent in paying the amount to M.R. over the counter, instead of insisting on presentation of the cheque through a Bank and payment into a Bank account. *Held*, (1) that under S. 244-A of the Act and R. 66 of the Madras Company Rules, it was incumbent on the Official Liquidator to open a Bank account and to get the cheques received by him in the course of liquidation collected and cashed through such bank account, and the Bank on which the cheque was drawn

<sup>1</sup>[244-B. (1) Where any company is being wound up, if the liquidator has

Unclaimed dividends and undistributed assets to be paid to Companies Liquidation Account.

in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable, the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 244-A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled, may make an order for the payment to that person of the sum due :

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government ; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under this section shall pay interest

#### LEG. REF.

<sup>1</sup> S. 244-B inserted by Act XXXVI of 1940.

should be deemed to be aware of the law on the subject; (2) that from the cheque itself the bank had notice that it was made out to M.R. in his capacity as Official Liquidator and that the amount of the cheque could be collected by the payee only through his bank; (3) that there was a clear breach of a statutory duty placed on the bank and since there was negligence on the part of

the bank and its officers, the bank must be held liable to make good the amount to the new Official Liquidator; (4) that since the Bank did not pay the amount in due course and in good faith, S. 85 of the Negotiable Instruments Act would not help the Bank as S. 85 would only protect the Bank if it made payment in accordance with the tenor of the instrument, in good faith and without negligence. 57 L.W. 533=1944 Comp. C. 228=(1944) 2 M.L.J. 295=I.L.R. (1945) Mad. 32.

on the amount retained at the rate of twenty per cent. per annum and shall also be liable to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single province which are not trading corporations.]

245. (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in British India, Court or person before whom affidavit may be sworn. or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by <sup>1</sup>[the Central Government or the Crown Representative], or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice Consuls.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

#### Rules.

246. (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such Court and in the Courts subordinate thereto, <sup>2</sup>[and for voluntary winding up (both members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act], and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-divisions of the shares of a company <sup>3</sup>[and generally for all applications to be made to the Court under the provisions of this Act] <sup>3</sup>[and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed.]

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories;

(b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;

(c) requiring delivery of property or documents to the liquidator;

(d) making calls;

(e) fixing a time within which debts and claims must be proved;

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "the Governor-General in Council" by A.O., 1937.

<sup>2</sup> These words were inserted by S. 114 of Act XXII of 1936.

<sup>3</sup> These words were inserted by S. 2 and Sch. I of Act XI of 1915.

SEC. 246: AMENDMENTS BY ACT XXII OF 1936.—The amendments supply certain omis-

sions in the section as it previously stood. The enlargement of the powers of the High Court to make rules, has also become necessary in view of the various new forms of procedure introduced by the several amendments made in this Act. An order for a call on contributories disregarding the requirements of any rule framed by the High Court under this section as to notice, cannot be maintained. 1 P.R. 1918=44 I. C. 139.

*Removal of defunct Companies from Register.*

247. (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the Company is carrying on business or in operation.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Official Gazette, and send to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the Official Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official Gazette, and, on the publication in the Official Gazette, of this notice, the company shall be dissolved: Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or, if there is no director, manager or other officer of the company whose name and address are known to the registrar,

SEC. 247: SCOPE AND APPLICABILITY.—The Registrar is not bound to remove the company from the register upon an application for removing it. 86 I.C. 652=1926 L. 443. A company may be wound up even after it has been dissolved, with this difference, *viz.*, that in the case of a defunct company it can be done on the application of an erstwhile shareholder. 24 N.L.R. 100=1928 N. 194.

The only person who can legally put in an appearance on behalf of a company in proceedings under this sub-section on the application of a shareholder, is either the secretary of the company or one of its directors though they may not have been parties to the original proceedings. The Registrar cannot represent the company. 116 I.C. 427=1929 N. 185. So, where a shareholder

may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

## PART VI.

### REGISTRATION OFFICE AND FEES.

248. (1) For the purposes of the registration of companies under this Act,

Registration offices.

there shall be offices at such places as the <sup>1</sup>[Central Government] thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The <sup>1</sup>[Central Government] may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the <sup>1</sup>[Central Government].

(4) The <sup>1</sup>[Central Government] may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the <sup>1</sup>[Central Government], not exceeding one rupee for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the <sup>1</sup>[Central Government], may appoint, not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall, until the <sup>1</sup>[Central Government] otherwise directs, be done to or by the existing registrar of joint-stock companies or in his absence to or by such person as the <sup>1</sup>[Central Government] may for the time being authorise, but, in the event if the Central Government altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the <sup>1</sup>[Central Government] may appoint.

249. (1) There shall be paid to the registrar in respect of the several matters

Fees.

mentioned in Table B in the First Schedule the several fees therein specified; or such smaller fees as the

<sup>2</sup>[Central Government] may direct.

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown.

<sup>2</sup>[249-A. (1) If a company, having made default in complying with any provision of this Act which requires it to file with,

Enforcing submission of returns and documents to registrar.

deliver or send to the registrar any return, account or other document, or to give notice to him of any matter, fails to make good the default within fourteen

days after the service of a notice on the company requiring it to do so, the Court may, on an application made to the Court by any member or creditor of the company

### LEG. REF.

<sup>1</sup> These words were substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup> This section was inserted by section 115 of Act XXII of 1936.

applied to the Court under this sub-section making the Registrar alone a party, it was held the company was not properly represented, and the Court cannot set aside the

order of the Registrar. 1929 N. 185.

SEC. 249-A: AMENDMENT BY ACT XXII OF 1936.—This section reproduces S. 135 of the English Act, and enables the Registrar as well as any member or creditor of the company, to apply to the Court for the enforcement of the duty of the company to submit to the Registrar the returns and documents which have to be submitted under the Act.

or by the registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.

(2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company, responsible for the default.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.]

## PART VII.

### APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

250. In the application of this Act to existing companies, it shall apply in

Application of Act to companies formed under former Companies Acts.

the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that—

(1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882;

(2) reference express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

251. This Act shall apply to every company registered but not formed under

Application of Act to companies registered but not formed under former Companies Act.

Act No. XIX of 1857 and Act No. VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

252. A company registered under Act XIX of 1857 and Act VII of 1860 or

Mode of transferring.

either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

## PART VIII.

### COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

Companies capable of being registered.

253. (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

(i) any company consisting of seven or more members, which was in existence on the first day of May, eighteen hundred and eighty-two including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and

(ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act of Parliament or <sup>1</sup>[Indian law] other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up:

(2) Provided as follows:—

(a) a company having the liability of its members limited by Act of Parliament or <sup>1</sup>[Indian law] or by Letters Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section;

(b) a company having the liability of its members limited by Act of Parliament or <sup>1</sup>[Indian law] or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(c) a company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles at a general meeting summoned for the purpose).

(e) where a company not having the liability of its members limited by Act of Parliament or <sup>1</sup>[Indian law] or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;

(f) where a company is about to register as a company limited by guarantee the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section.

254. For the purposes of this Part as far as relates to registration of companies

Definition of "joint-stock company."

as companies limited by shares, a joint-stock company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferrable as stock or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

255. Before the registration in pursuance of this Part of a joint-stock company, there shall be Requirements for registration by joint-stock companies. delivered to the registrar the following documents (that is to say):—

(1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;

(2) a copy of any Act of Parliament, <sup>1</sup>[Indian law], Royal Charter, Letters Patent, deed of settlement, contract of co-partnership or other instrument constituting or regulating the company; and



(3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say) : —

(a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists ;

(b) the number of shares taken and the amount paid on each share ;

(c) the name of the company, with the addition of the word " Limited " as the last word thereof ; and

(d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

Requirements for registration by other than joint-stock companies.

256. Before the registration in pursuance of this Part of any company not being a joint-stock company, there shall be delivered to the registrar—

(1) a list showing the names, addresses and occupations of the directors of the company ; and

(2) a copy of any Act of Parliament, <sup>1</sup>[Indian law], Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company ; and

(3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

257. The list of members and directors and any other particulars relating

Authentication of statement of existing companies.

to the company required to be delivered to the registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

258. The registrar

Registrar may require evidence as to nature of company.

may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined.

259. (1) Where a banking company, which was in existence on the first

On registration of banking company with limited liability, notice to be given to customers.

day of May eighteen hundred and eighty-two, proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at or delivering it at, his last known address.

(2) If the company omits to give the notice required by this section, then, as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

260. No fees shall be charged in respect of the registration in pursuance of

Exemption of certain companies from payment of fees.

this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament of <sup>1</sup>[Indian law] or by

Letters Patent.

Addition of " Limited " to name.

261. When a company registers in pursuance of his Part with limited liability, the word " Limited " shall form and be registered as part of its name.

262. On compliance

Certificate of registration of existing companies.

with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company

applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

263. All property, moveable and immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

264. The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with, or on behalf of, the company before registration.

265. All suits and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

266. When a company is registered in pursuance of this part—

(i) all provisions contained in any Act of Parliament, <sup>1</sup>[Indian law] deed of settlement, contract of co-partnery, Letter Patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidence as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;

(ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say) :—

(a) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;

(b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;

(c) subject to the provisions of this section the company shall not have power to alter any provision contained in any Act of Parliament or <sup>1</sup>[Indian law] relating to the company;

(d) subject to the provisions of this section, the company shall not have power, without the sanction of the Central Government, to alter any provision contained in any Letters Patent relating to the company;

(e) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the objects of the company;

(f) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted

before registration who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the cost and expenses of winding up the company so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply;

(iii) the provisions of this Act with respect to—

(a) the registration of an unlimited company as limited;

(b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up;

shall apply notwithstanding any provisions contained in any Act of Parliament, <sup>1</sup>[Indian law], Royal Charter, deed of settlement, contract of co-partnership, Letters Patent or other instrument constituting or regulating the company;

(iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of co-partnership, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act;

(v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament, <sup>1</sup>[Indian law], deed of settlement, contract of co-partnership, Letters Patent or other instrument constituting or regulating the company, be vested in the company.

267. (1) Subject to the provisions of this section, a company registered in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

Power to substitute memorandum and articles for deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications:—

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum of articles; and

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of co-partnership or other instrument constituting or regulating the company, not being an Act of Parliament, an <sup>1</sup>[Indian law], a Royal Charter or Letters Patent.

268. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time

Power of Court to stay or  
restrain proceedings.

after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

269. Where an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceeding

Suits stayed on winding up  
order.

shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

## PART IX.

### WINDING UP OF UNREGISTERED COMPANIES.

270. For the purposes of this Part, the expression "unregistered company"

Meaning of "unregistered  
company."

shall not include a railway company incorporated by Act of Parliament or by an <sup>1</sup>[Indian law], nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

271. (1) Subject to the provisions of this Part, any unregistered company

Winding up of unregistered  
company.

may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions :—

(i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal

### LEG. REF.

<sup>1</sup> These words were substituted for the words "Act of the Governor-General in Council" by A.O., 1937.

SEC. 269.—The dismissal of a suit against a registered company consequent on liquidation, does not operate as a bar to the maintenance and proof of the claim before the official liquidator. 24 I.C. 99.

SEC. 270.—See 1939 Mad. 318, cited, under S. 153, *supra*.

CONSTRUCTION OF SECTION.—This section is not exhaustive. The words "shall include" do not amount to "shall mean and include". 38 Bom.L.R. 1080=1937 Bom. 15. A Court in British India, therefore, has jurisdiction under this section read with S. 271, to wind up as an unregistered company a *foreign* company, whatever the number of its members, whether or not consisting of more than seven members if it has an office and assets within its jurisdiction. The foreign company will come within the second part of S. 270, and will be an unregistered company for the purpose of Part IX of the Act. 38 Bom.L.R. 1080=1937 Bom. 15. See *contra*, 8 R. 658=1931 R. 7=131 I.C. 497. The expression

"consisting of more than seven members" means consisting of more than seven members at the time of winding up, i.e., on the date of the presentation of the petition. 8 R. 658=1931 R. 7=131 I.C. 497.

SEC. 271: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) follows S. 338 (2) of the English Act and provides for the winding up of companies incorporated outside British India. This will enable the Court to deal effectively with fraudulent companies incorporated outside British India and which had been dissolved or had ceased to exist under the laws of the country in which they were incorporated. Further a provision like this is necessary to remove unnecessary burden in the office of the Registrar.

APPLICATION OF SECTION.—(See also notes under S. 153, *supra*.) When an unregistered company has less than seven members at the time when the petition for winding up is presented, the Court has no jurisdiction under S. 271 of the Act to order the winding up of the same, as such a company does not come under the definition of an "unregistered company" contained in S. 270 of the Act. 8 R. 658=131 I.C. 497=1931 R. 77. But see 38 Bom.L.R. 1080 which holds a contrary view.

place of business situate in more than one province, then in each province, where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company;

(ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision;

(iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):—

(a) if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the Court is of opinion that it is just and equitable that the company should be wound up;

(iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor;

(b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

(c) if execution of other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

<sup>1</sup>[(3) Where a company incorporated outside British India which has been carrying on business in British India ceases to carry on business in British India it may be wound up as an unregistered company under this Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated.]

272. (1) In the event of an unregistered company being wound up, every

Contributories in winding up of unregistered companies.

person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid.

(2) In the event of any contributory dying or being adjudged insolvent, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply.

273. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time

Power to stay or restrain proceedings.

after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

274. Where an order has been made for winding up an unregistered company, no suit or other legal proceedings shall be proceeded

Suits stayed on winding up order.

with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

275. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the

Directions as to property in certain cases.

Court may, by the winding up order, or by any subsequent order, direct that all or any part of the property, moveable or immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

276. The provisions of this Part with respect to unregistered companies shall

Provisions of this Part cumulative.

be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

## PART X.

### COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA.

277. (1) Every company incorporated outside British India, which at the

Requirements as to companies established outside British India.

commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India, shall, within six months from the commencement

SEC. 277: AMENDMENT BY ACT XXII OF 1936.—The amendment to sub-section (3) provides for the submission of all the necessary information required to be inserted in the balance-sheet under this Act. According to S. 347 of the English Act, the balance-

sheets of companies incorporated outside Great Britain must comply with the same requirements as those of companies registered in Great Britain. But this provision has been somewhat relaxed in this amendment by requiring only a supplementary

of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

(a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and managers (if any) of the company;

(d) the names and addresses of some one or more persons resident in British India authorised to accept on behalf of the company service of process and any notices required to be served on the company;

<sup>1</sup>[(e) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company;] and, in the event of any alteration being made in any such instrument <sup>2</sup>[or in any such address] or in the directors or managers or in the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

(i) in a case whereby the law, for the time being in force, of the country in which the company is incorporated such company is required to file with the public authority an annual balance-sheet,—

<sup>3</sup>[three copies of that balance-sheet] <sup>4</sup>[and if the balance-sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements <sup>5</sup>[in triplicate] as shall furnish such information,]; or

#### LEG. REF.

<sup>1</sup> This clause was inserted by S. 12 of Act II of 1938.

<sup>2</sup> These words were substituted for the words "or in such address", *ibid.*

<sup>3</sup> These words were substituted for the words "a copy of that balance-sheet", *ibid.*

<sup>4</sup> These words were inserted by S. 117 of Act XXII of 1936.

<sup>5</sup> These words were inserted by S. 12 of Act II of 1938.

statement. This has been explained by the Select Committee as follows:—"In view of the difficulty, which it is represented, would be experienced by certain companies incorporated abroad if they were required to prepare and file balance-sheets in the form required from companies incorporated in British India when the balance-sheet prescribed by the law under which they are incorporated is of a widely divergent nature, we have considered it sufficient to secure that they shall file with the registrar a copy of their own balance-sheet, but shall supplement it, if necessary by further documents giving the information which is deemed essential and which have now been tabulated in a new form inserted as Form H in the Third Schedule of the Act. Where any

such company is not required by the law of the country in which it is incorporated to file a balance-sheet, the company must comply with the requirements of the British Indian law in this respect. The old section contained a proviso to sub-section (3) which enabled the Governor-General in Council to exempt certain companies from furnishing the requirements contained in the sub-section; but this power has been taken away by the amendment. The present sub-section (5) adopts practically the provisions contained in sub-section (4) to S. 348 of the English Act; and its necessity is obvious. A foreign company registered in the foreign State is entitled to file suits and maintain actions in British India, and it is not necessary that it must register itself in British India for that purpose. The default on the part of the foreign company in fulfilling the requirements of S. 277 of the Companies Act does not disable it from maintaining a suit in British India." 38 Bom.L.R. 1092=1937 B. 24.

SERVICE OF NOTICE.—The service of notice to these companies should be only in the mode provided in the section. It is not sufficient if it is done in the manner prescribed in O. 29, R. 2, C. P. Code, 108 I.C. 660=1928 S. 111.



(ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the company is incorporated,—such a statement<sup>1</sup> [in triplicate] in the form of a balance-sheet as such company would, if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act :

[ \* \* \* \* \* ]

(4) Every company to which this section applies and which uses the word “ Limited ” as part of its name, shall—

(a) in every prospectus inviting subscriptions for its shares or debentures in British India, state the country in which the company is incorporated; and

(b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill heads and letter paper, and in all notices, advertisements and other official publications of the company.

<sup>3</sup>[ (5) Every company to which this section applies shall if the liability of the members of the company is limited cause notice of that fact to be stated in legible characters in every prospectus inviting subscriptions for its shares, and in all bill-heads and letter paper notices, advertisements and other official publications of the company in British India, and to be affixed on every place where it carries on business.

<sup>3</sup>[ (6) ] If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues.

<sup>3</sup>[ (7) ] For the purposes of this section—

(a) the expression “ certified ” means certified in the prescribed manner to be a true copy or a correct translation ;

(b) the expression “ place of business ” includes a share transfer or share registration office ;

(c) the expression “ director ” includes any person occupying the position of director, by whatever name called ; and

(d) the expression “ prospectus ” means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

<sup>3</sup>[ (8) ] There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

Restriction on sale and offer for sale of share. <sup>4</sup>[277-A. (1) It shall not be lawful for any person—

#### LEG. REF.

<sup>1</sup> These words were inserted by S. 12 of Act II of 1938.

<sup>2</sup> The proviso was omitted by S. 117 of Act XXII of 1936.

<sup>3</sup> This sub-section was inserted and the original sub-Ss. (5), (6) and (7) were re-numbered (6), (7) and (8), *ibid*.

<sup>4</sup> This section was inserted by S. 118, *ibid*.

SEC. 277-A: AMENDMENTS BY ACT XXII OF 1936.—This section and Ss. 277-B to 277-E have been inserted by the Amending

Act XXII of 1936. Formerly, there was only one section (S. 277) dealing with companies incorporated outside British India, and it was found to be inadequate to deal effectively with such companies, and so Ss. 277-A to 277-E, have been added in this Act. A considerable trade is being carried on in this country in shares, bonds, etc., of foreign companies with the aid of unscrupulous agents and fraudulent advertisements, and ignorant investors are often ruined. Many of the investors purchase these shares, bonds, debentures, etc., merely relying upon the very exaggerated and false

(a) to issue, circulate or distribute in British India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside British India whether the company has or has not established, or when formed will or will not establish, a place of business in British India, unless—

(i) before the issue, circulation or distribution of the prospectus in British India a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar ;

(ii) the prospectus states on the face of it that the copy has been so delivered ;

(iii) the prospectus is dated ; and

(iv) the prospectus otherwise complies with this Part ; or

(b) to issue to any person in British India a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part :

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside British India are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 98-A to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five thousand rupees.

(6) In this section and in section 277-B, the expressions 'prospectus,' 'shares' and 'debentures' have the same meanings as when used in relation to a company incorporated under this Act.]

accounts given by the canvassers as to their profitable nature, and without making any investigations as to the correctness or truth of the same. Under these circumstances, it is the duty of the Government to make such provisions in the law so as to enable these persons to obtain all the information necessary to enable them to judge for themselves as to the profitable nature or otherwise of such investments. If, in spite of this the investors choose to invest their monies in them and get ruined, they will have to blame themselves. Similar circumstances were found to prevail, in England also and Ss. 354 and 355 have been included in the English Act to regulate the issue

of prospectuses on behalf of companies incorporated outside that country. This section and S. 277-B reproduce in this Act Ss. 354 and 355 of the English Act. S. 277-A requires that before any shares or debentures of a foreign company are issued, circulated or distributed in British India, a duly certified prospectus should be filed with the Registrar, and a copy of such prospectus should accompany every form of application for shares or debentures issued, etc., in British India. Certain exceptions are laid down, and penalty also is prescribed for violation of the provisions of this section.

<sup>1</sup>[277-B. (1) In order to comply with this Part a prospectus, in addition to complying with the provisions of sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 277-A, Requirements as to prospectus. must—

(a) contain particulars with respect to the following matters :—

- (i) the objects of the company ;
- (ii) the instruments constituting or defining the constitution of the company ;
- (iii) the enactment, or provisions having the force of an enactment, by or under which the incorporation of the company was effected ;
- (iv) an address in British India where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language a translation thereof in the English language certified in the prescribed manner, can be inspected ;
- (v) the date on which and the country in which the company was incorporated ;

(vi) whether the company has established a place of business in British India, and, if so, the address of its principal office in British India :

Provided that the provisions of sub-clauses (i), (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business ;

(b) subject to the provisions of this section, state the matters specified in sub-section (1-A) of section 93 and set out the reports specified in that section :

Provided that—

(i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed, and

(ii) in section 93 of this Act a reference to the articles of the company shall be deemed to be a reference to the constitution of the company.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

(a) as regards any matter not disclosed, he proves that he was not cognisant thereof ; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part ; or

(c) the non-compliance or contravention was in respect of matters which in the opinion of the Court dealing with the case, were immaterial or were otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused :

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause (n) of sub-section (1) of section 93, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.]

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 118 of Act XXII of 1936.

SEC. 277-B: AMENDMENT BY ACT XXII

OF 1936.—This section adopts S. 355 of the English Act, and lays down the particulars which should be contained in the prospectus that has to be filed with the registrar under S. 277-A, *supra*.

<sup>1</sup>[277-C. (1) It shall not be lawful for any person to go from house to house offering shares of a company incorporated outside India for subscription or purchase to the public or any member of the public.

Restriction on canvassing for sale of shares.

(2) In this sub-section the expression 'house' shall not include an office used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees one hundred.]

<sup>1</sup>[277-D. <sup>2</sup>[(1)] The provisions of sections 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on

Registration of charges.

properties in British India which are created and to charges on property in British India which is acquired after the commencement of the Indian Companies (Amendment) Act, 1936, by a company incorporated outside British India which has an established place of business in British India.]

<sup>2</sup>[Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company :

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub-clause (i) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109-A shall apply as if the property wherever situated were situated outside British India.

(2) This section shall be deemed not to have come into force until the commencement of the Indian Companies (Amendment) Act, 1938 :

Provided that where the provisions of section 109 and sections 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1938.]

<sup>1</sup>[277-E. The provisions of sections 118 and 119 shall *mutatis mutandis* apply

Notice of appointment of receiver.

the case of all companies incorporated outside British India but having an established place of business in British India and the provisions of section 130 shall apply to such companies to the extent of requiring them to keep at their principal

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 118 of Act XXII of 1936.

<sup>2</sup> S. 277-D was re-numbered as sub-S. (1) of that section and the Provisos and sub-S. (2) were inserted by S. 13 of Act II of 1938.

SEC. 277-C: AMENDMENT BY ACT XXII OF 1936.—This section reproduces the provisions contained in S. 356 (1) of the English Act. The object of this section is to prevent canvassers going from house to house hawking for shares, debentures, etc.

SEC. 277-D: AMENDMENT BY ACT XXII OF 1936.—This section enacts the provisions contained in S. 90 of the English Act. Provisions as to the registration of charges and mortgages with the registrar, are intended to afford facility to those who have business dealings with the company and also to the members, to find out the exact financial position of the company. There is no justification at all for not insisting on the

registration of the same in the case of foreign companies, having an established place of business in this country. Moreover, it is more essential in the case of such companies than in the case of companies registered under this Act. Hence this section has been inserted.

SEC. 277-E: AMENDMENT BY ACT XXII OF 1936.—This section enacts the provisions contained in S. 90 of the English Act and makes the registration of the appointment of a receiver and other provisions contained in Ss. 118, 119 and 130 applicable also to companies incorporated outside British India and having an established place of business in British India. The Select Committee observed: 'We consider that the provision of the New Zealand Companies Act of 1933 requiring these companies to keep books of account in relation to the business done in the country where they are trading should be incorporated in the Act, and we have provided accordingly in this S. 277-E.'

place of business in British India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India :]

<sup>1</sup>[Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company.]

### <sup>2</sup>[PART X-A.]

#### BANKING COMPANIES.

<sup>3</sup>[277-F. A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely :—

(i) the borrowing, raising or taking up of money ; the lending or advancing of money either upon or without security ; the drawing, making, accepting, discounting, buying, selling, collecting, and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not ; the granting and issuing of letters of credit, travellers cheques and circular notes ; the buying selling and dealing in bullion and specie ; the buying and selling of foreign exchange including foreign bank notes ; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds ; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others ; the negotiating of loans and advances ; the receiving of all kinds.

#### LEG. REF.

<sup>1</sup> This proviso was added by S. 14 of Act II of 1938.

<sup>2</sup> Part X-A consisting of the Ss. 277-F to 277-N was inserted by S. 119 of Act XXII of 1936.

<sup>3</sup> This section was inserted by S. 118, *ibid.*

SEC. 277-F: AMENDMENT BY ACT XXII OF 1936.—This section and Ss. 277-G to 277-N have been inserted by the Amending Act XXII of 1936, and they lay down the special regulations to govern Banking Companies. It was felt necessary that the law relating to ordinary Banking Companies should be thoroughly overhauled in view of the various defects that have been found to exist in the matter of their regulation, conduct and control. At one time it was thought that a special enactment should be made with reference to these companies, but as there was no immediate prospect of any such legislation some special provisions relating to banking companies have been included in this Act. Some of the defects that were clear and which caused the ruin of many banking companies were: (i) their launching into trading ventures; (ii) their management by persons having other interests and by ignorant people; (iii) their commencing business without sufficient capital; (iv) their charging the unpaid capital; (v) their failure to keep sufficient reserve fund; (vi) their failure to keep adequate cash reserve to meet time and de-

mand liabilities; (vii) their forming, or taking shares in, subsidiary companies carrying on other kinds of business; and (viii) want of facilities in the nature of a moratorium to enable deserving companies to tide over temporary difficulties. With a view to get over the above-mentioned defects, this and the following sections up to S. 277-N have been enacted. It is obviously undesirable that a banking company should enter into trading operations themselves or to come into any close contractual relationship with trading concerns except as bankers. With this object in view this (S. 277-F) defines "a banking company" and attempts to limit its action to banking business alone, and to such other ordinary transactions as may emerge in the course of such business. It sets forth a fairly comprehensive list of 17 forms of business which may be undertaken by a banking company, in addition to its main business of accepting of deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order. It would not be necessary for any banking company to go beyond the undertakings mentioned in this section; and if it does so, it will no longer be a banking company but some kind of trading company. As a further precaution, the Governor-General in Council has been empowered by notification in the Gazette to add to the 17 forms of business mentioned in this section other forms of business also, if they should be found to be necessary.

of bonds, scrips or valuables on deposit, or for safe custody or otherwise ; the collecting and transmitting of money and securities ;

(2) acting as agents for Governments or local authorities or for any other person or persons ; the carrying on of agency business of any description other than the business of a managing agent <sup>1</sup>[of a company not being a banking company] including the power to act as attorneys and to give discharges and receipts ;

(3) contracting for public and private loans and negotiating and issuing the same ;

(4) the promoting, effecting, insuring, guaranteeing, underwriting, participating, in managing and carrying out of any issue, public or private, of State, Municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue ;

(5) carrying on and transacting every kind of guarantee and indemnity business ;

(6) promoting or financing or assisting in promoting or financing any business undertaking or industry, either existing or new, and developing or forming the same either through the instrumentality of syndicates or otherwise ;

(7) acquisition by purchase, lease, exchange, hire or otherwise of any property immovable or movable and any rights or privileges which the company may think necessary or convenient to acquire or the acquisition of which in the opinion of the company is likely to facilitate the realisation of any securities held by the company or to prevent or diminish any apprehended loss or liability ;

(8) managing, selling and realising all property movable and immovable which may come into the possession of the company in satisfaction or part satisfaction of any of its claims ;

(9) acquiring and holding and generally dealing with any property and any right, title or interest in any property moveable or immoveable which may form part of the security for any loans or advance or which may be connected with any such security ;

(10) undertaking and executing trusts ;

(11) undertaking the administration of estates as executor, trustee or otherwise ;

(12) taking or otherwise acquiring and holding shares in any other company having objects similar to those of the company ;

(13) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or *ex-employees* of the company or the dependents or connections of such persons ; granting pensions and allowances and making payments towards insurance ; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object ;

(14) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company ;

(15) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company ;

(16) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this section ;

(17) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company.]

[Provided that any company which uses as part of the name under which it carries on business the word "bank," "banker" or "banking" shall be deemed to be a banking company notwithstanding that the accepting of deposits or money on current account or otherwise, subject to withdrawal by cheque, draft

or order, is not 'or is not shown to be, the principal business of the company.] (Added by Act XXI of 1942).

<sup>1</sup>[277G. (1) No company formed after the commencement of the Indian Companies (Amendment) Act, 1936, for the purpose of carrying on business as a banking company or which uses as part of the name under which it proposes to carry on business the word 'bank,' 'banker' or 'banking' shall be registered under this Act, unless the memorandum limits the objects of the company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or otherwise along with some or all of the forms of business specified in section 277F.

(2) No banking company whether incorporated in or outside British India shall after the expiry of two years from the commencement of the said Act carry on any form of business other than those specified in section 277F :

Provided that the Central Government, may, by notification in the Official Gazette, specify in addition to the business set forth in clauses (1) to (17) of section 277F other forms of business which it may be lawful under this section for a banking company to engage in.]

<sup>1</sup>[277H. No banking company shall after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1936, employ or be managed by a managing agent other than a banking company for the management of the company.]

[277-HH. No banking company, whether incorporated in or outside British India, which carries on business in British India shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, employ or be managed by a managing agent, or any person whose remuneration or part of whose remuneration takes the form of commission or a share in the profits of the company, or any person having a contract with the company for its management for a period exceeding five years at any one time :

Provided that the period of five years shall, for the purposes of this section, be computed from the date on which this section comes into force :

Provided further that any such contract may be renewed or extended for a further period not exceeding five years at a time if and so often as the directors think fit.] (inserted by Act IV of 1944).

[277I. Notwithstanding anything contained in section 103, no banking company incorporated under this Act on or after the 15th day of January, 1937, shall commence business, unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as

#### LEG. REF.

<sup>1</sup> Inserted by S. 119 of Act XXII of 1936.

SEC. 277-G: AMENDMENT BY ACT XXII OF 1936.—This section has been newly inserted. It prohibits a banking company from undertaking or carrying on any business not included in S. 277-F; and it also prohibits the registrar from registering any company formed for the purpose of carrying a banking business or which uses as part of its name the words "bank", "banker", or "banking" unless its memorandum limits the objects to some or all of the forms of business mentioned in that section. The provisions of this section have been made applicable even to companies incorporated outside British India, but the opera-

tion has been postponed in the cases of these companies to afford them time to make any necessary arrangements for compliance with this section.

SEC. 277-H: AMENDMENT BY ACT XXII OF 1936.—This section has been newly inserted with a view not to exempt even companies already incorporated from the provisions of this section. It has been provided that it shall apply to all companies after the expiry of two years from the commencement of this Act. The section prohibits for obvious reasons the employment of any managing agent other than a banking company for its management.

SEC. 277-I: AMENDMENT BY ACT XXII OF 1936.—This section prohibits the commencement of business by a banking com-



working capital, and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.]

(2) No banking company, whether incorporated in or outside British India, if incorporated on or after the 15th day of January, 1937, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, carry on business in British India unless it satisfies the following conditions, namely:—

(a) that the subscribed capital of the company is not less than half the authorised capital, and the paid up capital, is not less than half the subscribed capital, and

(b) that the capital of the company consists of ordinary shares only, or ordinary shares and such preference shares as may have been issued before the commencement of the Indian Companies (Amendment) Act, 1944, only, and

(c) that the voting rights of all shareholders are strictly proportionate to the contribution made by the shareholder, whether a preference shareholder or an ordinary shareholder, to the paid up capital of the company.] Substituted by Act IV of 1944).

Prohibition of charge on unpaid capital. <sup>1</sup>[277]. No banking company shall create any charge upon any unpaid capital of the company, and any such charge shall be invalid.]

<sup>1</sup>[277K. (1) Every banking company shall, after the commencement of the Indian Companies (Amendment) Act, 1936, maintain a reserve fund.

(2) Every banking company shall out of the declared profits of each year and before any dividend is declared transfer a sum equivalent to not less than twenty per cent. of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.

#### LEG. REF.

<sup>1</sup> Inserted by S. 119 of Act XXII of 1936.

pany before shares have been allotted to an amount sufficient to yield a working capital of at least Rs. 50,000 and a duly signed affidavit to that effect has been filed with the registrar by the directors and manager. It requires a *definite* minimum amount which is not required in the case of other companies formed under this Act (*vide* S. 103). Although in the case of ordinary trading companies the matter of fixing the minimum required to commence the business may be left to the discretion of the directors with some necessary reservations, it is different in the case of banking companies which, from the very nature of their business, would require a sufficient working capital in cash obtained from the sale of shares. Hence this section requires a minimum net sum of Rs. 50,000 as working capital after payment of all other outgoings such as preliminary expenses, commissions, discounts, etc., for the bank to commence its business.

SEC. 277-J: AMENDMENT BY ACT XXII of 1936.—This section prohibits the creation of any charge on any unpaid capital of the bank, and declares the same to be invalid. This was one of the suggestions made by the Central Banking Enquiry Committee, and it reserves the uncalled capital

for the business. This affords also some protection to the creditors of the bank.

SEC. 277-K: AMENDMENT BY ACT XXII OF 1936.—This section provides for the keeping of a reserve fund by the bank. There are no provisions in the Act with reference to the maintenance of reserve fund or to the declaration of dividends; and these matters have been generally left over for the company itself to determine and provide for in the articles in the case of ordinary companies. But in the case of banking companies, a reserve fund is absolutely essential. Many companies carrying on banking business have been found to declare enormous dividends from the profits of each year going in some cases upto 50 per cent. without providing any reserve fund at all to meet unexpected emergencies or losses in the business; and many a company which adopted that course some day or other met with an inevitable crash; and the depositors were put to immense loss. It has been found necessary therefore that in the case of banking companies at least, some suitable provision should be made for the keeping of a sufficient amount by way of reserve out of the profit earned each year before the declaration and distribution of dividends. The Central Banking Enquiry Committee suggested the reservation from out of the profits of each year a sum equal to 2½ per cent. of its paid up

(3) A banking company shall invest the amount standing to the credit of its reserve fund in Government securities or in securities mentioned or referred to in section 20 of the Indian Trusts Act, 1882, or keep deposited in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section (2) of the Reserve Bank of India Act, 1934 :

Provided that the provision of the sub-section shall not apply to a banking company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, till after the expiry of two years from the commencement of the said Act.]

<sup>1</sup>[277L. (1) Every banking company shall maintain by way of cash reserve

Cash reserve.

in cash a sum equivalent to at least one and a half per cent. of the time liabilities and five per cent. of the demand liabilities of such company and shall file with the registrar before the tenth day of every month <sup>2</sup>[three copies of] a statement of the amount so held on the Friday of each week of the preceding month with particulars of the time and demand liabilities of each such day.

#### LEG. REF.

<sup>1</sup> Inserted by S. 119 of Act XXII of 1936.

<sup>2</sup> These words were inserted by S. 16 of Act XXII of 1936.

capital, but the legislature thought it better to express the amount which is to be transferred to the reserve fund as a fixed percentage of the profits rather than as a percentage of the capital, and has accordingly fixed in this section that a sum equivalent to not less than 20 per cent. of the profits of each year should be carried as reserve fund until the said fund becomes equal to the paid up capital. This section also deals with the investment of the reserve fund, and provides that the same should be invested in Government securities mentioned in S. 20 of the Trusts Act, or in a special account by the company with any scheduled bank as defined in clause (e) of S. 2 of the Reserve Bank of India Act. This provision has been found necessary because in the case of many companies although large amounts were kept in the accounts as reserve fund, still such amounts were being improperly utilised by the directors with the result that they could not be availed of for immediate use. This section is made applicable even to companies incorporated before the commencement of this Act; and provides a period of 2 years in the case of such companies for complying with the provisions of sub-section (2).

SECS. 277-K AND 277-L: Applicability and scope—Banking Company incorporated before Act—Reserve fund.—The proviso at the foot of clause (3) of S. 277-K of the Companies Act is a subsidiary clause to Cl. (3) and applies only to that clause and does not apply to Cls. (1) and (2) also. There is no warrant for holding that S. 277-K does not apply to a reserve fund already in existence. The use of the word "maintain" in cl. (1) means "maintain in tact" and necessarily prohibits the utilisation of the reserve fund in any way other than in accordance with cl. (3) of the

section. 56 L. W. 342=A.I.R. 1943 Mad. 629=(1943) 2 M.L.J. 19.

SEC. 277-L: AMENDMENT BY ACT XXII OF 1936.—This section provides for the maintenance by the bank of a cash reserve. Apart from the reserve fund which is to be maintained by the bank, it is also necessary that it should maintain a cash reserve, with reference to a percentage of the time and demand liabilities of the bank. In the circumstances peculiar to this country where banking business is more or less in its infancy, it is necessary that there should be a statutory provision for the compulsory maintenance of a minimum cash reserve, although it may involve the risk of the minimum limit being turned into the maximum limit by the company in actual practice. The principle of having some fixed amount as cash reserve has been adopted in the case of scheduled banks as defined in the Reserve Bank of India Act. Hence this section makes it obligatory on all banking companies to maintain a cash reserve of a sum equivalent to at least 1½ per cent. of the time liabilities and 5 per cent. of the demand liabilities of the bank. To ensure the observance of this provision by the company it is required to file with the registrar before the 10th day of each month a statement regarding the daily cash balances as disclosed by the accounts of the previous month. Sub-section (3) excepts scheduled banks as defined in the Reserve Bank of India Act from the operation of this section and also of S. 277-K. The section further provides for heavy penalties being laid on every director or officer who is knowingly and wilfully a party to any default in complying with the provisions of this section as well as those of sections 277-G, 277-H, 277 or 277-M. Where the evidence does not warrant the conclusion that an ordinary director of a company was knowingly and wilfully a party to the default to maintain the requisite cash reserve, he cannot be convicted under S. 277-L of the Act. 51 L.W. 434=(1940) 1 M.L.J. 478.

(2) For the purposes of sub-section (1) 'demand liabilities' means liabilities which must be met on demand, and 'time liabilities' means liabilities which are not demand liabilities.

(3) Nothing in this section or in section 277K shall apply to a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934.

(4) If default is made in complying with the requirements of section 277G, section 277H, <sup>1</sup>[section 277HH, section 277I section 277J,] section 277K or section 277M or with the requirements of this section as to the maintenance of a cash reserve, every director or other officer of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues, and if default is made in complying with the requirements of this section as to the filing of the statement referred to in sub-section (1), to a fine not exceeding one hundred rupees for every day during which the default continues.]

<sup>2</sup>[277M. <sup>3</sup>[(1)] <sup>4</sup>[A banking company shall not form any subsidiary com-

Restriction on nature of subsidiary companies.

pany except a subsidiary company] formed for the purpose of undertaking and executing trusts, undertaking the administration of estates as executor, trustee or otherwise and such other purposes set forth in section 277F as are incidental to the business of accepting deposits of money on current account or otherwise.]

<sup>5</sup>[(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of that company :

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 1936.]

<sup>6</sup>[277N. (1) The Court may on the application of a banking company which

Power of Court to stay proceedings..

is temporarily unable to meet its obligations make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it shall think fit and proper and may from time to time extend the period.

#### LEG. REF.

<sup>1</sup> Inserted by Act IV of 1944.

<sup>2</sup> Inserted by S. 119 of Act XXII of 1936.

<sup>3</sup> S. 277-M was re-numbered as sub-s. (1) of that section and sub-S. (2) was inserted by S. 17 of Act II of 1938.

<sup>4</sup> These words were substituted for the words "A banking company shall not form or hold shares, in any subsidiary company except a subsidiary company of its own," *ibid.*

SEC. 277-M: AMENDMENT BY ACT XXII OF 1936.—This section prohibits a banking company from forming or holding shares in any subsidiary company except a subsidiary company of its own formed for the purpose of carrying out some of the forms of business mentioned in S. 277-F incidental to banking operations.

SEC. 277-N: AMENDMENT BY ACT XXII OF 1936.—This section invests the Court with power in certain cases to stay the commencement or continuance of all actions and proceedings against a banking company for any fixed period with or without conditions attached. This is based on one of the recommendations of the Central Banking Enquiry Committee which suggested that some provision should be made for a moratorium to save from liquidation a banking

company in temporary difficulties. The liquidation of a bank affects the public to a very great extent and if it could be avoided by any means, it should be resorted to. Prior to the enactment of this section it has no doubt been possible for banking companies to avoid liquidation by taking proceedings under S. 153 of the Act and proposing schemes of composition with the creditors. But this has been found in practice to be unsatisfactory, inadequate, and causing considerable difficulty. Further, under that section, no interim protection could be obtained. Hence this section has been enacted. The protection under this section would be given only in the case of deserving companies which find themselves in temporary difficulties, and which could get over the same if some time and relief should be granted to them. So it has been provided that a banking company applying to the Court for protection under this section, should have first applied to the registrar and allowed him to have the books and documents of the company examined by a competent accountant in order to enable him to ascertain the exact financial position of the company and should have obtained a report from the registrar to the effect that

(2) No such application shall be maintainable unless accompanied by a report of the registrar :

Provided, however, the Court may, for sufficient reasons, grant interim relief, even if the application is not accompanied by such report.

(3) The registrar shall for the purposes of his report be entitled at the cost of the company to investigate the financial condition of the company and for such purpose to have the books and documents of the company examined by an accountant holding a certificate issued under section 144.]

## PART XI.

### SUPPLEMENTAL.

#### *Legal proceedings, offences, etc.*

278. (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

(3) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable.

279. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

280. Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

<sup>1</sup>[281. (1) If in any proceeding for negligence, default, breach of duty or

### LEG. REF.

<sup>1</sup>This section was substituted by S. 120 of Act XXII of 1936.

it is a fit case for the grant of any relief under this section. Provision also is contained in the section for the grant of *interim* relief, in urgent cases, even before the investigation by the Registrar and the receipt of his report.

SCOPE AND OBJECT.—It was never the intention of the Legislature in enacting S. 277-N that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the company should be prevented from seeking legal remedies to which they would otherwise have been entitled. The Court could only undertake the responsibility of barring these legal remedies to which the people would ordinarily be entitled if it was certain within reasonable limits that they would not suffer any real loss by being deprived of these remedies. Where the Court is not satisfied that the company is in a solvent

condition essentially an order under S. 277-N cannot be passed. 1939 A.L.J. 1009=1939 All. 726=I.L.R. (1939) All. 938.

SEC. 280: APPLICATION OF SECTION.—A misfeasance proceeding under S. 235 is not a suit or legal proceeding within the meaning of this section. (On this ground and also on grounds of public policy, the liquidator who files a misfeasance summons cannot be required to furnish security for costs. 55 A. 250=1930 A.L.J. 199=1933 A. 205. No appeal lies from an order refusing to direct a Company in liquidation to furnish security under S. 280 of the Act. 55 L.W. 89=1942 Mad. 405=(1942) 1 M.L.J. 180. The income-tax which does not become due and payable until after the winding up order has been made is not a debt for which priority can be claimed. I.L.R. (1943) Lah. 706=A.I.R. 1943 Lah. 228 (S.B.).

SEC. 281: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old S. 281; and it follows S. 372 of the English Act, the provisions of which are more, ample and detailed. "Default" and

Power of Court to grant relief in certain cases.

breach of trust against a person to whom this section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence default breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following :—

- (a) directors of a company ;
- (b) managers and managing agents of a company ;
- (c) officers of a company ;
- (d) persons employed by a company as auditors, whether they are or are not officers of the company.]

“breach of duty” have been added to “negligence” and “breach of trust” in sub-section (1); and provision has been made in sub-section (2) for any director, manager, etc., who may apprehend that any claim may be made against him in respect of negligence, default, etc., to apply to the Court *himself* in anticipation instead of waiting till the actual claim is made. In sub-section (3) the persons who are entitled to the grant of relief under this section are enumerated. The old section applied only to directors and this substituted section enumerates four classes of persons, including persons employed by the company as auditors.

SCOPE OF SECTION.—This section is not meant to cover any gross neglect of a director's ordinary duties over a long series of years. Even where managing agents have been appointed with very wide and all real powers, the directors have still their duties to perform or else the directors' names would have operated only as a mere trap for the unwary public. If the directors fail to perform their duties they must take the financial and other consequences of their negligence. 54 B. 227=32 Bom.L.R. 232=1930 B. 572; 47 A. 669=23 A.L.J. 473=1925 A. 519. It is wrong to think that S. 281 (2) is a section under which the Court is empowered to extend the time for holding meetings. The section does no such thing. It gives to the High Court a power to relieve certain classes of persons from the consequences of the default where they have an apprehension that they will be prosecuted and that apprehension can arise only after the Registrar of joint stock companies has done his duty and decided whether or not he proposes to prosecute. The duty of deciding whether there should be a prosecution or not, is not a function which is in-

tended by S. 281 (2) of the Act to be cast upon the High Court. The proper sequence of events is that the Registrar of joint stock companies should state whether he intends to launch prosecution or not. If he makes up his mind to prosecute and actually initiates the prosecution, then there can be an application under S. 281 (2) to the Court in which the prosecution is pending. If in such a case relief is sought before the prosecution is actually lodged, then that will be a proper case in which to apply to the High Court under S. 281 (2). But in such a case it would only be upon strong grounds and for special reasons that the High Court would interfere with a proposed prosecution. 1941 A. L. W. 1076. The power to relieve a director from the consequences of his wilful negligence is placed in the hands of the Court under S. 281 of the Act when the Court is convinced that the director has acted honestly and reasonably. Where it cannot be said that he has acted reasonably, though he may be said to have acted honestly, the Court has no power to grant any relief under the section. 46 L.W. 869=(1937) 2 M.L.J. 848. Before S. 281 can be invoked, it must be shown that the directors have acted honestly as well as reasonably. Though directors of a company are not trustees in the technical sense, they hold a fiduciary position with regard to the assets of the company and they are guilty of a grave breach of duty if they permit the managing director to gamble in differences on the stock exchange and to dissipate the company's funds in such gambling. Gambling in difference on the stock exchange can by no stretch of imagination be said to be legitimate business of a company which is carrying on business as an investment trust. Where in misfeasance proceedings against the directors of the company it is

282. Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

found that the managing director indulged in gambling on the stock exchange and borrowed money on the company's account which, however, he used for his own purposes, the ordinary directors together with the managing directors must be held liable for the losses sustained by the company as the result of the gambling transactions, but as regards the individual borrowings by the managing director, the other directors and the co-managing director cannot be held liable to repay the company, when it is apparent that they were not aware of the borrowings and there was no ground for suspicion that the managing director was not acting properly. 1944 Comp. C. 207=A. I. R. 1944 Mad. 536=(1944) 2 M.L.J. 85=I.L.R. (1945) Mad. 107. Company—Winding up—Directors entering into contract and making payments during—Liability of—They have no right to benefit of S. 281. See 1937 P. 293=168 I.C. 786.

SEC. 282: CONSTRUCTION OF BALANCE-SHEETS.—Balance-sheets and prospectuses are governed by the same principles of law with regard to the making of false statements. It is the effect upon the ordinary investor reading the statements in ordinarily careful manner in which an investor would do, which has to be considered when the Court has to find whether a breach of this section has been committed. 40 C. W. N. 1341=1936 C. 680. A balance sheet which does not disclose the true state of affairs of a company is not a properly drawn up balance sheet, and the opinion of an auditor that it has been properly drawn up is of no value whatever. 40 C.W.N. 1341. A banker in drawing up a balance sheet, must disclose both loans and overdrafts; and it does not make the slightest difference whether a particular advance made by him is a loan or an overdraft, when the question is as to the suppression of an advance from the balance sheet. (Per *Henderson, J.*) 40 C. W.N. 1341=1936 C. 680. There can never be an overdraft based on a deposit account. Overdrafts are the usual accompaniments of current accounts. (Per *Cunliffe, J.*, *ibid.*) The liquidator referred to in S. 282 is presumably the *de facto* liquidator. A person who accepts an appointment as liquidator of a company and who acts in accordance with the powers granted to him must be deemed to have accepted the duties and responsibilities of that office and so any wrongful act done by him is a wrongful act done by him as liquidator, even if his appointment is not legal. 55 L.W. 410=A.I.R. 1942 Mad. 702=(1942) 2 M.L.J. 140.

LOAN AND DEPOSIT.—A loan and a deposit

are items differing from the balance sheet point of view. They ought to appear on different sides, one as an asset and the other as a liability. The act of consolidating the two and presenting them as one item in the balance sheet is a striking case of non-disclosure, amounting to suppression of truth; and the statement would be false in material particulars, and the managing directors would be guilty of an offence under this section. 40 C.W.N. 1341=1936 C. 680.

FALSE STATEMENT IN BALANCE SHEET.—If a balance sheet shows as profits a sum of money representing the interest on bad and doubtful debts due to the bank which was never paid and was never likely to be paid, it contains a false statement and a material one, for which the directors signing it are liable to be prosecuted under this section. 25 S. L. R. 297. A private complaint in respect of offence under S. 282 is not barred. 1942 Sind 9. See also 1937 M.W.N. 1122.

ACTS AMOUNTING TO OFFENCE.—A person who makes a declaration that all the directors had paid their dues as mentioned in the prospectus, while as a matter of fact they had not so paid, and obtains an order for the commencement of business, is guilty under this section. 46 A. 218=22 A.L.J. 83=1924 A. 314. Where the manager signs a balance sheet false in material particulars, he is liable; and it is no defence to the charge that he was not bound to sign it or that he had signed it merely because the directors wished him to do so. 25 S.L.R. 297=134 I.C. 993=1932 S. 4. Nor is it a defence to the directors who have signed it, to plead that they had no knowledge of banking accounts and that they did not often attend the meetings of the directors. 1932 S. 4.

"WILFULLY", MEANING OF.—The word "wilfully" in this section does not embody the idea of a criminal mentality. It means nothing more nor less than the spontaneous action of a person who is a free agent. It is not a term of art, but a legal expression to be fitted to the circumstances being considered by the Court and to be interpreted according to the facts of each case. 40 C. W.N. 1341=1936 C. 680. It is not necessary that the statement should be such as to deceive any one or that it should even be dishonestly made. 159 I.C. 523=1935 C. 731. So where, after the company has begun to earn revenue, current expenditure has been debited to organisation expenses when it ought to have been debited in the revenue accounts in the balance sheet, it must be held to contain a wilful false statement. 1935 C. 731.



<sup>1</sup>[282-A. Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years.]

<sup>1</sup>[282-B. (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

#### LEG. REF.

<sup>1</sup> This section was inserted by S. 121 of Act XXII of 1936.

SEC. 282-A: AMENDMENT BY ACT XXII OF 1936.—This section follows S. 87 of the Friendly Societies Act of 1896. Several cases of wrongful detention and misapplication of the company's properties by the directors, managers, and other employees of the company have occurred and the provisions of the Act were found to be insufficient to afford adequate and speedy relief, and hence it was thought necessary to introduce this section providing for such cases and subjecting the delinquents to a heavy penalty. Bank in liquidation—Managing agent failing to deliver property to liquidator—Offence. (1944) 1 M.L.J. 390 cited under S. 238-A.

SEC. 282-B: AMENDMENT BY ACT XXII OF 1936.—This section has been designed to prevent misuse of securities lodged with a company by its employees under their contracts of service and to safeguard provident funds. It provides for the investment of all future funds in trust securities, and as to the existing funds which are not so invested it requires the same to be so invested in not more than 10 annual instalments, each instalment being not less than 1/10 of the amount of such monies. Sub-section (4) enables the employee to satisfy himself as to the safe investment of the funds. Further, to ensure the observance of the provisions of this section, a heavy penalty is provided for any contravention of the same.

TRUST—PROVIDENT FUND MONIES AND EMPLOYEES CASH SECURITY DEPOSITED IN BANK—IF CREATES A TRUST.—The fact that a Bank is given notice that money deposited is trust money does not make the Bank a trustee thereof. The legal consequence of such notice is only that the Bank should not participate in a breach of trust by the trustee. S. 282-B of the Companies Act imposes on a company a duty to invest all provident fund moneys in securities mentioned in S. 20

of the Trusts Act, and all such moneys belonging to the Fund at the commencement of the Companies Act which are not so invested shall be invested in such securities by annual instalments not exceeding ten in number and not less in amount than one-tenth of the whole amount of such moneys. On the coming into force of S. 282-B, if the said moneys are not invested in any such securities as are mentioned in S. 20 of the Trusts Act, the obligation of a company is to invest a tenth of the said moneys in that year and in every succeeding year in the authorised securities, and the balance of the moneys can be invested in any authorised Bank or Banks according to the rules of the institution. In so far as a company has not invested the said sum in any authorised security the company is guilty of a breach of trust, and a Bank holding the moneys in deposit must be held to participate in that breach of trust, and the bank can therefore be compelled to restore such trust fund, i.e., in respect of so much of the provident fund as it is obligatory on the company to invest in authorised securities. 1940 Mad. 184=1939 M.W.N. 1068. See also 1938 M.W.N. 1332=1939 Mad. 352; 49 L.W. 181=1939 Mad. 337=(1939) 1 M.L.J. 209. Where a company has deposited its employees security fund and Provident Fund in a Bank prior to the coming into the operation of S. 282-B of the Companies Act, as amended in 1936, and the deposit is renewed after that section came into force it cannot be said that the renewal constitutes a breach of trust on the ground that the moneys are not invested in approved securities mentioned in S. 20 of the Trusts Act as required by S. 282-B of the Companies Act. So far as the amount of the security deposit is concerned, there can be no breach of trust, because the Bank is not a trustee in respect of the same, although the company may be a trustee and the money may be trust money in its hands. In regard to the provident fund deposit, there can be a breach of trust only in respect of so much



(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund after the commencement of the Indian Companies (Amendment) Act, 1936, <sup>1</sup>[shall be either deposited in a Post Office Savings Bank Account or invested] in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882 and all moneys belonging to such fund at the commencement of the said Act <sup>2</sup>[which are not so deposited or invested shall be so deposited or] invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one tenth of the whole amount of such moneys :

Provided that the where one-tenth part of the whole amount of the money belonging to such fund exceeds the maximum amount which may be deposited in a Post Office Savings Bank account under the rules regulating such deposits for the time being in force, the amount of such excess may be kept or deposited in a special account to be opened for the purpose in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934 (II of 1934).] (Added by Act XIII of 1946.)

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment.

(4) An employee shall be entitled on request made in this behalf to the company to see the banks' receipt for any money or security such as is referred to in sub-section (1) and sub-section (2).

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred rupees.]

[ (6) Nothing in sub-section (2) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognized provident fund within the meaning of clause (a) of section 58-A of the Indian Income-tax Act, 1922, (XI of 1922), or, the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8, and 9 of the Indian Income tax (Provident Funds Relief) Rules] (Added by Act IV of 1945).

283. If any person or persons trade or carry on business under any name or

Penalty for improper use  
of word "Limited."

title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

#### LEG. REF.

<sup>1</sup> Substituted by Act XXII of 1941.

<sup>2</sup> Added by Act XIII of 1946.

of it as is required to be invested in authorised securities, namely, the annual instalments for the year or years in question, and there can be no breach of trust in respect of the balance. 1939 M.W.N. 1069=1939 Comp. Cas. 281. See also 1939 M.W.N. 1066; 1938 Mad. 651. As the result of the statutory obligation under S. 282-B (1) of the Companies Act imposed upon a Bank, the employees' cash security was deposited by the Bank in a scheduled Bank which subsequently went into liquidation. The depositor bank claimed priority in respect

of the deposit on the ground that the amount had been deposited for a specific purpose. Held, that the depositor Bank held the moneys for a special purpose and was required by statute to deposit therein in a scheduled bank, and that the deposit bank was not a trustee, though the depositor was a trustee. The position of the deposit bank was still that of a banker keeping an account for a customer and therefore the depositor could not claim any priority. The relationship between the depositor and deposit bank was only that of creditor and debtor though the deposit bank having notice of the trust could not be a party to a breach of trust by the trustee. 52 L.W. 512= (1940) 2 M.L.J. 559=I.L.R. (1941) Mad.

<sup>1</sup>[284. The provisions with respect to winding up contained in this Act as

Saving of pending proceedings for winding up.

amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act, 1936, had not been passed.]

285. Every instrument of transfer or other document made before the com-

Saving of document.

mencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

Former registration offices and registers continued.

286. (1) The offices existing at the commencement for this Act for registration of joint stock companies shall be continued as if they had been established under this Act.

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

1-a[\* \* \* \* \*]

Savings for Indian Life Assurance Companies Act, 1912, and Provident Insurance Societies Act, 1912.

287. Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

288. In sections 1 and 18 of Act No. XXI of 1860 (for the registration of

Construction of "registrar of joint stock companies" in Act XXI of 1860.

Literary, Scientific and Charitable Societies), the words "registrar of joint stock companies" shall be construed to mean the registrar under this Act.

Act not to apply to Banks of Bengal Madras or Bombay.

289. Save as provided in sections 188 and 189, nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

<sup>2</sup>[289-A. The powers

Application of Act to non-trading companies with purely provincial object.

conferred by this Act on the Central Government shall, in relation to companies with objects confined to a single Province which are not trading corporations, be powers of the Provincial Government.]

290. (1) The enactments mentioned in the Fourth Schedule are hereby

Repeal of Acts and Savings.

repealed to the extent specified in the fourth column thereof :

Provided that the repeal shall not affect—

(a) the incorporation of any company registered under any enactment hereby repealed ; nor

(b) Table B<sup>3</sup> in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor

(c) Table A<sup>4</sup> in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof, so far as the same applies to any company existing at the commencement of this Act.

#### LEG. REF.

<sup>1</sup> This section was substituted by S. 18 of Act II of 1938.

<sup>1-a</sup> Sub-s. (3) was omitted by A.O., 1937.

<sup>2</sup> This section was inserted by A.O., 1937.

<sup>3</sup> See Appendix I to this Act.

<sup>4</sup> See Appendix II to this Act.

125. See also 1940 O.W.N. 1022=1941 Oudh 126; 1938 Mad. 651; (1939) 1 M.L.J. 209=1939 Mad. 337.

Sec. 287.—The effect of S. 287 of the Companies Act and S. 22 of the Life Assurance Companies Act is to incorporate into

the Life Assurance Companies Act the relevant provisions about winding up contained in the Companies Act including S. 166 of the Companies Act. The right to wind up a company is, however, a statutory right and unless petitioner can bring his case within the terms of S. 166, he is not entitled to maintain the petition. A policy holder in a Life Assurance Company Limited by guarantee which has no share capital is not entitled to apply for winding up of that company either as contributory or as a creditor. 40 Bom.L.R. 52=174 I.C. 593=1938 Bom. 182.

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act.

(3) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

### SCHEDULES.

#### THE FIRST SCHEDULE.

(See sections 2, 17, 18, 79, 266.)

##### TABLE A.

##### REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

###### *Preliminary.*

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

###### *Business.*

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

###### *Shares.*

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine <sup>1</sup>[and any preference share may with the sanction of a special resolution be issued on the terms that it is or at the option of the company is liable to be redeemed.]

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may <sup>1</sup>[subject to the provisions of section 66-A of the Indian Companies Act, 1913] be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon: Provided that, in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certi-

##### LEF. REF.

<sup>1</sup> These words were added by S. 122 of Act XXII of 1936.

TABLE A.—By sanctioning the adoption of Table A the Legislature has given a general sanction to the doing, by and in relation to a company limited by shares, of everything which the Table says may be done; and, therefore, any and every provision contained in such a company's articles of association which is to the same effect as some provision in Table A, is valid. *Lock v. Queensland, etc., Co.*, (1896) A.C. 461; (1896) 1 Ch. 397. Regulations in Table A are only model regulations which may or may not be adopted by a company at its option. 49 C.W.N. 502.

ART. 1.—See S. 2 of the Act for the definitions of words.

ART. 2.—The restrictions contained in S. 103 of the Act are by that section itself made inapplicable to private companies or

to companies registered before the commencement of this Act which do not issue prospectuses inviting the public to subscribe for its shares, or to companies limited by guarantee without having a share capital in so far as the restrictions relating to shares are concerned.

ART. 3.—As to the different shares and the rights attached to them, see notes under S. 2 (16) *supra*.

ART. 7.—Where the articles of association of a company provide for the issue of a duplicate share certificate on proof of loss or destruction or on such indemnity as the directors might deem fit, the directors' discretion as to the indemnity to be furnished must be deemed to be absolute so that the Court would not interfere in the matter of the exercise of their discretion. 31 C.W.N. 155=1927 C. 947.

ART. 8.—This article is intended to prevent the unrestricted reduction of the share

ficate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. <sup>1</sup>[Except to the extent allowed by section 54-A of the Indian Companies Act, 1913], no part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

#### *Lien.*

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the director thinks fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

#### *Calls on Shares.*

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares.

#### LEG. REF.

<sup>1</sup>These words were inserted by S. 122 of Act XXII of 1936.

capital of the company. The Act itself provides for the reduction of the capital in certain cases, and lays down suitable safeguards so that the power may not be abused. *Vide* S. 54-A, and Ss. 55 to 66.

In the case of *British and America Trustee and Finance Corporation v. Couper*, [1894] A.C. 399, Lord Macnaghten says:—"The exercise of the power is fenced round by safeguards, which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims satisfied. The public, the shareholders and every class of shareholders, individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion, which is entrusted to the Court. Until confirmed by the Court, the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed, the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new start. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode and the incidence of the reduction, and the application or disposition of any capital moneys, which the proposed reduction may set free."

ART. 9.—Where the article gives the company a lien in respect of the debts due by a shareholder to it, it is not necessary that

the debt should have been contracted by the shareholder after his membership. The lien applies even in respect of his debts contracted with the company before he became a shareholder. *Chandoor v. Venugopal Rice Factory*, 43 I.C. 508.

ART. 12.—Three calls were made in pursuance of three resolutions of the directors which were passed without stipulating the amount, time and place for the payments. An allottee failed to pay the allotment and call money; and thereupon the directors passed a resolution forfeiting the shares. But later, they rescinded the resolution and made a fresh call which also was not paid by the allottee. Thereupon, the company brought a suit, and it was held that the first three calls were invalid and the forfeiture resolution *ultra vires*; that the new resolution was valid, and that the company was not precluded from showing the *ultra vires* acts of the directors. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. Calls can be made only by a resolution of the board of directors indicating the amount of the call, the time and place at which, and the person to whom, it is to be paid; and the omission to include these directions cannot be cured by any subsequent notice regarding the directions. 50 B. 461=28 Bom.L.R. 411=1926 B. 341. But it was held in 35 Bom. L.R. 26=1933 B. 80, with reference to a particular article of a company, that it was not necessary for the resolution of the directors making the call to specify the time and place at which or the person to whom the payment was to be made, that in the absence of any evidence the Court might assume that the notices were sent out by the agents

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

of the company with the sanction of the directors, and also that, assuming a formal notice was necessary in such cases, it was open to the parties to waive the same.

ART. 14: INTEREST.—As to interest on calls in arrears after forfeiture of the shares, *see* 48 B. 715=27 Bom.L.R. 574=88 I.C. 96. *See also* 1932 A. 342=1932 A.L.J. 354, where on non-payment of calls the share was forfeited and subsequently the liquidator sued to recover the amount due with interest, it was held that interest at 5 per cent. might be awarded up to the date of forfeiture but not thereafter.

ART. 16.—Any agreement with a company's agent entered into by a person that he should not be liable for payment of call money on shares is a fraud on creditors. It can only amount to a personal arrangement with agent and cannot be a defence to suit by company to recover the same. *Forget v. The Cement Products Co., of Canada, Ltd.*, 1916 W.N. 259=1917 P.C. 267 (P.C.).

ART. 17.—A company, by the issue to a member, of a share credited with a definite sum as paid thereon, can in no sense become a debtor to its shareholder in respect of that full amount. 54 B. 437=57 I.A. 152=34 C.W.N. 709=1930 P.C. 151=59 M.L.J. 242 (P.C.).

ART. 18: APPLICATION OF ARTICLE.—Any provision regarding voluntary transfers in the Articles of Association will not apply to transfers by Court sale. 28 L.W. 932=1928 M. 571=111 I.C. 225.

ESSENTIALS FOR TRANSFER—EQUITABLE TITLE—AVAILABILITY AGAINST THIRD PARTIES.—Where the law prescribes a mode of transfer, any transfer otherwise than by the manner prescribed by law will not confer a valid title. This R. 18 requires that the deed of transfer has to be executed by the transferor and the transferee, and that the transferor shall be deemed to remain the holder of the share until the name of the transferee shall be entered in the register. Where the deed of transfer was signed only by the transferor, the right of the transferee was merely a right in equity to

compel the vendor to execute a proper conveyance and the transaction evidenced by the transfer can be treated only as an agreement to convey capable of being perfected into an absolute conveyance by complying with the rules laid down in the Companies Act and the Articles of Association. This equitable title acquired against the transferor, will not avail against third parties. So, in the case of a conflict between a person who had obtained a deed of transfer signed by the transferor alone, and a person who had purchased the share subsequently in a Court auction sale, and of which due notice was given to the company it was held that the latter was entitled to priority as regards the transfer. 45 M. 537=42 M.L.J. 449=70 I.C. 659.

TRANSFER BY COURT SALE.—As regards the shares held in limited companies by judgment-debtors their attachment and sale are governed by the provisions of the Civil Procedure Code. O. 21, R. 46, C. P. Code, enacts that in the case of a share in the capital of a Corporation, attachment shall be made by a written order prohibiting the person in whose name the shares may be standing from transferring the same or receiving any dividend thereon and a copy of the order being sent to the proper officer of the Corporation. O. 21, R. 76 provides that the Court may instead of directing the sale to be made by public auction authorize the sale of such instrument or share through a broker. O. 21, R. 79 (3) provides that the delivery thereof shall be made by a written order of the Court prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser. O. 21, R. 80 provides that where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a Corporation is standing is required to transfer such nego-

*Transfer and transmission of shares.*

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve :

I, A. B. of \_\_\_\_\_, in consideration of the sum of rupees \_\_\_\_\_ paid to me by C. D. of \_\_\_\_\_ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [or shares] numbered in the undertaking called the \_\_\_\_\_ Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid. As witness our hands the \_\_\_\_\_ day of \_\_\_\_\_

Witness to the signatures of, etc.

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(a) a fee not exceeding two rupees is paid to the company in respect thereof; and  
(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

<sup>1</sup>[If the directors refuse to register a transfer of any share, they shall within two months after the date on which the transfer was lodged with the company send to the transferee and the transferor notice of the refusal.]

21. The executors or administrators of a deceased sold holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

**LEG. REF.**

<sup>1</sup> These words were added by S. 122 of Act XXII of 1936.

transferable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary and such execution or endorsement shall have the same effect as an execution or endorsement by the party. Where the sale is confirmed and the provisions of the Code have been complied with, the transfer becomes complete and there is nothing further to be done by the transferee or by the Court. 45 M. 537=70 I.C. 659=52 M.L.J. 449.

**TRANSFER IN BLANK.**—The delivery of share certificates with the transfer executed in blank passes a title both legal and equitable; but not the property in the shares. 46 B. 489=23 Bom.L.R. 1144=66 I.C. 726.

**ART. 20: DISCRETION OF DIRECTORS TO RECOGNISE EXECUTION PURCHASERS.**—The discretion given by the rule to the directors either to register or to decline to register any transfer of shares is to prevent undesirable persons or debtors of the company from getting transfers of the shares. This discretion can be exercised not only in the case of private transfers but also in the case of purchase of shares in execution of decrees. 45 M. 537=42 M.L.J. 449; 41 B. 76.

**COMPANY SELLING SHARES OF SHAREHOLDERS—POSITION OF.**—Where a limited liability company undertakes to sell the shares belonging to one of its shareholders, the position of its Managing Director in negotiating and completing the sale is one of a fiduciary

character. Utmost good faith should be insisted upon in transactions of this description. If any advantage was obtained by the Managing Director by the sale, whether the purchase was made in his name or in the name of his minor sons, the benefit must go to the owner of the shares. 1930 A.L.J. 1396=128 I.C. 229=1930 A. 615.

**PURCHASER OF SHARE—RIGHT TO DIVIDEND.**—In the absence of a contract to the contrary a purchaser of shares would ordinarily be entitled to all the dividends which may have been declared after the date of the purchase. But there is nothing in law against a shareholder reserving the dividends to himself selling only the shares. When there was a definite understanding that only the shares and not the dividends on the shares were the subject of bargain, whether under private or public sale, the original owner would be entitled to the dividend relating to the period anterior to the sale, even though the same may have been declared subsequent to the date of sale. 1930 A.L.J. 1396=128 I.C. 229=1930 A. 615.

**ART. 21: APPLICABILITY OF RULE.—Arts. 21 and 22,** while appropriate to a system such as that prevailing in England under which a legal title from a deceased person can only be traced either through probate or through letters of administration, are hardly so appropriate to a system under which a legal title by devolution may be obtained, apart altogether from and without either probate or letters of administration. 1936 R. 52. The provision contained in this article causes great hardship to the heirs of small investors, who are put to the necessity of obtaining letters of administration at



22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person, before the death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

#### *Forfeiture of Shares.*

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of call or instalment as is unpaid, together with any interest which may have accrued.

considerable expense. So also, where shares are held by a member of a Joint Hindu family some difficulty is felt. The shares held by such a member generally belong to the joint Hindu family, and on his death the survivor becomes entitled to them by right of survivorship. In such a case, he would not be entitled according to law to obtain letters of administration in respect of such shares. The directors, therefore, cannot validly require such a person to produce letters of administration which he could not obtain under law. 1930 A. 82=126 I.C. 357. It is not within the legal competence of any company to lay down any condition regulating the grant of letters of administration in contravention of any statutory enactment relating thereto. The Articles of Association of a company provided that the executors or administrators of a deceased shareholder are the only persons who are recognised by the company as having a title to the shares. In a joint Hindu family, a person claiming by survivorship is not entitled to a grant of letters of administration to any portion of such property. Hence in such cases, the company cannot insist upon the surviving member of the joint Hindu family obtaining letters of administration. It is open to the company to refuse to recognise the claim in the absence of satisfactory evidence of the right of survivorship. But if the company disputes or denies the title of the claimant without any just cause, and merely on the ground that letters of administration have not been obtained, the company will expose itself to the risk, trouble and expense of a declaratory suit by the claimant. 1930 A. 82.

ART. 22.—As to the power to transfer shares of the legal representative of a deceased member, see S. 35. The legal representatives of a deceased member or the receiver in insolvency would in their representative capacity on behalf of the estate, be entitled to receive dividends, bonuses and other benefits attached to the shares, and would be bound to pay the calls as contributories. See Ss. 160 and 161 and also Art. 23.)

ART. 24.—The director of a company has no power to cancel or forfeit shares or

release shareholders in the absence of such special power. 19 A.L.J. 351=62 I.C. 450. The articles of association are merely the terms of the contract which a member is supposed to know and to have agreed to. The company, therefore, cannot make a member liable for forfeiture otherwise than in accordance with the provisions of the articles of association. There is no valid forfeiture if notice as required to be given has not been given. (*Stanhope's case*, (1866) L.R. 1 Ch. 161.)

CONDITIONS OF VALID FORFEITURE.—A valid call and default are conditions precedent to and necessary for a valid forfeiture. The directors, for instance, must be properly appointed. The resolution of the directors making the call should mention the amount, the time and place of payment. Where these things are absent, the calls would be invalid as against the contributories, and on such invalid calls there can be no legal default and consequently no legal forfeiture. But mere laches on the part of directors or irregularities such as that the forfeiture is not formally registered or that there is no formal resolution of the directors do not affect the legality of the forfeiture. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. A mere intention to forfeit not carried into effect does not amount to forfeiture. A company's minutes book only showed a resolution notice calling for payment, and another notice demanding payment within six week's 'failing which shares held by them will be forfeited as provided in the Act'. The shareholders did not comply with the notice and more than a year later the company was wound up. It was held that the notice by itself was sufficient to operate as a forfeiture, and no resolution to that effect by the directors was required. Therefore, the contributories were held bound to contribute. 10 P. 249=130 I.C. 534=1931 P. 44; 36 P.L.R. 282=155 I.C. 16=1934 L. 1015. But where there is a valid resolution of forfeiture, the fact that the member's name has not been removed from the register is immaterial. *Lyster's Case*, (1867) 4 Eq. 233; *Marshall v. Glamorgan Iron and Coal Co.*, (1868) 7 Eq. 129.

REVOCATION OF FORFEITURE.—Where the



25. The notice shall name a further day (not earlier than the expiration of fourteen days' from the date of the notice) on or before which the payment required by the notice is to be made and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares.

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given, for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any) nor shall his title to the share be affected by any irregularity or invalidity on the proceedings in reference to the forfeiture, sale or disposal of the share.

calls have been valid and there has been default, and the power of forfeiture has once been exercised by the directors, it is not open to the directors and to the company to rely upon the irregularity of their own procedure and without the consent of the contributory whose shares have been forfeited to revoke the forfeiture and replace him on the register as contributory. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. But where the calls have been *invalid* as the directors making the calls did not stipulate the amount, time or place of payment, the allottee of the shares is not bound to pay these calls, and his failure to do so cannot constitute default entailing forfeiture. In such a case, even if the directors should pass a resolution of forfeiture, it would be *ultra vires* on their part. It is therefore open to them to rescind that resolution of forfeiture and to issue a fresh call on the shares held by the allottee. When the allottee fails to pay, it would be open to the company to maintain a suit both for the allotment and call money. 54 B. 178.

**PRESUMPTION.**—Where there is an entry as to forfeiture in the company's register, there is a presumption that the same has been properly made and that all the antecedent requirements have been complied with; but this presumption is rebuttable. 83 I.C. 94=1924 M. 703.

**CANCELLATION OF SHARES.**—A resolution authorising the money of those shareholders who have not paid their allotment money and are not willing to remain as members to be returned, is *ultra vires*. 19 A.L.J. 351=62 I.C. 450.

**FORFEITURE AND SURRENDER, DISTINGUISHED**—Forfeiture denotes a proceeding taken by the company adversely to the shareholder; but surrender denotes consent on the part of the shareholder.

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**ART. 26**—Where notices were issued to shareholders making calls, stating that in default of payment the shares will be forfeited, but no resolution was passed by the directors actually forfeiting the shares, and the company afterwards went into liquidation, it was held that there was no valid forfeiture and that the shareholders were liable to pay the amounts of their calls in the winding up. 155 I.C. 16=1934 L. 1915.

**ART. 27**—There is no obligation on the part of the directors to sell or ascertain the value of a forfeited share the moment that it was forfeited. In a suit for the value of the shares, to fix the value as at the time of bringing the suit would not be incorrect or unreasonable. 158 I.C. 10=1935 L. 190.

**ART. 28: LIMITATION.**—This article imposes on forfeiture, a new obligation or a new debt, and as the shareholder thenceforth ceases to be a member of the company, his liability to pay future calls is gone, and all that is left is this new liability to pay the company "all monies which at the date of forfeiture were presently payable by him to the company in respect of the shares". Such a person is liable with regard to unpaid calls, not as a contributory either as a present or a past member of the company, but as a debtor to the company. This gives the company a fresh cause of action. So a suit to enforce this obligation is governed by Art. 115 and time begins to run from the date on which shares are forfeited. 52 B. 477=30 Bom.L.R. 549=1928 B. 252. The fact that the calls are barred by time as against the company and that the company could not realise them by lapse of time is no answer to the liquidator's claim for contribution. 38 A. 357; 31 M. 66; 22 B. 654; 10 P. 249=12 Pat.L.T. 215. See also 54 A. 541=1932 A.L.J. 354=1932 A. 342.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

*Conversion of shares into stock.*

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock and may with the like sanction re-convert any stock into paid-up share of any denomination.

32. The holders of stock may transfer the same, or any part thereof in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

*Share-warrants.*

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends or other moneys on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it and the shares shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share warrant. The company shall, on two days, written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company, or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

*Alteration of Capital.*

41. The directors may, with the sanction of <sup>1</sup>[the company in general meeting], increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time,

or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may, by <sup>1</sup>[ordinary resolution],

(a) consolidate and divide its share capital into shares of larger amount than its existing shares ;  
(b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital, into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913 ;

(c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person ;

<sup>2</sup>[44-A. The company may, by special resolution, reduce its share capital in any manner and with, and subject to any incident authorised and consent required, by law.]

#### *General Meetings.*

45. The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held <sup>3</sup>[within eighteen months from the date of its incorporation and thereafter once at least in every year] at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting, being so held, a general meeting shall be held in the month next following and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings ; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and extraordinary general meetings shall also be called on such requisition, or in default, may be called by such requisitionists, as provided by section 78 of the Indian Companies Act, 1913. If at any time there are not within British India sufficient directors capable of acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

#### *Proceedings at General Meeting.*

49. <sup>4</sup>[Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions], fourteen days, notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and hour of meeting, and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under <sup>5</sup>[the Indian Companies Act, 1913, or] the regulations of the company, entitled to receive such notices from the company ; but the <sup>6</sup>[the accidental omission to give notice to or the non-receipt of notice] by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the amounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business ; save as herein otherwise provided, <sup>7</sup>[two members in the case of a private company and five members in the case of any other company] personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved ; in any other case, it shall

#### **LEG. REF.**

<sup>1</sup> These words were substituted for the words "special resolution" by sec. 122 of the Act XXII of 1936.

<sup>2</sup> Cl. (d) of regulation 44 was omitted and regulation 44-A was inserted by *ibid.*

<sup>3</sup> These words were substituted for the words "once in every year" by *ibid.*

<sup>4</sup> These words were inserted, *ibid.*

<sup>5</sup> These words were substituted for the words "non-receipt of the notice" by sec. 122 of Act XXII of 1936.

<sup>6</sup> These words were substituted for the words "three members", *ibid.*

ART. 49: ESSENTIALS OF VALID MEETING.—For a meeting to be a meeting of the company it must be a meeting convened strictly in accordance with the Articles of Association either by the directors or by the shareholders under requisition or by the direction of the Court to the liquidator in winding up proceedings. 52 C. 513—1925 C. 817.

stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded [in accordance with the provisions of clause (c) of sub-section (1) of section 79 of the Indian Companies Act, 1913], and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against, that resolution.

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman, of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

#### *Votes of Members.*

60. On a show of hands every member present in person shall have one vote. <sup>2</sup>[On a poll every member shall have one vote in respect of each share or each hundred rupees of stock held by him.]

#### LEG. REF.

<sup>1</sup> These words and figures were substituted for the words "by at least three members" sec. 19 of Act II of 1938.

<sup>2</sup> These words were substituted for the words "On a poll every member shall have one vote for each share of which he is the holder" by sec. 122 of Act XXII of 1936.

**ART. 53: MEMBER'S RIGHT TO BE HEARD.**—At a meeting, a shareholder has a right to be heard on reasonable terms for a reasonable time. But whether the denial of this right vitiates the resolution, depends upon the facts of each case. 26 Bom.L.R. 987 =1925 B. 49.

**AMENDMENTS.**—Any proper amendment, moved by any member at a meeting, should be put to the meeting for consideration, and if the chairman rules out any such amendment, the resolution is liable to be set aside. But if an amendment is really a counter-proposal involving either adjournment of the consideration of the resolution or the rejection of the resolution proposed before the meeting, or goes beyond the scope of the subject-matter of the resolution it should be ruled out. 26 Bom.L.R. 987=1925 B. 49. An amendment may be rejected if it is contrary to the terms of the order of the Court, under which the meeting takes place. 26 Bom.L.R. 907=1925 B. 105.

**POINT OF ORDER.**—A point of order assailing the competency of the meeting to consider a proposed resolution, which is long

enough to form a speech against the resolution, can be ruled out. 26 Bom.L.R. 887 =1925 B. 49. A point of order objecting to the validity of votes tendered for the resolution should be handed over to the chairman before he commences to take the poll, and it should also be directed to particular votes. 26 Bom.L.R. 987=1925 B. 49=90 I.C. 580.

**ART. 55: CHAIRMAN'S POWER OF CLOSING MEETING.**—The chairman empowered by the Articles of Association to adjourn a meeting has a discretion to adjourn with the consent of the meeting, but he is not bound to do so. 47 B. 915=25 Bom.L.R. 1083 =80 I.C. 75.

**RIGHT OF GENERAL MEETING TO ADJOURN.**—In the absence of an express prohibition to the contrary, the law gives the right to every meeting to adjourn itself, provided the adjournment is for a *bona fide* purpose. 55 M.L.J. 385=1928 M. 1215.

**PROXIES, USE OF, IN ADJOURNED MEETING.**—An adjourned meeting is merely a continuation of the meeting and old proxies may be made use of at the adjourned meeting also. 55 M.L.J. 358=1928 M. 1215.

**ART. 56.**—The mere fact that an amendment to a resolution was first lost on a show of hands but on demand for a poll before the result was declared it was withdrawn in view of another amendment, does not invalidate the original resolution. 26 Bom.L.R. 987=1925 B. 49.

**ART. 73: CONSTRUCTION AND SCOPE.—**

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors, and to sending to the registrar, an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

75. The director shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors;
  - (b) of the names of the directors at each meeting of the directors and of any committee of the directors;
  - (c) of all resolutions and proceedings at all meetings of the company, and, of the directors, and of committees of directors;
- and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

#### The seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

#### Disqualifications of Directors.

77. The officer of director shall be vacated if the director—

<sup>1</sup>[(a) fails to obtain within the time specified in sub-section (1) of section <sup>2</sup>[85] of the Indian Companies Act, 1913, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment; or]

<sup>1</sup>[(b) is found to be of unsound mind by a Court of competent jurisdiction; or]

<sup>1</sup>[(c) is adjudged insolvent; or]

<sup>1</sup>[(d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or]

<sup>1</sup>[(e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker; or]

<sup>1</sup>[(f) absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is longer, without leave of absence from the board of directors; or]

<sup>1</sup>[(g) accepts a loan from the company; or]

#### LEG. REF.

<sup>1</sup> These clauses were substituted for the original cls. (a) to (d) by sec. 122 of Act XXII of 1936.

<sup>2</sup> This figure was substituted for the figure "84" by sec. 19 of Act II of 1938.

however the loans, although in excess of the authority of the directors, are not *ultra vires*, the money having been received by the company and applied for its purposes, the Official Liquidator of the company cannot, during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced. I.L.R. (1933) Bom. 421=42 C.W.N. 733=40 Bom.L.R. 1109=1938 P.O. 159 (P.G.). Though the borrowings by the directors of a company may have at times exceeded the limits fixed by Art. 73, where the claim made by a creditor lending money is not in excess of the amount limited, the claim cannot be challenged on the ground that the incurring of the debt was *ultra vires*. The rule in *Clayton's case* has no application where the question is between moneys borrowed *intra vires* and moneys borrowed *ultra vires*. As soon as the amount due comes to below the limit, the borrowing is authorised under Art. 73, and the presumption would be that the moneys already repaid represented the

moneys borrowed *ultra vires* which never became the property of the company, but remained the property of the lender. In a case where the borrowing is *ultra vires* the directors, and not *ultra vires* the company, the money can be recovered in an action for money had and received. 37 Bom.L.R. 978=1936 B. 62.

ART. 75.—There is always a presumption in favour of the validity of the proceedings rather than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. 26 Bom.L.R. 987=1925 B. 49. The minutes in the books are to be received, though not as conclusive, yet as *prima facie* evidence of resolutions and proceedings at general meetings and a chairman's declaration of a poll as evidenced by an entry in minutes will be presumed to be correct, and this presumption is rebuttable. But if the meeting be held under the orders of the Court under the chairmanship of an officer of the Court the presumption is absolute. 28 Bom.L.R. 907=1925 B. 105.

ART. 76: IRREGULARITY IN AFFIXING SEAL.—Where a document is intended and required to be under seal, a mere defect or irregularity in affixing the seal, does not make the document bad for all purposes. If the Court is satisfied that the parties intended and had power to create a charge by



<sup>1</sup>[ (h) ] is concerned or participates in the profits of any contract with the company ; or

<sup>2</sup>[ (i) ] is punished with imprisonment for a term exceeding six months :

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is a director, but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

#### *Rotation of Directors.*

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. <sup>3</sup>[Subject to the provisions of sections 83-A and 83-B of the Indian Companies Act, 1913] the Company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The Company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead ; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

#### *Proceedings of Directors.*

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

#### LEG. REF.

1 The original cls. (e) and (f) were re-lettered as (h) and (i) by sec. 122 of Act XXII of 1936.

2 These words were inserted by sec. 122 of Act XXII of 1936.

the document, it will give effect to the intention notwithstanding any mistake in or a failure of the attempt to effect it. If, further, the document was acted upon by the company, the obligation it embodies will be enforced. 57 C. 1101=34 C.W.N. 570=1930 C. 782. An agreement between a company and a person as *bantian* of the company that the latter will advance all the necessary funds up to a certain limit and in return will have the sole right to collect all sums due on bills to the company and re-pay himself the advances so made as also his remuneration, is an instrument which if otherwise binding creates an equitable charge on the company's outstandings for the amount due to the person. Such an agreement need not be under the company's seal. It is enough if it is in writing. Even if such agreement is required to be under seal by the Articles of Association, if it is fixed with the seal irregularly, the irregularity does not affect the

binding character of the agreement. 57 C. 1101=34 C.W.N. 570=1930 C. 782.

ART. 87: MEETING MUST BE DULY ASSEMBLED.—The mere accidental assembling of a majority of persons who are directors of a company does not constitute a legal board, and the acts of the directors at a meeting irregularly called, as where notice of meeting is not given to some of the directors, is not binding on the company, unless ratified. A majority must have been duly assembled, and then a majority of those who are assembled can act for the whole. But where there is a custom or by-law of the directors to hold meetings for the transaction of business at a certain time and place, special notice of such meetings is not necessary in order to validate such business transacted thereat. So also, where a meeting is regularly assembled, but adjourns to a future time and place, special notice of adjourned meeting is not necessary, since the fact and record of adjournment give such notice.

DIRECTOR CANNOT ACT BY PROXY.—A director cannot delegate the performance of his discretionary duties, which imply trust and confidence, to a proxy, but he must attend the meetings of the Board and set in person.

NOTICE OF MEETING.—The right of all the



88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so <sup>1</sup>[formed] shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings; if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

#### *Dividends and Reserve.*

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits <sup>2</sup>[of the year or any other undistributed profits].

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose

#### **LEG. REF.**

<sup>1</sup> This word was substituted for the word "found" by Act X of 1914, Sch. I.

<sup>2</sup> These words were added by sec. 122 of Act XXII of 1936.

directors to notice is founded on the right of being present for the purpose of consultation of which right a minority cannot be arbitrary deprived by the majority. But while all the members must be notified in order to validate the transactions had at the meeting, it is not necessary that all should be present; but it will be sufficient if a quorum assemble. It follows that proceedings at a meeting of the majority of directors, without notice to the other members, are void, although all those present voted in favour of the action taken, and the result would have been the same had the other members been present. It is not necessary that a notice convening a meeting of the directors should contain particulars as to the business which is to be done at the meeting. The meeting can take up any question it likes without previous notice so as to make it binding upon the whole committee. 54 M. L.J. 140=51 M. 68=1928 M. 372.

**ART. 88.**—The rules of a company as to the quorum for a meeting of the directors

for enacting any business applies to the transaction of business by circulation where such transaction of business is allowed, but there is no restriction as to number. 20 L. W. 74; 51 C. 406=1924 C. 982=82 I.C. 405.

**ART. 94.**—Where a person who had ceased to be a director by efflux of time, entered into a contract as director on behalf of the company with a third party, and the shareholders agreed to ratify and carry out the same, it was held that the irregularity was cured by this article, and that the company was estopped from contending that the contract was not binding on it because the director who had entered into the contract was not a duly appointed one. 1935 R. 76=156 I.C. 196.

**ART. 95.**—Until the dividend is declared, no shareholder has any right of suit in respect of it. *Bond v. Barrow Haematite Steel Co.*, (1902) 1 Ch. 353. After its declaration it becomes a debt payable to the shareholder, and each shareholder becomes entitled to sue the company for the proportionate amount due to him. *Re Severn, etc., Ry. Co.*, (1896) 1 Ch. 559. The company is not a trustee for the dividends held for the shareholders. 47 M.L.J. 563=1924 M. 721=79 I.C. 947.

to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

#### *Accounts.*

<sup>1</sup>[103. The directors shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place :

(b) all sales and purchases of goods by the company :

(c) the assets and liabilities of the company.]

<sup>1</sup>[104. The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.]

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

<sup>1</sup>[106. The directors shall as required by sections 131 and 131A of the Indian Companies Act, 1913, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, <sup>2</sup>[income and expenditure accounts], balance-sheets, and reports as are referred to in those sections.]

107. The profit and loss account shall <sup>3</sup>[in addition to the matters referred to in subsection (3) of section 132 of the Indian Companies Act, 1913] show, arranged under the most convenient heads, the amount of gross income, <sup>4</sup>[diminished in the case of a banking company by the amount of any provision made to the satisfaction of the auditors for bad and doubtful debts] distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, <sup>5</sup>[fourteen] days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

#### *Audit.*

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

#### *Notices.*

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

#### LEG. REF.

<sup>1</sup> This regulation was substituted by sec. 122, Act XXII of 1936.

<sup>2</sup> These words were inserted by sec. 19 of Act II of 1938.

<sup>3</sup> These words were inserted by sec. 122 of Act XXII of 1936.

<sup>4</sup> Inserted by Act XXX of 1943.

<sup>5</sup> This word was substituted for the word "seven" by sec. 19 of Act II of 1938.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive, notice of the meeting. 1\* \* \*

### TABLE B.

(See sections 249 and 262).

#### TABLE OF FEES TO BE PAID TO THE REGISTRAR.

##### I.—By a company having a share Capital.

Rs. A. P.

1. For registration of a company whose nominal share capital does not exceed Rs. 20,000 a fee of .. .. .	40	0	0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—			
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees .. .. .	20	0	0
For every 10,000 rupees of nominal share capital or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,00,000 rupees .. .. .	5	0	0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,00,000 rupees .. .. .	1	0	0
3. For registration of any increase of share capital made after the first registration of the company the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration :			
Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.			
4. For registration of any existing company, except such companies as are by this Act, exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up .. .. .	5	0	0
6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of .. .. .	5	0	0

##### II.—By a company not having a share capital.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 .. .. .	40	0	0
2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 .. .. .	100	0	0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100 .. .. .			
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of .. .. .	400	0	0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable <sup>1</sup> [in respect of such increase] if such increase had been stated in the articles of association at the time of registration .. .. .			

<sup>1</sup>[\*]

#### LEG. REF.

<sup>1</sup> The words "No other persons shall be entitled to receive notices of general meetings" were omitted by sec. 19 of Act II of 1938.

<sup>2</sup> These words were inserted by Notification No. 1-D, dated 3rd November, 1917, see Gazette of India, 1917, Pt. I, p. 1787.

<sup>3</sup> The figure "5" was omitted, *ibid.*

Rs. A. P.

Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the company.

6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company.

7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up .. .. . 5 0 0

8. For making a record of any fact by this Act authorised or required to be recorded by the registrar a fee of .. .. . 5 0 0

## [THE SECOND SCHEDULE.

(See sections 98 and 154).

## FORM I.

THE INDIAN COMPANIES ACT, 1913.

## STATEMENT IN LIEU OF PROSPECTUS

filed by

.....LIMITED.

pursuant to section 98 of the Indian Companies Act, 1913.

Presented for filing by

The nominal share capital of the company.	Rs. . . . .
Divided into .. .. .	Shares of Rs. . . . . each. " Rs. . . . . each. " Rs. . . . . each.
Amount (if any) of above capital which consists of redeemable preference shares .. .. .	Shares of Rs. .... each.
The date on or before which those shares are, or are liable, to be redeemed.	
Names, descriptions and addresses of directors or proposed directors and managers or proposed managers and any provision in the articles, or in any contract as to appointment of and remuneration payable to directors or managers.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. —shares of Rs. . . . . fully paid. 2. —shares upon which Rs. . . . per share credited as paid. 3. Debenture Rs. . . . . 4. Consideration.
Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company. Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs. .... Cash . . . Rs. .... Shares. . . . Rs. .... Debentures . . . Rs. .... Goodwill Rs. ....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or, Rate of the commission. ....	Amount paid. Amount payable. Rate per cent.

LEG. REF.

of Act XXII of 1936.

1 This schedule was substituted by sec. 123

The number of shares, if any, which persons have agreed for <del>the</del> commission to subscribe absolutely.	
Estimated amount of preliminary expenses.	Rs. ....
Amount paid or intended to be paid to any promoter.	Name of promoter. .... Amount Rs. ....
Consideration for the payment.	Consideration :—
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts other than contracts appointing or fixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement.)	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where, the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
If it is proposed to acquire any business, the amount, as certified by the persons by whom the [accounts] of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the amounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.	
(Signatures of the persons above-named as Directors or proposed Directors or of their agents authorised in writing.)	
Date.	

FORM II.  
THE INDIAN COMPANIES ACT, 1913.  
STATEMENT IN LIEU OF PROSPECTUS  
filed by

..... LIMITED,

Pursuant to sub-section (1) of section 134 of the Indian Companies Act, 1913.  
Presented for filing by

The nominal share capital of the company.	Rs.
Divided into	Shares of Rs. .... each. Shares of Rs. .... each. Shares of Rs. .... each.

LEG. REF.

1 This word was substituted for the word

“amounts” by sec. 20 of Act II of 1938.

Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs..... each.
The date on or before which these shares are or are liable, to be redeemed.	
Names, descriptions and addresses of Directors or proposed Directors and Managers or proposed Managers and any provision in the Articles, or in any contract as to appointment of and remuneration payable to Directors or Managers.	
If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. Shares of Rs.....fully paid. 2. Shares upon which Rs.....per share credited as paid. 3. Debenture Rs. 4. Consideration.
Names and addresses of vendors of property (1) purchased or acquired by the Company within the two years preceding the date of this Statement or (2) agreed or proposed to be purchased or acquired by the Company.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for good will.	Total purchase price Rs.... Cash . . . Rs.... Shares . . . Rs.... Debentures . Rs.... Goodwill . . Rs....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company; or rate of the Commission.	Amount paid. Amount payable.  Rate per cent.
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Unless more than two years have elapsed since the date on which the Company was entitled to commence business :—	
Estimated amount of preliminary expenses.	Rs.
Amount paid or intended to be paid to any promoter.	Name of promoter. Amount Rs.
Consideration for the payment.	Consideration.
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the Company or contracts, other than contracts appointing or fixing the remuneration of a Managing Director or Managing Agent, entered into more than two years before the delivery of this statement.	
Times and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the Company.	
Full particulars of the nature and extent of the interest of every Director in the promotion of or in the property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be acquired by the Company or where	





## FORM B.

(See sections 7 and 151.)

## MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND NOT HAVING A SHARE CAPITAL.

*Memorandum of Association.*

1st.—The name of the company is "The Mutual Calcutta Marine Association, Limited."  
 2nd.—The registered office of the company will be situate in Calcutta.  
 3rd.—The objects for which the company is established are "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

*Names, Addresses and Descriptions of Subscribers.*

- " 1. A. B. of
- " 2. C. D. of
- " 3. E. F. of
- " 4. G. H. of
- " 5. I. J. of
- " 6. K. L. of
- " 7. M. N. of

Dated the

Witness to the above signatures.

X. Y. of

## ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION.

*Number of Members.*

1. The company for the purpose of registration is declared to consist of five hundred members.
2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

*Definition of Members.*

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

*General Meetings.*

4. The first general meeting shall be held at such time (not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the Directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting; if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

*Proceedings at General Meetings.*

10. Fourteen days' notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say) :—if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting adjourn the meeting from time to time and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

#### *Votes of Members.*

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointer, or if such appointer is a corporation, under its common seal.

23. (1) No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

Company, Limited.

I, \_\_\_\_\_, of \_\_\_\_\_, being a Member of the \_\_\_\_\_ Company, Limited, hereby appoint \_\_\_\_\_ of \_\_\_\_\_ as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the \_\_\_\_\_ day of \_\_\_\_\_ and at any adjournment thereof.

Signed this \_\_\_\_\_ day of \_\_\_\_\_.

#### *Directors.*

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association, shall, for all the purposes of the Indian Companies Act, 1913, be deemed to be directors.

#### *Powers of Directors.*

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

#### *Elections of Directors.*

28. The directors shall be elected annually by the company in general meeting.

#### *Business of Company.*

(Here insert rules as to mode in which business of insurance is to be conducted.)

#### *Audit.*

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being.

in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

*Notices.*

30. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, repaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

*Names, Addresses and Descriptions of Subscribers.*

" 1. A. B. of  
" 2. C. D. of  
" 3. E. F. of  
" 4. G. H. of  
" 5. I. J. of  
" 6. K. L. of  
" 7. M. N. of  
day of

19

*Dated the*

Witness to the above signatures.

X. Y., of

FORM C.

(See Sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND HAVING A SHARE CAPITAL.

*Memorandum of Association.*

1st.—The name of the company is "The Snowy Range Hotel Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are "the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
" 1. A. B. of .. .. .	200
" 2. C. D. of .. .. .	25
" 3. E. F. of .. .. .	30
" 4. G. H. of .. .. .	40
" 5. I. J. of .. .. .	15
" 6. K. L. of .. .. .	5
" 7. M. N. of .. .. .	10
TOTAL SHARES TAKEN ..	325

*Dated the*

Witness to the above signatures.

X. Y., of

C.C.M.—206

*day of*

19.

*Articles of Association to accompany preceding Memorandum of Association.*

- 1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.
- 2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.
- 3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.
- 4. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

*Names, Addresses and Descriptions of Subscribers.*

, merchant.

- " 1. A. B. of
- " 2. C. D. of
- " 3. E. F. of
- " 4. G. H. of
- " 5. I. J. of
- " 6. K. L. of
- " 7. M. N. of

day of

19

*Dated the*  
Witness to the above signatures.  
X. Y., of

FORM D.

(See Sections 8 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY HAVING A SHARE CAPITAL.

*Memorandum of Association.*

- 1st.—The name of the company is "The Patent Stereotype Company."
  - 2nd.—The registered office of the company will be situate in the province of Bombay.
  - 3rd.—The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates of which method P. Q., of Bombay, is the sold patentee."
- We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.						Number of shares taken by each subscriber.
" 1.	A. B. of	..	..	..	..	3
" 2.	C. D. of	..	..	..	..	2
" 3.	E. F. of	..	..	..	..	1
" 4.	G. H. of	..	..	..	..	2
" 5.	I. J. of	..	..	..	..	2
" 6.	K. L. of	..	..	..	..	1
" 7.	M. N. of	..	..	..	..	1
TOTAL SHARES TAKEN ..						12

*Dated the*  
Witness to the above signatures.  
X. Y., of

day of

19

*Articles of Association to accompany the preceding Memorandum of Association.*

- 1. The share capital of the company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.
- 2. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

*Names, Addresses and Descriptions of Subscribers.*

, merchant.

- "1. A. B. of  
 "2. C. D. of  
 "3. E. F. of  
 "4. G. H. of  
 "5. I. J. of  
 "6. K. L. of  
 "7. M. N. of  
*dry of*

*Dated the*  
 Witness to the above signatures.  
 X. Y., of

19

## FORM E.

AS REQUIRED BY PART II OF THE ACT.

(See Section 32.)

Summary of Share Capital and Shares of the		Company, Limited, made up	
to the	day of	19	(being the day of the first
ordinary general meeting in 19	divided into <sup>1</sup>	shares of	Rs. each.
Nominal share capital Rs.		shares of	Rs. each.
Total number of shares taken up <sup>1</sup> to the		day of 19	
which number must agree with the total shown in the list as held by existing members.			
Number of shares issued subject to payment wholly in cash		..	
Number of shares issued as fully paid up otherwise than in cash		..	
Number of shares issued as partly paid up to the extent of	per share		
otherwise than in cash			
*There has been called up on each—of shares		.. Rs.	
There has been called up on each—of shares		.. Rs.	
There has been called up on each—on shares		.. Rs.	
*Total amount of calls received, including payments on application and allotment		.. Rs.	
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash.		.. Rs.	
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of	per share	.. Rs.	
Total amount of calls unpaid		.. Rs.	
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary		.. Rs.	
Total amount (if any) paid on shares forfeited		.. Rs.	
Total amount of shares and stock for which share-warrants are outstanding		.. Rs.	
Total amount of share-warrant issued and surrendered respectively since date of last summary.		.. Rs.	
Number of shares or amount of stock comprised in each share-warrant		.. Rs.	
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act		.. Rs.	

## LEG. REF.

1 When there are shares of different kinds or amounts (*e.g.*, Preference and Ordinary of Rs. 200 or Rs. 100) state the numbers and nominal values separately.

2 Where various amounts have been called or there are shares of different kinds, state them separately.

3 Include what has been received on forfeited as well as on existing shares.

4 State the aggregate number of shares forfeited.

SEC. 32 (2) AND FORM E.—The Companies Act sanctions forfeiture of shares generally, that is to say, forfeiture as a means to get rid of a member who is in default either in payment of calls or in observing or performing other rules and regulations of the company. See 32 (2) (g) and Form E of Sch. III recognise forfeiture generally and not for non-payment of calls only. 49 C.W. N. 592.

List of Persons holding shares in the Company, Limited, on the day of 19 , and of persons who have held shares therein at any time since the date of the last return, showing their names and addresses and an account of the shares so held.

Folio in register ledger containing particulars.	Names, Address, and Occupations.				Account of Shares.								Remarks.
	Name in full.	Father's Name.	Address.	Occupation or caste.	<sup>1</sup> Number of shares held by existing Members at date of return.	<sup>2</sup> Number.	<sup>4</sup> Particulars of Shares transferred since the date of the last Return by persons who are still Members.	<sup>1</sup> Number.	<sup>3</sup> Shares transferred since the date of the last Return by persons who have ceased to be Members.	Date of Registration of Transfer.			

Names and addresses of the persons who are the Directors of the , Limited on the day of 19 .

Names.	Addresses.

Names and addresses of the persons who are the managers of the , Limited, on the day of 19 .

Names.	Addresses.

NOTE.—Banking companies must add a list of all their places of business.  
I, , do hereby certify that the above list and summary truly and correctly states the facts as they stood on day of 19 .  
(State, whether director, manager or secretary). (Signature).....

LEG. REF.  
<sup>1</sup> State the aggregate number of shares forfeited (if any).  
<sup>2</sup> The aggregate number of shares held, and not the distinctive numbers, must be stated and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.  
<sup>3</sup> When the shares are of different classes, these columns may be sub-divided so that the number of each class held or transferred may be shown separately.  
<sup>4</sup> The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the remarks column immediately opposite the particulars of each transfer.

## FORM F.

(See Section 132.)

.....LIMITED.

Balance sheet as at .....19

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
CAPITAL—		FIXED CAPITAL EXPENDITURE—	
Authorised Capital . . . . . shares of		(Distinguishing as far as possible between expenditure upon good will, land, buildings, lease-holds, railway sidings, plant, machinery, furniture, development of property patents, trade marks, and designs, interest paid out of capital during construction, etc., and stating in every case the original cost and the additions thereto and deductions therefrom during the year, and the total Depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance-sheet after the first balance-sheet subsequent to the reduction or revaluation shall show the reduced figures, with the date of and the amount of the reduction made.)	
Issued capital. . . . . shares of Rs. . . each		PRELIMINARY EXPENSES	
(i) Shares issued as fully paid up pursuant to any contract without payments being received in cash. . . . . shares of Rs. . . each		COMMISSION OR BROKERAGE	
(ii) Shares issued for payments in cash. . . shares of Rs. . . each		(Commission or Brokerage paid for underwriting or placing or subscribing shares or debentures until written off.)	
Subscribed Capital. . . . . shares of Rs. . each.		DISCOUNT ALLOWED on the issue of shares or so much as has not been written off at the date of the balance-sheet	
Amount called up at Rs. . . . . per share		STORES AND SPARE PARTS	
Less—Calls unpaid—		LOOSE TOOLS	
(i) due from Managing Agents		LIVE-STOCK AND VEHICLES	
(ii) due from others		STOCK-IN-TRADE	
Add—Forfeited shares (amount paid up).		(Stating mode of valuation, e.g., cost or market value).	
Note—Where circumstances permit issued and subscribed capital and amount called up may be shown as one item, e.g.,		BILLS OF EXCHANGE	
Issued and Subscribed Capital. . . . . shares of Rs. . . each Rs. . . . . paid up		[BOOK DEBITS (OTHER THAN BAD AND DOUBTFUL DEBITS OF A BANKING COMPANY FOR WHICH	
RESERVES			
DEBENTURES stating the nature of security			
ANY SINKING FUND			
ANY OTHER FUND CREATED OUT OF NET PROFITS, including any development fund.			
ANY PENSION OR INSURANCE FUND			
[PROVISION FOR BAD AND DOUBTFUL DEBITS (IN THE CASE OF COMPANIES OTHER THAN BANKING COMPANIES.) (Substituted by Act XXX of 1943.)			

LEG. REF.

This Form was substituted by S. 124 of Act XXII of 1936.







## FORM G.

(See Section 136.)

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE COMPANIES AND DEPOSIT, PROVIDENT, OR BENEFIT SOCIETIES.

<sup>1</sup>The share capital of the company is Rs. divided into shares of Rs. each.

The number of shares issued is (Call to the amount of Rs. per share have been made, under which the sum of Rs. has been received.

The liabilities of the company on the thirty-first day of December (or thirtieth of June) were—

Debts owing to sundry persons by the company ;

Under decree, Rs.

On mortgages or bonds, Rs.

On notes, bills or hundis, Rs.

On other contracts, Rs.

On estimated liabilities, Rs.

The assets of the company on that day were :

Government securities [stating them], Rs.

Bill of exchange, hundis and promissory notes, Rs.

Cash at the Bankers, Rs.

Other securities, Rs.

<sup>2</sup>[FORM H.

(See Section 277.)

INFORMATION TO BE SUPPLIED IN OR IN ADDITION TO THE INFORMATION CONTAINED IN THE BALANCE-SHEET OF A COMPANY REFERRED TO IN PART X.

*Liabilities.*

1. *Summary of Authorised Share Capital and Issued Share Capital.*
2. *Redeemable Preference Shares, stating date on or before which the shares are or are liable to be redeemed.*
3. *Debentures stating the nature of the security.*
4. *Redeemed debentures which the Company has power to re-issue.*
5. *Loans (a) secured, stating the nature of the security (b) unsecured.*
6. *Loans from Banks :—*  
(a) *Secured, stating the nature of the security ;*  
(b) *Unsecured.*
7. *Profit and Loss Account, showing (unless disclosed in a separate account) :—*  
*Balance as per previous Balance-Sheet.*  
*Appropriation thereof.*  
*Profit since last Balance-Sheet.*
8. *Contingent Liabilities.*
9. *Arrears of Cumulative Preference Dividend.*

*Assets.*

1. *Fixed Assets with sufficient particulars to disclose their general nature, and stating how their values are arrived at.*
2. *Preliminary expenses, so far as not written off.*
3. *Any expenses incurred in connection with any issue of Share Capital or Debentures, so far as not written off.*
4. *If it is shown as a separate item in or is otherwise ascertainable from the books of the Company, or from any contract for the sale or purchase of any property to be acquired by the Company, or from any documents in the possession of the Company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property the amount of the goodwill and of any patents and trade marks as so shown or ascertained.*
5. *Interest paid on Capital, so far as not written off, showing the Share Capital on which and the rate at which interest has been paid out of Capital during the period to which the accounts relate.*
6. *Discount allowed on shares issued, so far as not written off.*
7. *Commission paid or allowed in respect of any shares or debentures, so far as not written off.*
8. *Loans outstanding to enable employees or trustees on their behalf to purchase shares in the Company.*
9. *Particulars showing :—*

(a) *the amount of any loans which during the period to which the accounts relate have been made either by the Company or by any other person under a guarantee from or on a security provided by the Company to any director or officer of the Company, including any such loans which were repaid during the said period ;*

## LEG. REF.

1 If the company has no capital divided into shares, the portion of the statement re-

lating to capital and share must be omitted.

<sup>2</sup> This form was inserted by sec. 124 of Act XXII of 1936.

and  
(b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof:

and  
(c) the total of the amount paid to the Directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the Company or by or from any subsidiary Company.

Note (1).—There shall not be required to be shown:—

(a) in the case of a Company the ordinary business of which includes the lending of money, loans made by the Company in the ordinary course of its business;

or  
(b) loans made by the Company to any employee of the Company if the loan does not exceed twenty thousand rupees and is certified by the directors of the Company to have been made in accordance with any practice adopted or about to be adopted by the Company with respect to loans to its employees.

Note (2).—The foregoing shall not apply in relation to a Managing Director of the Company, and in the case of any other director who holds any salaried employment or office in the Company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

(Where a company is a holding company then the Balance-Sheet shall disclose the particulars required by section 132-A.)]

#### THE FOURTH SCHEDULE.\*

(See Section 290.)

##### ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal.
1882 ..	VI	The Indian Companies Act, 1882	So much as has not been repealed.
1887 ..	VI	The Indian Companies Act (1882) Amendment Act, 1887.	The whole.
1891 ..	XII	The Amending Act, 1891.	So much of the Second Schedule as relates to the Indian Companies Act, 1882.
1895 ..	XII	The Indian Companies (Memorandum of Association) Act, 1895.	The whole.
1899 ..	IX	The Indian Arbitration Act, 1899c	The second proviso to section 3 relating to the Indian Companies Act, 1882.
1900 ..	IV	The Indian Companies (Branch Registers) Act, 1900.	The whole.
1910 ..	IV	The Indian Companies (Amendment) Act, 1910.	The whole.

#### APPENDIX I.

(Table B in schedule to Act XIX of 1857).<sup>1</sup>

##### REGULATIONS FOR MANAGEMENT OF THE COMPANY.

###### Shares.

1. No person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under this hand in such form as the Company from time to time directs.

2. The Company may from time to time make such calls upon the shareholders, in respect of all moneys unpaid on their shares, as they think fit, provided that twenty-one days' notice at least is given of each call; and each shareholder shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the Company.

3. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

LEG. BHF.

<sup>1</sup> See sec. 290 (1) (b) of the Indian Companies Act VII of 1913.

C.G.M.—207

\* The Table is reproduced here as an Appendix for convenience of reference.

4. If, before or on the day appointed for payment, any shareholder does not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate of 5 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

5. The company may, if they think fit, receive from any of the shareholders willing to advance the same, all or any part of the moneys due upon their respective shares beyond the sums actually called for, and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the shareholder paying such sum in advance and the Company agree upon.

6. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

7. The Company may decline to register any transfer of shares made by a shareholder who is indebted to them.

8. Every shareholder shall, on payment of such sum not exceeding eight annas as the Company may prescribe, be entitled to a certificate under the common seal of the Company, specifying the share or shares held by him and the amount paid up thereon.

9. If such certificate is worn out or lost, it may be renewed on payment of such sum, not exceeding eight annas, as the Company may prescribe.

10. The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

#### *Transmission of Shares.*

11. The executors or administrators or representatives of a deceased shareholder shall be the only persons recognized by the Company as having any title to his share.

12. Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder or in any way other than by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the Company.

13. Any person who has become entitled to a share in any way other than by transfer may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share.

14. The person so becoming entitled shall testify such election by executing to his nominee a transfer of such share.

15. The instrument of transfer shall be presented to the Company accompanied with such evidence as they may require to prove the title of the transferor, and thereupon the Company shall register the transferee as a shareholder.

#### *Forfeiture of shares.*

16. If any shareholder fails to pay any call due on the appointed day, the Company may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with any interest that may have accrued by reason of such non-payment.

17. The notice shall name a further date, and a place or places, being a place or places at which calls of the Company are usually made payable, on and at which such call is to be paid; it shall also state that, in the event of non-payment at the time and place appointed, the shares in respect of which such call was made will be liable to be forfeited.

18. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect.

19. Any shares so forfeited shall be deemed to be the property of the Company, and may be disposed of in such manner as the Company thinks fit.

20. Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

#### *Increase in Capital.*

21. The Company may, with the sanction of the Company previously given in general meeting, increase its capital.

22. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital.

#### *General Meetings.*

23. The first general meeting shall be held at such time, not being more than twelve months after the incorporation of the Company, and at such place as the directors may determine.

24. Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the 1<sup>st</sup> [first Monday in February] in every year, at such place as may be determined by the directors.

#### **LEG. REF.**

1 The bracketted portion read originally as follows: " . . . day of . . . . . "

25. The above-mentioned general meetings shall be called ordinary meetings ; all other general meetings shall be called extraordinary.

26. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any number of shareholders holding in the aggregate not less than one-fifth part of the shares of the Company, convene an extraordinary general meeting.

27. Any requisition so made by the shareholders shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

28. Upon the receipt of such requisition, the directors shall forthwith proceed to convene a general meeting ; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other shareholders holding the required number of shares, may themselves convene a meeting.

29. Seven days' notice at the least, specifying the place, the time, the hour of meeting, and the purpose for which any general meeting is to be held, shall be given by advertisement, or in such other manner (if any) as may be prescribed by the Company.

30. Any shareholder may, on giving not less than three days' previous notice, submit any resolution to a meeting beyond the matters contained in the notice given of such meeting.

31. The notice required of a shareholder shall be given by leaving a copy of the resolution at the registered office of the Company.

32. No business shall be transacted at any meeting, except the declaration of a dividend, unless a quorum of shareholders is present at the commencement of such business ; and such quorum shall be ascertained as follows (that is to say) ; if the shareholders belonging to the Company at the time of the meeting do not exceed ten in number, the quorum shall be five ; if they exceed ten, there shall be added to the above quorum one for every five additional shareholders up to fifty, and one for every ten additional shares after fifty, with this limitation, that it shall not be necessary for any quorum in any case to exceed fifty.

33. If within one hour from the time appointed for the meeting the required number of shareholders is not present, the meeting, if convened upon the requisition of the shareholders, shall be dissolved ; in any other case it shall stand adjourned to the following day at the same time and place ; and if at such adjourned meeting the required number of shareholders is not present, it shall be adjourned *sine die*.

34. The chairman (if any) of the Board of Directors shall preside as Chairman at every meeting of the Company.

35. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the shareholders present shall choose some one of their number to be chairman of such meeting.

36. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place ; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

37. At any general meeting, unless a poll is demanded by at least five shareholders, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

38. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs ; and the result of such poll shall be deemed to be the resolution of the Company in general meeting.

#### *Votes of Shareholders.*

39. Every shareholder shall have one vote for every share up to ten ; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares.

40. If any shareholder is a lunatic or idiot, he may vote by his committee ; and if any shareholder is a minor, he may vote by his guardian, or any one of his guardians if more than one.

41. If more persons than one are jointly entitled to a share or shares, the persons whose names stand first in the register of shareholders as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

42. No shareholder shall be entitled to vote at any meeting unless all calls due from him have been paid, nor until he shall have been possessed of his shares three calendar months, unless such shares shall have been acquired or shall have come by bequest, or by marriage, or by succession to an intestate's estate, or by any deed of settlement after the death of any person who shall have been entitled for life to the dividends of such shares.

43. Votes may be given either personally or by proxies ; a proxy shall be appointed in writing under the hand of the appointer, or, if such appointer is a corporation, under their common seal.

44. No person shall be appointed a proxy who is not a shareholder, and the instrument appointing him shall be deposited at the registered office of the Company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote ; but no instrument, appointing a proxy shall be valid after the expiration of one month from the date of its execution,

*Directors.*

45. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

46. Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this Act be deemed to be directors.

*Powers of Directors.*

47. The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of association (if any) declared to be exercisable by the Company in general meeting, subject nevertheless to any regulations of the articles of association, to the provisions of this Act, and to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company in general meeting, but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

*Disqualification of Directors.*

48. The office of director shall be vacated—

if he holds any other office or place of profit under the Company ;

if he becomes bankrupt or insolvent ;

if he is concerned in or participates in the profits of any contract with the Company ;

if he participates in the profits of any work done for the Company.

But the above rules shall be subject to the following exceptions :—that no director shall vacate his office by reason of his being a shareholder in any incorporated Company which has entered into contracts with or done any work for the Company of which he is a director ; nevertheless he shall not vote in respect of such contract or work ; and, if he does so vote, his vote shall not be counted, and he shall incur a penalty, not exceeding five hundred rupees.

*Rotation of Directors.*

49. At the first ordinary meeting after the incorporation of the Company the whole of the directors shall retire from office ; and at the first ordinary meeting in every subsequent year, one-third of the directors for the time being, or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

50. The one-third or other nearest number to retire during the first and second years ensuing the incorporation of the Company shall, unless the directors agree among themselves, be determined by ballot ; in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

51. A retiring director shall be re-eligible.

52. The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

53. If at any meeting at which an election of directors ought to take place no such election is made, the meeting shall stand adjourned till the next day, at the same time and place, and, if at such adjourned meeting no election takes place, the former directors shall continue to act until new directors are appointed at the first ordinary meeting of the following year.

54. The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

55. Any casual vacancy occurring in the Board of Directors may be filled up by the Directors ; but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

*Proceedings of Directors.*

56. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit, and determine the quorum necessary for the transaction of business ; questions arising at any meeting shall be decided by a majority of votes ; in case of an equality of votes, the chairman, in addition to his original vote, shall have a casting vote ; a director may at any time summon a meeting of the directors.

57. The directors may elect a chairman of their meetings and determine the period for which he is to hold office ; but if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of the number to be chairman of such meeting.

58. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit : any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

59. A committee may elect a chairman of their meetings : if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

60. A committee may meet and adjourn as they think proper : questions at any meeting shall be determined by a majority of votes of the members present ; and in case of an equal division of votes, the chairman shall have a casting vote.

61. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of



them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

62. The director shall cause minutes to be made in books provided for the purpose—

- (1) of all appointments of officers made by the directors ;
- (2) of the names of directors present at each meeting of directors and committees of directors ;
- (3) of all orders made by the directors and committees of directors ; and
- (4) of all resolutions and proceedings of meetings of the Company, and of the directors and committees of directors.

And any such minute as aforesaid if signed by any person purporting to be the chairman of any meeting of directors, or committee of directors, shall be receivable in evidence without any further proof.

63. The Company, in general meeting, may, by a special resolution, remove any director before the expiration of his period of office, and appoint another qualified person in his stead ; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

#### *Dividends.*

64. The directors may, with the sanction of the Company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares.

65. The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends or for repairing or maintaining the works connected with the business of the Company, or any part thereof ; and the directors may invest the sum so set apart as a reserved fund upon such securities as they, with the sanction of the Company, may select.

66. The directors may deduct from the dividends payable to any shareholder all such sums of money as may be due from him to the Company on account of calls or otherwise.

67. Notice of any dividend that may have been declared shall be given to each shareholder or sent by post or otherwise to his registered place of abode ; and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the Company.

68. No dividend shall bear interest as against the Company.

#### *Accounts.*

69. Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year made up to a date not more than three months before such meeting.

70. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters ; every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting ; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

71. A balance-sheet shall be made out in every year, and laid before the general meeting of the Company ; and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

72. A printed copy of such balance-sheet shall, seven days previously to such meeting, be delivered at or sent by post to the registered address of every shareholder.

#### *Audit.*

73. The accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors to be elected by the Company in general meeting.

74. If not more than one auditor is appointed, all the provisions herein contained relating to auditors shall apply to him.

75. The auditors need not be shareholder in the Company ; no person is eligible as an auditor who is interested otherwise than as a shareholder in any transaction of the Company ; and no director or other officer of the Company is eligible during his continuance in office.

76. The election of auditors shall be made by the Company at their ordinary meeting, or, if there are more than one, at their first ordinary meeting in each year.

77. The remuneration of the auditors shall be fixed by the Company at the time of their election.

78. Any auditor shall be re-eligible on his quitting office.

79. If any casual vacancy occurs in the office of auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

80. If no election of auditors is made in manner aforesaid, the Local Government may, on the application of one-fifth in number of the shareholders of the Company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the Company for his services.

81. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

82. Every auditor shall have a list delivered to him of all books kept by the Company, and he shall at all reasonable times have access to the books and accounts of the Company; he may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the Company.

83. The auditors shall make a report to the shareholders upon the balance-sheet and accounts; and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs; and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

*Notices.*

84. Notices requiring to be served by the Company upon the shareholders may be served either personally, or by leaving the same, or sending them through the post in a letter addressed to the shareholders, at their registered places of abode.

85. All notices directed to be given to the shareholders shall, with respect to any share to which persons are jointly entitled, be given to whichever of the said persons is named first in the register of shareholders; and notice so given shall be sufficient notice to all the proprietors of such share.

FORM OF BALANCE-SHEET REFERRED TO IN TABLE B.  
*Balance-Sheet\* of the* *Company made up to* *18* *Cr.*

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
I.—CAPITAL	II.—DEBTS AND LIABILITIES OF THE COMPANY.	III.—PROPERTY HELD BY THE COMPANY.	IV.—DEBTS OWING TO THE COMPANY.
1	2	3	4
SHOWING— The total amount received from the shareholders; showing also— (a) The number of shares .. (b) The amount paid per share. (c) If any arrears of calls, the nature of the arrears, and the name of the defaulters. (Any arrears due from any director or officer of the Company to be separately stated). (d) The particulars of any forfeited shares.	SHOWING— The amount of loans on mortgage or debenture bonds. The amount of debts owing by the Company distinguishing— (a) Debts for which acceptances have been given. (b) Debts to tradesmen for supplies of stock-in-trade or other articles. (c) Debts of law expenses (d) Debts for interest on debentures or other loans (e) Unclaimed dividends. (f) Debts not enumerated above.	SHOWING— Immoveable property, distinguishing— (a) Land (describing tenure) (b) Buildings Movable property, distinguishing— (c) stock-in-trade. (d) Plant (The cost to be stated with deduction for deterioration in value as charged to the Reserve Fund or Profit and Loss.	SHOWING— Debts considered good for which the Company holds bills or other securities. Debts considered good for which Company hold no security. Debts considered doubtful and bad. (Any debt due from a director or other officer of the Company to be separately stated.)
VI.—RESERVE FUND.		V.—CASH AND INVESTMENT.	9
VII.—PROFIT AND LOSS.			10
CONTINGENT LIABILITIES.			

\* See clauses 71 and 72 of the foregoing Table B.

## APPENDIX II.

(Table A\* in the first Schedule to Act VI of 1882.)<sup>1</sup>.

## REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

*Shares.*

1. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.
2. Every member shall, on payment of eight annas or such less sum as the Company in general meeting may prescribe, be entitled to a certificate under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.
3. If such certificate is worn out or lost, it may be renewed on payment of eight annas or such less sum as the Company in general meeting may prescribe.

*Calls on Shares.*

4. The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call; and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors.
5. A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.
6. If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.
7. The directors may, if they think fit, receive, from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and, upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

*Transfers of Shares.*

8. The instrument of transfer of any share in the Company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.

9. Shares in the Company shall be transferred in the following form :  
 I, A. B., of \_\_\_\_\_, in consideration of the sum of rupees \_\_\_\_\_ paid  
 to me by C. D. of \_\_\_\_\_ do hereby transfer to the said C. D., the share (or shares)  
 numbered \_\_\_\_\_ standing in my name in the books of the \_\_\_\_\_ Company  
 to hold unto the said C. D., his executors, administrators and assigns, subject to the several conditions  
 on which I held the same at the time of the execution thereof; and I, the said C. D., do hereby agree  
 to take the said share (or shares) subject to the same conditions. As witness our hands the \_\_\_\_\_ day  
 of \_\_\_\_\_

10. The Company may decline to register any transfer of shares made by a member who is indebted to them.

11. The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

*Transmission of Shares.*

12. The executors or administrators of a deceased member shall be the only persons recognised by the Company as having any title to his share.

13. Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may, from time to time, be required by the Company.

14. Any person who has become entitled to a share in consequence of the death, bankruptcy or insolvency of any member or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

15. The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

16. The instrument of transfer shall be presented to the Company, together with such evidence as the directors may require to prove the title of the transferee, and thereupon the Company shall register the transferee as a member.

*Forfeiture of Shares.*

17. If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice

LEG. REF.

<sup>1</sup> See sec. 290 (1) of the Indian Companies Act (VII of 1913).

\* The Table is reproduced here as an Appendix for convenience of reference.

on him requiring him to pay such call together with interest and any expenses that may have accrued by reason of such non-payment.

18. The notice shall name a further day on or before which such call and all interest and expenses that have accrued by reason of such non-payment are to be paid. It shall also name the place where payment is to be made, the place so named being either the registered office of the Company or some other place at which calls of the Company are usually made payable. The notice shall also state that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited.

19. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest and expenses due in respect thereof has been made, be forfeited by a resolution of the directors to that effect.

20. Any share so forfeited shall be deemed to be the property of the Company and may be disposed of in such manner as the Company in general meeting thinks fit.

21. Any member whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

22. A solemn declaration in writing, made before a Magistrate, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share and such declaration and the receipt of the Company for the price of such share shall constitute a good title to such share and a certificate of proprietorship shall be delivered to the purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

#### *Conversion of Shares into Stock.*

23. The directors may, with the sanction of the Company previously given in general meeting, convert any paid up shares into stock.

24. When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interest, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the Company may be transferred, or as near thereto as circumstances admit.

25. The several holders of stock shall be entitled to participate in the dividends and profits of the Company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof, respectively, the same privileges and advantages for the purpose of voting at meetings of the Company and for other purposes as would have been conferred by shares of equal amount in the capital of the Company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the Company, shall be conferred by any such aliquot part of the consolidated stock as would not, if existing in shares, have conferred such privileges or advantages.

#### *Increase in Capital.*

26. The directors may, with the sanction of a special resolution of the Company previously given in general meeting, increase its capital by the issue of new shares; such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the Company in general meeting directs, or, if no direction is given, as the directors think expedient.

27. Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the Company.

28. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions, with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

#### *General Meetings.*

29. The first general meeting shall be held at such time, not being more than six months after the registration of the Company, and at such place as the directors may determine.

30. Subsequent general meetings shall be held, once at the least in every year, at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

31. The abovementioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

32. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by not less than one-fifth in number of the members of the Company, convene an extraordinary general meeting.

33. Any requisition made by the members shall express the object of the meeting proposed to be called and shall be left at the registered office of the Company.

34. Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

*Proceedings in General Meeting.*

35. Seven days' notice at the least, specifying the place, the day and the hour of meeting, and, in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

36. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, and the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

37. No business shall be transacted at any general meeting except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business. Such quorum shall be ascertained as follows, that is to say :—If the persons who have taken shares in the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation that no quorum shall in any case exceed twenty.

38. If, within one hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week, at the same time and place; and if, at such adjourned meeting, a quorum is not present, it shall be adjourned *sine die*.

39. The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the Company.

40. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.

41. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

42. At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

43. If a poll is demanded by five or more members, it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the Company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

*Votes of Members.*

44. Every member shall have one vote for every share up to ten. He shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares.

45. If any member is a lunatic or idiot, he may vote by his committee or other legal curator; and, if any member is a minor, he may vote by his guardian or any one of his guardians if more than one.

46. If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

47. No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer, at any meeting held after the expiration of three months from the registration of the Company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

48. Votes may be given either personally or by proxy.

49. The instrument appointing a proxy shall be in writing, under the hand of the appointer, or, if such appointer is a corporation, under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the Company.

50. The instrument appointing a proxy shall be deposited at the registered office of the Company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

51. Any instrument appointing a proxy shall be in the following form :—

Company, Limited.

I, \_\_\_\_\_, of \_\_\_\_\_, being a member of the  
 Company, Limited, and entitled to \_\_\_\_\_ vote or \_\_\_\_\_ votes, hereby  
 appoint \_\_\_\_\_, of \_\_\_\_\_, as my proxy to vote for me and  
 on my behalf at the [ordinary or extraordinary *as the case may be*] general meeting of the Company  
 to be held on the \_\_\_\_\_ day of \_\_\_\_\_ and at any adjourn-  
 ment thereof (or at any meeting of the Company that may be held in the year \_\_\_\_\_).  
 As witness my hand, this \_\_\_\_\_ day of \_\_\_\_\_ Signed by the  
 said \_\_\_\_\_ in the presence of \_\_\_\_\_

*Directors.*

52. The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

53. Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors.

54. The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the Company in general meeting.

*Powers of Directors.*

55. The business of the Company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the Company and may exercise all such powers of the Company as are not by the foregoing Act, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act and to such regulations, being not inconsistent with the aforesaid regulations, or provisions, as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

56. The continuing directors may act notwithstanding any vacancy in their body.

*Disqualification of Directors.*

57. The office of director shall be vacated—

if he, or any partner of his, or the firm of which he is a member, holds any other office or place of profit under the Company;

if he becomes bankrupt or insolvent;

if he is punished under any of the penal provisions of the foregoing Act;

if he is concerned in or participates in the profits of any contract with the Company.

But the above rules shall be subject to the following exceptions:—that no director shall vacate his office by reason of his being a member of any Company which has entered into contracts with, or done any work for, the Company of which he is director; nevertheless, he shall not vote in respect of such contract or work, and, if he does so vote, his vote shall not be counted.

*Rotation of Directors.*

58. At the first ordinary meeting after the registration of the Company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

59. The one third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the Company shall, unless the directors agree among themselves, be determined by ballot. In every subsequent year, the one-third or other nearest number who have been longest in office shall retire.

60. A retiring director shall be re-eligible.

61. The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

62. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

63. The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

64. Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long as only the vacating director would have retained the same if no vacancy had occurred.

65. The Company in general meeting may by a special resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

*Proceedings of Directors.*

66. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction



of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors.

67. The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but, if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

68. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committees so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the directors.

69. A committee may elect a chairman of its meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

70. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present; and, in case of an equality of votes, the chairman shall have a second or casting vote.

71. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

#### *Dividends.*

72. The directors may, with the sanction of the Company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

73. No dividend shall be payable except out of the profits arising from the business of the Company.

74. The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the Company or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.

75. The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the Company on account of calls or otherwise.

76. Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the Company.

77. No dividend shall bear interest as against the Company.

#### *Accounts.*

78. The directors shall cause true accounts to be kept—  
of the stock in trade of the Company;  
of the sums of money received and expended by the Company, and the matters in respect of which such receipt and expenditure take place; and  
of the credits and liabilities of the Company.

The books of account shall be kept at the registered office of the Company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the Company in general meetings, shall be open to the inspection of the members during the hours of business.

79. Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

80. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

81. A balance sheet shall be made out in every year and laid before the Company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

82. A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served.

#### *Audit.*

83. Once at the least in every year the accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

84. The first auditors shall be appointed by the directors ; subsequent auditors shall be appointed by the Company in general meeting.

85. If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

86. The auditors may be members of the Company, but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the Company, and no director or other officer of the Company is eligible during his continuance in office.

87. The election of auditors shall be made by the Company at their ordinary meeting in each year.

88. The remuneration of the first auditors shall be fixed by the directors ; that of the subsequent auditors shall be fixed by the Company in general meeting.

89. Any auditor shall be re-eligible on his quitting office.

90. If any casual vacancy occurs in the office of any auditor appointed by the Company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

91. If no election of auditors is made in manner aforesaid the Local Government may, on the application of not less than five members of the Company, appoint an auditor for the current year and fix the remuneration to be paid to him by the Company for his services.

92. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

93. Every auditor shall have a list delivered to him of all books kept by the Company, and shall at all reasonable times have access to the books and accounts of the Company. He may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts, examine the directors or any other officer of the Company.

94. The auditors shall make a report to the members upon the balance-sheet and accounts, and in such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have or has been given by the directors, and whether they or it have or has been satisfactory. Such report shall be read, together with the report of the directors, at the ordinary meeting.

#### *Notices.*

95. A notice may be served by the Company upon any member either personally or by ending it through the post in a letter addressed to such member at his registered place of abode.

96. All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members ; and notice so given shall be sufficient notice to all the holders of such share.

97. Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post ; and, in proving such service, it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

## FORM OF BALANCE-SHEET REFERRED TO IN TABLE A.

Dr.

Balance-sheet\* of the

Company made up to

18 . . .

Cr

## CAPITAL AND LIABILITIES.

## PROPERTY AND ASSETS.

I.—CAPITAL.		Rs.	As	III.—PROPERTY HELD BY THE COMPANY.		Rs.	As
II.—DEBTS AND LIABILITIES OF THE COMPANY.	SHOWING—			SHOWING—			
	1 The number of shares .. ..				7 Immovable property—distinguishing—		
	2 The amount paid per share ..				(a) Freehold land .. ..		
	3 If any arrears of calls, the nature of the arrears and the names of the defaulters ..				(b) Buildings .. ..		
	4 The particulars of any forfeited shares ..				(c) Leasehold .. ..		
	5 SHOWING—				8 Movable property—distinguishing—		
VI.—RESERVE FUND.	6 The amount of loans or mortgages or debenture bonds .. ..			SHOWING—	(d) Stock-in-trade .. ..		
	The amount of debts owing by the Company—distinguishing—				(e) Plant .. ..		
	(a) Debts for which acceptances have been given .. ..				The cost to be stated with deductions for deterioration in value as charged to the reserve fund or profit and loss.		
	(b) Debts to tradesmen for supplies of stock-in-trade or other articles. ..						
	(c) Debts for law expenses .. ..						
	(d) Debts for interest on debentures or other loans .. ..			IV.—DEBTS OWING TO THE COMPANY.	9 Debts considered good for which the Company holds bills or other securities.		
VII.—PROFIT AND LOSS.	(e) Unclaimed dividends .. ..				10 Debts considered good for which the Company hold no security. ..		
	(f) Debts not enumerated above .. ..				11 Debts considered doubtful and bad ..		
	SHOWING—				Any debt due from a director or other officer of the company to be separately stated.		
	The amount set aside from profits to meet contingencies.				SHOWING—		
	The disposable balance for payment of dividends, etc. .. ..				12 The nature of investment and rate of interest.		
CONTINGENT LIABILITIES.				V.—CASH AND INVESTMENTS.	13 The amount of cash, where borrowed and if bearing interest.		
	Claims against the Company not acknowledged as debts. Money for which the Company is contingently liable.						

\* See cls. 1 and 8a of the foregoing Table A.

**THE COMPANIES (FOREIGN INTERESTS) ACT XX OF 1918**

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill (see *Port St. George Gazette*, Part III, 15th October, 1918, p. 589).

"It is considered desirable that companies which, during the war, have been reconstituted in India on lines approved by the Government of India and that new companies, whose business is of importance to the security of India and of the British Empire as a whole, should be restrained from altering their articles of association, in such a way as to bring them under the control of foreign interests. It is therefore proposed that the provisions in the articles of association of such companies, which are designed to restrict the shares or interests to be held or the powers to be exercised by persons other than British subjects, should not be altered without the consent of the Governor-General in Council. Similar legislation in the United Kingdom has resulted in the Companies (Foreign Interests) Act (7 and 8 Geo. 5, Ch. 18) which prohibits the alteration of restrictive articles of this nature without the permission of the Board of Trade. Clauses 3 and 4 (1) of the Bill are designed to give effect to this proposal, and the remaining sub-clauses of clause 4 have been inserted to prevent evasion of this provision by voluntary liquidation on the part of the companies concerned.

[26th September, 1918.

*An Act to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain Companies, and to provide for other purposes connected therewith.*

WHEREAS it is expedient to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain companies, and to provide for other purposes connected therewith ; it is hereby enacted as follows :—

Short title.

1. This Act may be called THE INDIAN COMPANIES (FOREIGN INTERESTS) ACT, 1918.

Definitions.

2. (1) In this Act—

(a) the expression "British subject" has the same meaning as in section 27 of the British Nationality and Status of Aliens Act, 1914, but shall include any person who holds a certificate of naturalization as a British subject granted under any [Act of the Central Legislature]<sup>1</sup> for the time being in force, and any association incorporated in any part of His Majesty's Dominions : Provided that the said expression shall, for the purposes of this Act, be deemed to apply to any subject of a State in India ;

(b) the expression "restrictive provision" means any provision in the articles of association of a company which, in the opinion of the Central Government is designed to restrict or limit or has the effect of restricting or limiting the share or shares or interests which may be held, or the rights, powers or authority which may be conferred upon or exercised by or on behalf of persons other than British subjects in the company, or in respect of the control, management or direction of the affairs thereof.

(2) All words and expressions used in this Act and defined in the Indian Companies Act, 1913, shall be deemed to have the meanings respectively attributed to them by that Act.

3. This Act shall apply to such companies as the Central Government may,

Application of Act.

by notification in the Official Gazette, declare to be companies with restrictive provisions, and any such

notification shall specify the restrictive provisions.

4. So long as a notification issued under section 3 is in force in respect of

Alterations in restrictive any company, notwithstanding anything to the contrary provisions and winding up. in any other Act—

(1) no alteration of the articles of association of the company affecting either directly or indirectly any restrictive provision shall be of any effect until it has received the consent in writing of the Central Government.

(2) a resolution for the voluntary winding up of the company shall be of no effect unless the Central Government authorizes or ratifies it by a written consent ;

LEG. REF.

the Governor-General in Council".

<sup>1</sup> Substituted by A.O., 1937, for "Act of

(3) any Court which has jurisdiction to wind up the company may, in its discretion, refuse to make a winding up order. In the exercise of its discretion the Court shall be guided by the consideration whether the winding up is *bona fide* with a view to the discontinuance of the undertaking, or is with a view to continuing the undertaking freed either wholly or in part from any restrictive provision ;

(4) The Central Government in giving consent, or the Court in making winding up order, as the case may be, may impose such terms or conditions for giving effect to the purposes of this Act as <sup>1</sup>[it] thinks fit.

### **THE (COMPANY) BANKING COMPANIES (INSPECTION) ORDINANCE (IV OF 1946).**

[15th January, 1946.]

*An Ordinance to enable inspection of the affairs of banking companies to be made in certain circumstances.*

WHEREAS, an emergency has arisen which renders it necessary to make provision to enable inspection of the affairs of banking companies to be made in certain circumstances ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 (26 Geo. 5, c. 2), the Governor-General is pleased to make and promulgate the following Ordinance :—

Short title.

1. (1) This Ordinance may be called THE  
BANKING COMPANIES (INSPECTION) ORDINANCE, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance,—

(a) “banking company” means a banking company as defined in section 277-F of the Indian Companies Act, 1913 (VII of 1913).

(b) “Reserve Bank” means the Reserve Bank of India.

3. Notwithstanding anything to the contrary contained in section 138 of the Indian Companies Act, 1913 (VII of 1913), the

Power to order inspection.

Central Government may at any time direct the Reserve Bank to cause an inspection to be made of any

banking Company and its books and accounts, and to make a report thereon to the Central Government.

4. (1) On receipt of a direction under section 3, the Reserve Bank may authorise one or more competent persons to make the

Inspection of books and examination of officers.

inspection as aforesaid, and it shall be the duty of every director or other officer of the banking company to produce to any person so authorised all such books,

accounts and other documents in his custody or power relating to the affairs of the banking company as the person so authorised may require of him.

(2) Any person making an inspection under sub-section (1) may examine on oath any director or other officer of the banking company in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book, account or other document which under this section it is his duty to produce, or to answer any question relating to the business of the banking company, he shall be liable to a fine which may extend to five hundred rupees in respect of each offence, and if he persists in such refusal to a further fine which may extend to fifty rupees for every day during which the offence continues.

5. (1) If after consideration of the report of the Reserve Bank under section 3, the Central Government is of opinion that

Powers of Central Government on receipt of report.

the affairs of a banking company are being conducted to the detriment of the interest of its depositors, the Central Government may—

LEG. REF.

<sup>1</sup> Substituted for “he or it” by A.O., 1937.

(a) by order in writing prohibit the banking company from receiving fresh deposits, or,

(b) notwithstanding anything contained in sub-section (6) of section 42 of the Reserve Bank of India Act, 1934 (II of 1934) refuse to direct the inclusion of the banking company in the Second Schedule to that Act, or if the banking company is included therein, by notification in the official Gazette direct its exclusion from that Schedule :

Provided that the Central Government may cancel or modify any order passed under this sub-section upon such terms and conditions as it may think fit to impose.

(2) If any deposits are received by a banking company in contravention of an order under clause (a) of sub-section (1), every director or other officer of the banking company, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent it, shall be deemed to be guilty of such contravention and shall be punishable with a fine which may extend to twice the amount of the deposits so received.

6. The Central Government may, after giving reasonable notice to the banking company concerned, publish any report of the Reserve Bank under section 3 or such portion thereof as may appear necessary to the Central Government.

Publication of reports.

## THE CONTEMPT OF COURTS ACT (XII OF 1926).<sup>1</sup>

### EFFECT OF LEGISLATION.

Year.	No.	Short title.	Repealed or otherwise how affected by Legislation.
1926	XII	The Contempt of Courts Act, 1926.	Am. Act XII of 1937.

[8th March, 1926.

*An Act to define and limit the powers of certain Courts in punishing contempts of Courts.*

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of <sup>2</sup>[\*] Courts ;

AND WHEREAS it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court ; It is hereby enacted as follows :—

Short title, extent and commencement. 1. (1) This Act may be called THE CONTEMPT OF COURTS ACT, 1926.

### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1925, Pt. V, p. 42; for Report of Sel. Com., see *ibid.*, p. 249.

<sup>2</sup> Word 'subordinate' omitted by Act XII of 1937.

SEC. 1: SCOPE OF ACT.—(Per *Yorke, J.*). Far from the enactment implying a recognition that no such power had in fact previously existed, the Contempt of Courts Act is an Act which creates no fresh powers at all but merely recognises the fact that such powers already do exist but seeks to define and limit them. 14 Luck. 492—A.I.R. 1939 O. 131 (F.B.). The proceedings for contempt of the High Court are in the exercise of the inherent jurisdiction of the Court and are of a criminal nature. When the matter is of a criminal nature, the Civil Procedure Code does not apply. 1941 O.W.N. 455—1941 O.A. (Supp.) 198—1941 A.W.R. (H.C.) 120. Proceedings for contempt of Court are of a summary nature. That being so such proceedings are not suitable for the

decision of a hotly contested question of fact. A.I.R. 1944 Lah. 196 (S.B.). Contempt of Court proceedings are summary and a very arbitrary method of dealing with an offence. That being so, contempt proceedings should be sparingly instituted and a person should not be convicted unless his conviction is essential in the interests of justice. There must be a substantial contempt, that is something which tends in a substantial manner to interfere with the course of justice or to prejudice the public against one of the parties to a proceedings. A.I.R. 1943 Lah. 329 (F.B.). While it is true that proceedings for contempt are in the nature of criminal proceedings, it is not quite correct that the position of the alleged contemner is that of an accused person who cannot file an affidavit or make a statement on oath. A.I.R. 1944 Lah. 329 (F.B.). The principle that the summary proceedings for contempt of Court should not be instituted in respect of what amounts to a technical contempt after the proceedings in the Court have been disposed of and there is no possibility of interference

- (2) It shall extend to the whole of British India.  
 (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.<sup>1</sup>

#### LEG. REF.

<sup>1</sup> This Act was brought into force on the 1st May, 1926, see Gazette of India, 1926, Pt. I, p. 442.

with the due course of justice applies only to applications for proceedings in contempt made by private parties and not to institution of proceedings by Court. The jurisdiction of the Court exists not only to prevent the mischief in the particular case but also to prevent similar mischief arising in other cases. Consequently, even when the proceedings before it have been disposed of, the Court can institute proceedings to see whether an article published in connexion with the proceedings before it was on the date of its publication calculated to interfere with the due course of justice and to prevent repetition of the same if it amounted to contempt. 45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.). There is no rule of law which prevents the Court from proceeding against a person who has been guilty of contempt without first obtaining an affidavit from some person. If doubtful questions of fact are involved, the Court may refuse to issue notice to the person charged with contempt without satisfying itself by means of an affidavit that there is reasonable ground for thinking that an offence of contempt has been committed. 1944 O.W.N. (H.C.) 287=1945 A.W.R. (H.C.) 15=1945 O.A. (H.C.) 15=1945 All. 67=1945 A.L.J. 26. Proceedings for contempt of Court though not criminal, are of a quasi-criminal nature and therefore where there is any reasonable doubt, the persons charged with contempt are entitled to the benefit of such doubt. A.I.R. 1944 Lah. 196 (S.B.).

CONTEMPT, WHAT IS.—Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, is a contempt of Court. That is one class of contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is another class of contempt. The former class belongs to the category which is characterised as 'scandalising a Court or a Judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt. 40 C.W.N. 801=38 Bom. L.R. 681=A.I.R. 1936 P.C. 141=71 M.L.J. 685 (P.C.). See also 44 Cr.L.J. 93. Where the writer had written an article on the inequality of sentence under text. "The Human Element", held, that he was perfectly justified in pointing out what is obvious, that sentences do vary in apparently similar circumstances with the habit of mind of the particular Judge. It is quite inevitable.

Some very conscientious Judges have thought it their duty to visit particular crimes with exemplary sentences; others equally conscientious have thought it their duty to view the same crimes with leniency. Hence, to say that the human element enters into the awarding of punishment is not contempt of Court. (*Ibid.*) Letter by manager of estate to Collector referring to decision of latter as District Magistrate dismissing a complaint and stating that opposite party had been emboldened by the view taken by the District Magistrate—Not contempt of Court. 38 Cr. L.J. 412=18 Pat.L.T. 113=A.I.R. 1937 Pat. 124. The publication of comments on a pending case amounts to contempt, if the comments are such as are likely to prejudice the administration of justice in the case. In the absence of an express provision allowing him to do so, no person can contract out of a responsibility imposed upon him by law in the case of a contempt of Court for publication of prejudicial comments on case pending trial and a printer as well as a publisher cannot escape responsibility for matter printed and published. 6 R. 39=1928 R. 115; A.I.R. 1940 Sind 239 (F.B.) (Liable even if the article is written by another and he has dissociated from it and disapproved it). The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice, and on the same principle it is a contempt of Court to make a speech tending to influence the result of a pending trial whether civil or criminal. 188 I.C. 408=41 Cr. L.J. 584=1940 A.W.R. (O.C.) 238. One kind of contempt of Court is scandalizing the Court itself. Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower its authority is a contempt of Court. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts, is a contempt of Court. There may be likewise a contempt of the Court in abusing parties who are concerned in causes there or in prejudicing mankind against a party before the cause is heard. In the class of cases of contempt of Court where anything is done which is calculated to interfere with the due course of justice or is likely to prejudice the public for or against a party the essence of the matter is the tendency to interfere with the due course of justice. Any publication which is calculated to poison the minds of jurors, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt. But before a Court will take notice of such a publication the Court must be satisfied that the matter published tended substantially to interfere with the due course of justice or was calculated substantially to create prejudice in the public mind. The



Court will not take action where the offending matter amounts to what is sometimes referred to as a technical contempt, i.e., in a case involving a mere question of propriety where the tendency of the article to do harm is slight and the character and circumstances of the comment is otherwise such that it can properly be ignored. It is however of the very essence of the offence that proceedings should be pending when the offending publication appears. It is not necessary in the case of a criminal trial that the accused should have been committed for trial or even for him to have been brought before a Magistrate provided that he had been arrested and was in custody. Further, the offence of contempt may be committed even if there is no proceeding or cause actually pending provided that such a proceeding or cause is imminent and the writer of the offending publication either knew it to be imminent or should have known that it was imminent. It is sufficient if the effect of the article complained of is to create prejudice and to interfere with the due course of justice. A.I.R. 1943 Lah. 329 (F.B.). See also 56 L.W. 702=1943 P.C. 202=(1943) 2 M.L.J. 568 (P.C.); 1945 Nag. 33. In cases of contempt the question of motive is irrelevant; what the Court has to consider is the effect—the probable effect of the publication. Motive of the contemner cannot be considered in determining his guilt; it may, however, be a proper criterion for awarding punishment. 1942 O.W.N. 6; 1943 Lah. 329 (F.B.). See also 1945 N.L.J. 30; 1945 Nag. 33. Acts which are calculated to affect the dignity of the Court may constitute contempt. 47 C.W.N. 854. The fact that an act was done ignorantly or innocently would make no difference to the offence of contempt. It would only be relevant regarding the measure of punishment. 1945 N.L.J. 30=A.I.R. 1945 Nag. 33. The truth of the allegations is no defence in proceedings for contempt. Nobody is allowed to scandalise a Court and make allegations against it even if they are true. Every attempt to justify must constitute a new offence of contempt committed in the very face of the Court. 1945 A.W.R. (H.C.) 15=1944 O.W.N. (H.C.) 287=1944 A.L.W. 606. Where during the pendency of a suit for a declaration that certain land claimed by the defendant is a public pathway, a resolution is passed at a public meeting protesting against the attempts of the defendant to close the land in question which is being used by the general public from time immemorial, the effect and tendency of the resolution is to embarrass, and the passing of that resolution amounts to contempt. It is objectionable to put forward in the resolution of a public meeting a positive assertion of a public right of way, as it would predispose people to a belief, right or wrong, that the defendant is an invader of the public right. I.L.R. (1938) 2 Cal. 447=42 C.W.N. 952=A.I.R. 1938 Cal. 772. Where the publication of a plaint is the publication of a document reflecting severely on the conduct of the defendant, a contempt of scan-

dalous and serious nature is committed. 165 I.C. 813=1936 Lah. 917. Where the editors of newspapers publish copies or summary of pleadings and other similar documents in pending cases, they do so at considerable risk. Where however the abstract of the plaint published in the newspaper only represented the defendant as the victim of the wickedness of others, it contained no attack upon her personal character and there was no attempt to prejudge the issue or prejudice her defence. *Held*, that the publication did not amount to contempt of Court. 152 I.C. 900=38 C.W.N. 330=1934 C. 606. See also 44 Bom.L.R. 95=1942 Bom. 86. The cases of contempt which consist of 'scandalising the Court itself' require to be treated with much discretion. Proceedings for this species of contempt are a weapon to be used sparingly. The test to be applied is to see whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. Where the printer and publisher and editor of a daily newspaper were charged in contempt proceedings for having published a news item and comment thereon, unfavourably alleging that the Chief Justice had committed an ill-advised act, namely, writing to the Subordinate Judges asking (as the news item said), enjoining (as the comment said) them to collect money for the war fund it was held that the words did not contain any criticism of any judicial act of the Chief Justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice and that hence the proceedings in contempt were misconceived. 56 L.W. 702=1943 A.L.J. 527=48 O.W.N. 44=A.I.R. 1943 (P.C.) 202=(1943) 2 M.L.J. 568 (P.C.). Where the gravamen of an article published in a newspaper is that judgment after judgment is being given in the High Court arbitrarily and that neither law nor facts are discussed before judgment is delivered, and it further says that it is necessary 'to restore the confidence of the public that law is discussed and facts are digested before cases are disposed of', there can be no doubt that the article is as gross a contempt of Court and misrepresentation of proceedings in Court as it is possible to imagine and nothing could be more calculated to bring the High Court into contempt and to lower its authority with the general public. 16 L. 266=155 I.C. 695=1935 Lah. 212 (S.B.). See also 1942 O.W.N. 6. It is not possible to lay down an exhaustive catalogue of cases which would amount to contempt of Court, but interference with the administration of justice is one of the well-recognised heads of contempt of Court. A notice was issued to the defendant in a pending suit by the plaintiff's counsel after the plaintiff's evidence closed and the defendant's evidence begun, threatening him with drastic action in case he did not withdraw a plea which he had taken in the suit, and offering to desist from taking any action in case the plea was withdrawn within a certain time.

It was intended to put pressure on the defendant and to compel him to withdraw the plea. *Held*, that the action amounted to a direct interference with administration of justice and constituted contempt of Court. 57 A. 573=1935 A. 117=1935 A.L.J. 29. The editor of a newspaper, who was convicted of having published in his newspaper an obscene advertisement published a leading article in his newspaper in the course of which he said: "The prosecution clearly stated that the case was filed as the result of 'correspondence from Government', but with the blessings of the magistrate, refused to produce the correspondence and the statement had to go uncontested. Without meaning any disrespect, we doubt whether in any case where opinions count and Subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute the Police told the Magistrate that the Government was behind the prosecution". *Held*, that the passage suggested that there was not and there could not be any proper judicial trial, that the proceedings before the Magistrate were an empty formality, that the Magistrate had made up his mind to convict the accused even before the trial was over with a view to conform to what he believed to be the wishes of the Government; in other words, once the Magistrate knew that the Government had instituted the prosecution, there was bound to be a conviction, and the article amounted to a gross contempt of Court, and the contempt was so grave that the High Court could not allow attacks of this nature to be made against the subordinate Courts of the Province without taking serious action. 1942 M.W.N. 722=55 L.W. 799 (2)=A.I.R. 1942 Mad. 711 (1)=(1942) 2 M.L.J. 622 (S.B.)=I.L.R. (1943) Mad. 26; *see also* 1942 Bom. 331=44 Bom.L.R. 796. The editor of a newspaper is responsible for what is published in his newspaper. The usual presumption of the editor being aware of the contents of publication is not rebutted by a vague and general statement that the editor was on leave on the day that the article was published. 45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.). In contempt of Court proceedings the fact that the item alleged to be contempt merely consists of quotations from other source would afford no defence if the article amounted to contempt because a person may be as much guilty of contempt by quoting from some source as writing the matter himself. 45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.). *See also* 16 Luck. 758 (newspaper article likely to deter witness from giving evidence). Contempt of Court when committed by an Attorney in a private capacity can be of such a nature as to show professional unfitness. The fact that it is contained in a notice sent by the Attorney under sec. 80, C.P. Code, to a Judge in respect of certain remarks made by the Judge in a judgment in a case in which the Attorney was a witness is no ground for holding that no offence was committed. No one by merely filing or

threatening to file a suit and calling his communication a notice under sec. 80, C.P. Code, can insult and vilify a Judge in that manner. The Attorney who makes such allegation renders himself liable to be dealt with under the disciplinary powers of the High Court. 43 Bom.L.R. 250. It is not uncommon to attack abuses and to attack persons in an election manifesto whether the abuses exist or not and whether the persons deserve the attack. But to slander the whole judiciary of a province in an attempt to secure votes at a Bar Council election is not only contemptible but almost criminal. An advocate indulging in such attacks is guilty of contempt of Court. 57 A. 573=1935 A.L.J. 46=1935 A. 38. An article in a newspaper contained a passage as follows: "In this connection it is amusing to note that when a comparatively undeserving lawyer is raised to the Bench, which is a fairly frequent occurrence in our judicial history, it is generally claimed, etc.". *Held*, the words 'a comparatively undeserving lawyer', were particularly offensive, connoting as they did lack of capacity or character or of both, and that the passage in question amounted to an unwarranted defamation of the High Court, likely to injure and lower its prestige in the eyes of the public and to shake their confidence in its capacity to administer justice, and that it constituted a contempt of Court of which the High Court is bound to take cognizance. 57 A. 573=1935 A.L.J. 125=1935 A. 1. To constitute contempt it is not necessary that the act or writing should be in respect of a case which has been heard or is pending. Judges and Courts are no doubt open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court would treat that as contempt of Court. A publication out of Court of a libel on one or more Judges of the Court will constitute contempt. 36 Cr.L.J. 1053=39 C.W.N. 770=1935 Cal. 419 (S.B.). An article published in a newspaper stated as follows: "It is so unfortunate and regrettable that at the present day the Chief Justice and the Judges find a peculiar delight in hobnobbing with the executive with the result the judiciary is robbed of its independence which at one time attracted the admiration of the whole country. The old order of things has vanished away. We wish the Chief Justice and the Judges appreciate the sentiments of the public. The generation that has gone by should be an ideal to them". *Held*, that it constituted contempt of the High Court. (*Ibid.*) Where the effect of certain newspaper articles was likely to be to deter witness from giving evidence in a pending case, it amounts to contempt of Court (though not of a serious nature. (1941 O.A. 429. Where a complainant in a defamation case writes an article a couple of days after the complaint is filed asserting the truth of the statements contained in his paper and challenges the accused to prove their falsity, the article does not amount to contempt of Court. 1941 O.A. 429.

HEADLINES AMOUNTING TO COMMENT ON a pending case are not permissible. Where a newspaper in publishing the proceedings of a pending case inserted headlines which in fact amounted to a criticism of the prosecution case under the guise of a summary of the day's proceedings and some of the headlines were mere arguments of the defence and it appeared that their publication might have an effect on the minds of witnesses to be examined or cross-examined and amounted to conduct calculated to produce an atmosphere of prejudice, *held*, that the publication of the headlines amounted to contempt. 37 C.W.N. 276=60 C. 603=1933 C. 118. Where a newspaper published with scare headlines portion of a complaint against the respondent in which gross allegations were made against him four months after the complainant had been filed, while proceedings were actually pending in the trial Court and also in the High Court for quashing the complaint, and further the paper published above the complaint its own comments, *Held*, that nothing could be more in the nature of contempt than action of that character. 40 P.L.R. 791=A.I.R. 1938 Lah. 815. Although the danger or absence of danger of actual prejudice is an important consideration it is not the only consideration. The jurisdiction of the Court exists not only to prevent mischief in the particular case but to prevent similar mischief arising in other cases. 37 C.W.N. 276=1933 C. 118=60 C. 603. The misuse of the process of the Court for obtaining a warrant against a person against whom the complainant has no intention of proceeding, merely to use it as a lever for blackmailing him, amounts to contempt of Court. 41 P.L.R. 130=A.I.R. 1939 Lah. 143.

JURISDICTION.—A contempt of the High Court is an "act made punishable under a law for the time being in force" within the meaning of sec. 4 (v) of the Code of Criminal Procedure and such offence can be inquired into according to the provisions of the Code as set out in sec. 5 (2)—Hence where a contempt has been committed within the territorial jurisdiction of a High Court in India, such Court is competent to issue process to secure the attendance of the offender wherever he may be residing in British India as in the case of an offence under the Penal Code or under any other Act for the time being in force. 1944 A.L.J. 459=I.L.R. (1944) All. 665=1945 All. 1. *See also* 1945 O.W.N. 109; 1944 Bom. 127. There is no warrant for holding that a Court cannot commit for contempt if any other remedy exists. The fact that there is another remedy available is no doubt a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand, the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. 1945 A.L.J. 505=A.I.R. 1945 P.C. 147=(1945) 2 M.L.J. 356 (P.C.).

JURISDICTION TO PUNISH FOR CONTEMPT.—

The jurisdiction to punish for contempt of itself is inherently vested in every High Court in India including the non-Presidency High Court, which is also a superior Court of record. This inherent power of the High Courts has not been taken away or in anywise limited by Act XII of 1926. Consequently the High Courts in India continue to have power to deal with contempt of themselves in the same manner as a Court of record has under the common law of England. There is no limitation imposed on the High Courts in the matter of punishment of offenders for contempt. A sentence passed on an offender committing him to custody in jail until such time as he apologised to the Court and further purged his contempt by paying into the Court the sums of money received in defiance of the Court's injunction, is in accordance with law. 18 Lah. 69=38 Cr.L.J. 863=A.I.R. 1937 Lah. 497 (S.B.); 40 C.W.N. 1285; 156 I.C. 1055=39 C.W.N. 770. *See also* I.L.R. (1944) Bom. 333=46 Bom.L.R. 94=1944 Bom. 127; 44 Bom.L.R. 249=1942 Bom. 154; 1943 Nag. 334=1943 N.L.J. 505; 1944 Bom. 127. The idea underlying the Act is that if a person can be sufficiently punished by some other tribunal, then the High Court should not entertain summary proceedings for contempt. 1943 Nag. 334=1943 N.L.J. 505. A Court subordinate to the High Court has no jurisdiction to entertain contempt proceedings if the contempt is not committed in its presence. 1943 Nag. 334=1943 N.L.J. 505. An order made by the Chief Judge of the Bombay Small Cause Court, directing a mutawalli of a wakf to furnish within a specified period a statement of accounts and particulars, is an order directing him to do a specific thing within a limited time. An order of such a nature, if disobeyed, can be enforced by proceedings for contempt by the High Court under the Contempt of Courts Act of 1926. 43 Cr.L.J. 667=44 Bom.L.R. 249=A.I.R. 1942 Bom. 154 (1). Chief Court of Sind has power to punish for contempt. I.L.R. (1944) Kar. 396. Apart from the inherent jurisdiction of the High Court, such jurisdiction has been expressly conferred on the High Court by the Contempt of Courts Act of 1926, in all cases of contempt except those which amount to offences under the Indian Penal Code. 57 A. 573=1935 A. 117=1935 A.L.J. 29. The Judicial Commissioner's Court although it is the highest Court of Judicature in the Province and has general superintendence over other Subordinate Courts in the Province, cannot be held to derive its authority from the Court of King's Bench, nor has it been established by Royal Charter. The Judicial Commissioner's Court has no power either by statute or otherwise to punish contempt of Subordinate Courts either in civil or criminal cases. 1935 N. 46=31 N.L.R. 154=156 I.C. 666. But *see also* 18 Lah. 69=A.I.R. 1937 Lah. 497=40 C.W.N. 1285; A.I.R. 1940 Sind 239; A.I.R. 1939 Oudh 131 (F.B.). If the Official Receiver considers that members of his staff have been obstructed to an extent which amounts to a contempt

of Court, it is entirely within his discretion either to take proceedings for contempt or to initiate criminal proceedings. It is, however, a salutary principle that where the contempt is some form of physical violence or obstruction and is as such punishable by a Criminal Court, it should be dealt with there. 41 C.W.N. 1325. The High Court in insolvency has jurisdiction to commit to prison for contempt not only the insolvent, but other persons who deliberately aid the insolvent in defying an order of the Court. The Court's powers are not limited by sec. 58 of the Presidency Towns Insolvency Act. 48 L. W. 462=(1938) 2 M.L.J. 609. The power to commit for contempt is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for. 49 L. W. 29=I.L.R. (1939) Mad. 466=A.I.R. 1939 Mad. 257=(1939) 2 M.L.J. 843 (F. B.). The Court's jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the course of justice. Where in the course of a newspaper article it was suggested that a political party was in sympathy with a terrorist gang against whom criminal proceeding was pending, *held*, that the comments were improper but did not amount to contempt (Essentials for prosecution for contempt stated.) 58 C. 884=35 C.W.N. 189=1931 C. 257. The Chief Court of Sind has a right to punish in a summary way contempt of itself. A.I.R. 1940 Sind 239 (F.B.). It is a duty of a Court, not so much to itself but to the public in whose interest it administers justice, that it should preserve its proceedings from misrepresentation. There is no distinction between a misrepresentation of the action of a Chief Court when it exercises its undoubted powers of superintendence of Magisterial Courts under sec. 224, Government of India Act, 1935, and sec. 17, Sind Courts Act, 1926, and the misrepresentation of the action of the Court of a Judge in a judicial as distinct from an administrative capacity, provided always that that action relates to the administration of justice. A.I.R. 1940 Sind 239 (F.B.). *See also* A.I.R. 1939 Oudh 131 (F.B.).

**CRITICISM OF EXECUTIVE OFFICER.**—No doubt a criticism of an executive officer, no matter how severe, cannot amount to contempt of Court, but if such criticism contains matter which is calculated to interfere with the due course of justice it would amount to contempt. Proprietors and publishers of newspapers who set out to criticise the public administration in respect of matters which are *sub judice* or are about to be adjudicated upon, do so at their peril. A.I.R. 1945 Lah. 206. *See also* 212 I.C. 17=45 Cr.L.J. 415.

**JURISDICTION OF COURT—RESIDENCE OF ACCUSED IF MATERIAL.**—Contempt of Court conforms to the ordinary rule that the jurisdiction of the Court is determined by the place where the offence is committed and not by the place where the offender may happen to reside. If the offender removes himself

beyond the territorial jurisdiction there might be difficulty in securing his appearance and executing the sentence but that would not deprive the Court of jurisdiction over the offence. This is especially so where the accused has appeared and has submitted to the Court's jurisdiction. 57 M. 831=1934 M. 423=66 M.L.J. 650. The High Court has jurisdiction to hear a notice of motion for contempt of Court against a party who, though not resident within the limits of its ordinary original jurisdiction, is yet a resident of British India, because as a subject of British India, he is governed by and bound to obey the laws of British India and to recognise the authority of Courts established by laws prevailing in British India. 36 Bom. L.R. 992=1934 B. 452=59 B. 10.

Where a person is restrained by a judicial order of one High Court from proceeding with certain action and the person commits contempt of that High Court by defying the order in the jurisdiction of other High Court, the former High Court has jurisdiction to commit the person for contempt. [I.L.R. (1937) 1 Cal. 345. *Foll.*] A.J.R. 1937 Cal. 601. *See also* 40 C.W.N. 1285. As to jurisdiction of Oudh Chief Court in respect of contempt of subordinate Courts, *see* 1939 O. W.N. 296=A.I.R. 1939 Oudh 131 (F.B.).

**COMPETENCY OF HIGH COURT TO SECURE ATTENDANCE OF OFFENDER BEYOND ITS JURISDICTION.**—Where contempt has been committed within the territorial jurisdiction of a High Court in India, such a Court is competent to issue process to secure the attendance of the offender whoever he may be residing in British India, as in the case of an offence under the Penal Code or under any other law for the time being in force. 20 Luck. 442=1945 O.W. N. 169=A.I.R. 1945 Oudh 266.

**INHERENT POWER TO PUNISH.**—The power to punish for contempt of Court is a power inherent in superior Courts of Record, which in India are the High Courts. Each High Court has inherent power to punish contempt of itself; but no other Court has any power to deal with contempt of Court. If a High Court considers that a person has committed contempt of that Court although the contempt may have been committed outside the jurisdiction of that Court, it can deal with that person if he were within its jurisdiction. But there is no power in any High Court to arrest for contempt of Court a man outside the jurisdiction of that Court. 46 Bom.L.R. 94=A.I.R. 1944 Bom. 127. *See also* 1944 A.L.J. 459. The fact that criminal proceedings under sec. 194, Cr. P. Code, may be directed against a person who has defamed the Court generally is no bar to his being proceeded against for contempt of Court. 1935 A. 1=154 I.C. 955.

**SOME ILLUSTRATIVE CASES—COMMENT ON PENDING CASES.**—All proceedings in suits pending in a Court of Justice are privileged, and any comment on the subject-matter of the suits and any abuse of the parties or holding them up to ridicule and contempt in the eyes of the public, whilst the suit is

pending are not allowed. The object of proceedings in contempt in such cases is not so much to vindicate the dignity of the Court or of the person of the Judge, as to ensure that every litigant in a Court of justice has a fair and unprejudiced hearing at the trial on the merits of his case. The Court has to read the article and see whether the article may tend to interfere with the proper course of justice. If it has that tendency it constitutes contempt of Court. 39 Bom.L.R. 471=38 Cr.L.J. 942=A.I.R. 1937 Bom. 305. *See also* 1943 Lah. 329 (F.B.). A libel on the parties to a suit which does not amount to an interference with the course of administration of justice is not a matter for contempt proceedings. (*Ibid.*). Proceedings in contempt are not taken merely in respect of technical offences. To suggest in a newspaper article that evidence intended to be used in a prosecution which is either proceeding or is plainly contemplated, has been obtained by improper means and is unreliable or to suggest that admissions by the accused have been improperly obtained, amounts to contempt of Court. 40 Bom.L.R. 75. The offence of contempt may be committed if the writer of the offending publication either knows a proceeding or cause to be imminent or should have known that it was imminent. In criminal cases it is not necessary that the accused should have been brought before a Magistrate provided he has been arrested and is in custody. It would no doubt be going too far to say that even if it is found as a fact that the writer of the offending publication had no actual knowledge of the institution of the case it was his duty to make enquiries in this behalf but when the writer knew that a report had been made to the police and the police investigation had been followed by the attachment of property and arrest of the offenders, the writer must be taken to have known that a case was almost certain to be filed and therefore would be guilty of contempt of Court. 221 I.C. 195=A.I.R. 1945 Lah. 206. There is a special responsibility which rests on newspapers of seeing everything is excluded from their columns in reference to pending cases, whether civil or criminal, which might possibly have the effect of prejudicing or prepossessing the mind of any judicial officer, jurymen or potential witness who might be or become concerned with it. It is to check the tendency which newspaper references to pending cases have of reducing the Court concerned to impotence so far as the actual elimination of prejudice and prepossession is concerned, that the High Court exercises a strict supervision over such references. 1946 A.W.R. (H.C.) 62. It is of the very essence of contempt of Court that proceedings should be pending, when the article alleged to constitute contempt is published. It is not necessary that the accused in a criminal case which is the subject of comment should have been committed for trial or even for him to have been brought before a committing Magistrate provided he

has been arrested and is in custody when the article is published. 21 Pat.L.T. 980.

As to what are pending proceedings, *see* 185 I.C. 86=41 Cr.L.J. 148. Any publication which tends to excite prejudice against the parties to a pending litigation or their litigation while it is pending constitutes contempt of Court. Attacks on or abuse of a party, his witnesses or solicitor constitute contempt, but a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action. I.L.R. (1938) Mad. 545=A.I.R. 1938 Mad. 248=(1938) 2 M.L.J. 81. The comment on a case which is *sub-judice* or suggestion that the Court should take a certain course in respect of a matter before it constitutes contempt and honesty of motive is immaterial. Good intention is not the deciding factor in a matter of contempt, though the intention and *bona fide* nature of the action have a bearing on the question whether the Court should take action. To comment on a case which is about to come before the Court with knowledge of that fact is just as much contempt as comment on a case actually launched. This does not mean that reference cannot be made to pending cases or that items of news which are concerned with pending cases should not be published. What cannot be permitted is a discussion of the attitude which the Court should adopt when considering the case. 49 L.W. 29=I.L.R. (1939) Mad. 466=A.I.R. 1939 Mad. 257=(1939) 2 M.L.J. 843 (F.B.). A pamphlet which assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in a pending litigation, amounts to contempt of Court. So also a document containing reflections upon the conduct and the character of certain of the persons concerned in a pending proceeding and predicting that a certain party will win and thereby justice will be defeated. 1939 Cal. 672=43 C.W.N. 333=I.L.R. (1939) 1 Cal. 394. Where a member of the Legislative Assembly wrote a letter to a Magistrate making certain suggestions with reference to proceedings under S. 107, Cr.P. Code, pending before him, it was held that it grossly offended against the law of contempt of Court and that no member of the Legislative Assembly had any right to interfere in such a manner in the course of administration of criminal justice. 185 I.C. 754=A.I.R. 1940 Oudh 178; 1939 A.L.J. 99=1939 All. 427; 181 I.C. 714=1939 O.W.N. 525=A.I.R. 1939 Oudh 180. *See also* 14 Luck. 649; 14 Luck. 653. Every private communication to a Judge for the purpose of influencing his decision upon a pending matter, is contempt of Court as tending to interfere with the course of justice. 181 I.C. 466=1939 O.W.N. 522=A.I.R. 1939 Oudh 182. Where a party to a pending case wrote a letter to the Judge seized of the case containing the following statement "you have on your responsibility caused all these proceed-



ings against law to be taken with a view to cause loss to me. In case I succeed in appeal, you yourself shall be responsible for the property or the value thereof due to the above-mentioned unlawful acts," it was held that it amounted to contempt of a serious nature and that it contained a threat and an imputation against the Judge's impartiality and that it was a serious matter which could not be treated lightly. 1940 N.L.J. 425=A.I.R. 1940 Nag. 407. Where the respondent, the editor of a newspaper, after reproducing an accurate statement of a criminal complaint lodged against the accused, added in big headlines that "thousands of rupees were missing" as a fact, instead of "as alleged," *held*, the respondent was guilty of contempt. 1931 M.W.N. 1058=34 L.W. 727=61 M.L.J. 848. Where during the pendency of a suit relating to the genuineness of a will the editor of a newspaper published a copy of the will in the paid advertisement column and it appeared that the publication was likely to prejudice the mind of the public, *held*, that the act of the persons responsible for the paper amounted to contempt of Court. 1931 A.L.J. 647=1931 A. 420. The special privilege of the press is a timeworn fallacy. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. 15 Luck. 268=41 Cr.L.J. 169=1930 O.W.N. 1132=A.I.R. 1940 Oudh 137. *See also* A.I.R. 1940 Rang. 70=41 Cr.L.J. 445. Far from there being any special privilege of the press, there is on the other hand a special responsibility affecting the editor of a newspaper, namely that he is in duty bound always to bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of the public as to prejudice the course of litigation. 1940 O.W.N. 1197. It is not possible to say that criticism of Court is protected and can be justified where there is no good faith, where there are misstatements and misrepresentations and where necessarily the Court is brought into contempt and disrepute. A.I.R. 1940 Sind 239 (F.B.). Guardian celebrating marriage of ward in breach of undertaking given to Court—Offence—Persons assisting guardian whether liable. 31 Bom. L.R. 1120; 1940 Nag. 203; I.L.R. (1942) Nag. 45. *See also* A.I.R. 1938 Cal. 38; 1933 Pat. 142=12 Pat. 1. Where a person is restrained by a judicial order from proceeding with certain action, the person so ordered is not justified in disobeying the order merely because he is advised or thinks that the order is wrong in law. A.I.R. 1937 Cal. 601. *See also* 44 Bom.L.R. 231=1942 Bom. 154. The words "opinion, advice or direction" in S. 34, Trusts Act, must be read together as meaning nothing more than guidance. Under S. 34 the

Court exercises what may be called its consultative jurisdiction, giving guidance to a trustee who presumably asks for it, because he wants it and intends to follow it. S. 34 is intended to enable a trustee to obtain the Court's guidance in suitable matters for his protection. The advice, opinion or direction given under S. 34 is not an order binding on parties and disobedience to it does not involve committal for contempt though the trustee disobeying the direction would lose the protection given by S. 34. A.I.R. 1945 Sind 81 (F.B.). There are no doubt statutes which authorize the Court to give instructions which, when given have the full force of orders which must be obeyed and though it may be said that the dictionary definition of an order as something to be obeyed and a direction as something to be followed is a mere play upon words, a distinction without a difference, the distinction may in fact be very real. It depends upon the context in which the word "direction" is used. A.I.R. 1945 Sind 81 (F.B.). Where in the course of a series of newspaper articles the editor alleged that the Judges had convicted a person after having expressed a doubt of his guilt, that the conduct of cases before the Chief Justice was such that arguments and authorities were ignored and that the life and liberty of the subject brought before him was in peril, and further that the Chief Justice passed monstrous sentences and unjustifiably convicted persons on the uncorroborated testimony of an approver and accused the people of the province as habitual liars thus prostituting the position of a Judge. *Held*, that the articles were intended to lower the prestige of the High Court and the dignity of the Judge and that the editor could be punished for contempt. 8 P. 323=117 I.O. 180 (2)=30 Cr.L.J. 741 (F.B.). Where a party sends threatening letters to the opposite party and his advocate demanding the withdrawal of certain allegations in the pleadings it is calculated to interfere with and obstruct or divert the course of justice and hence the party sending such communications is therefore clearly guilty of contempt of Court. I.L.R. (1940) Nag. 69=1939 N.L.J. 461. For words or action used in the face of the Court, or in the course of proceedings to be a contempt they must be such as would interfere or tend to interfere with the course of justice. An insult to counsel or opposing litigant is very different from an insult to the Court itself. 1945 M.W.N. 371=58 L.W. 347=47 Bom.L.R. 738=49 O.W.N. 733=A.I.R. 1945 P.C. 134=(1945) 2 M. L.J. 109 (P.C.). Where a person accused of an offence under secs. 420 and 406, I.P. Code, files a complaint for defamation against a witness in that case and during its pendency, in respect of certain statements made by that witness, it was *held* that inasmuch as the complaint was made more than

6 months after the examination of all the witnesses and not straightaway as soon as the particular witness was examined, it was a *bona fide* act intended for the protection of the complainant's own good name and not an act aimed at putting pressure to bear on witnesses and as such there was not even a technical offence of contempt committed. 181=I.C. 575=40 Cr.L.J. 569=A.I.R. 1939 Oudh 225. Where a person files a complaint for defamation in respect of various allegations against him contained in a petition to adjudicate him an insolvent and also says that he had told the other party that if insolvency proceedings are started, he would take counter proceedings, there is nothing done from which an inference could be drawn that if the allegations in the insolvency proceedings are withdrawn, the criminal proceedings for defamation would also be dropped. There is a distinction between a threat before proceedings are instituted and a threat after proceedings have been instituted. If when the earlier proceedings have been taken a threat is held out then to the person who institutes the proceedings by the opposite party to the effect that unless the proceedings are withdrawn drastic action would be taken, the holder of the threat would be guilty of contempt of Court; but where the threat is held out before the institution of the proceedings it amounts only to a warning so that an unguarded action may not be taken. There may well be action in the nature of a blackmail and it would be dangerous to hold that if the person attempted to be blackmailed were to hold out a counter threat, he would be guilty of contempt of Court. 1940 A.L.J. 798. Where during the course of a guardianship proceedings, one of the parties files an affidavit containing aspersions on the other party and he thereupon files an application under Sec. 476, Cr. P. Code, for enquiry into the falsity of the allegations in the affidavit and for necessary action and also files a complaint against the other under Sec. 500, I.P. Code, neither the application under S. 476, Cr. P. Code, nor the complaint under S. 500, I.P. Code, constitutes contempt of Court. 1940 A.L.J. 579=1940 All. 497. Where a person not a party to the suit sends a registered notice to the defendant, demanding the withdrawal of an abusive epithet used in the written statement with reference to him, and threatening to file a suit for damages, if it was not withdrawn, it is merely the formal preliminary notice for a suit for damages for libel and does not constitute contempt of Court. 187 I.C. 65=1939 A.L.J. 1157=1940 All. 114. See also I.L.R. (1942) Nag. 506=43 Cr.L.J. 98. Where A aids and abets B in his disobedience of an injunction, it is a wrong remedy to petition the Court to issue notice upon A to show cause why he should not be committed for contempt for disobedience of the

injunction. The petition should ask the Court that A be committed for aiding and abetting B in his disobedience. 1938 P.W. N. 895=19 Pat.L.T. 867=1938 P.C. 295. The Government granted certain lease of quarrying rights to A, A took possession of the quarries. In a dispute concerning lease the Government and its servants were restrained by an injunction from disturbing possession of A. B, who was not a party to the injunction proceedings, but who derived his supposed interest from the Government, continued to work the quarries. A brought an action for contempt proceedings against the Government for disobedience of the injunction, and against B, for aiding and abetting the disobedience. Held, that Government could not be said to have disobeyed the injunction. It was for A, who had the immediate right to possession or was in possession under the order of the Court, and not for the Government, who was not in actual possession to eject B. The duty of the Government was to leave those who claimed entitled to the possession of the soil to take the appropriate measures. Held, further, as Government was not liable, B, who derived his interest through it, could also not be held liable for disobedience. [16 Pat. 159=1937 Pat. 65=166 I.C. 966 (S.B.), reversed]. 19 Pat.L.T. 867=178 I.C. 490. See also 41 C.W.N. 821=1938 P.C. 295 (P.C.); 1945 Sind 81. Where attacks are made on the personal character of a Judge, or where base or improper motives in the decision of a case are attributed to Judge, the process of the Court should be used; but the process of contempt for scandalising the Court is one which should be sparingly used. A general expression of opinion hostile to the utility of Courts of Justice, without any attack on any particular Judge or comment on any particular case, is not likely to affect the public and does not amount to contempt of Court. I.L.R. (1938) Bom. 179=40 Bom. L.R. 75=1938 Bom. 197. The truth of the allegations is no defence in proceedings for contempt. Nobody is allowed to scandalise a Court and make allegations against it even if they are true. Every attempt to justify must constitute a new offence of contempt committed in the very face of the Court. I.L.R. (1945) All. 7=1944 O.W.N. (H. C.) 287=1945 A.L.J. 26=A.I.R. 1945 All. 67. Scandalizing the Court amounts to contempt of Court. It is immaterial whether the attack on the Judge is with reference to a case about to be tried or actually under trial or recently adjudged. And the offence is in no way mitigated when the attack is not upon a particular Judge but upon the Court as a whole, indeed, upon all the Judges. Contempt is not only committed when there is a detailed discussion of the facts and merits, but when, for instance, some presumptuous person states that the case of the party is



sound in law and fact before such case is heard and decided. An article suggesting abuse by Chief Court of its powers a desire on the part of that Court to enter into a conflict with the executive Government and containing a plain invitation to Magistrates to disregard the authority of that Court and to subordinate themselves to the alleged wishes of the executive Government, is an article tending to embarrass the administration of justice and calculated to create in the minds of the general public grave apprehension that the Chief Court is not entitled to public confidence in its discharge of its duties. Such article amounts to contempt of Court. 1940 Sind 229 (F.B.). Before a person can be committed for contempt, the Court should be satisfied (a) that something has been published which either is clearly intended or at least is calculated to prejudice a trial which is pending; (b) that the offending matter was published with the knowledge of the pending cause or with the knowledge that the case was imminent; and (c) that the matter published tended substantially to interfere with the due course of justice or was calculated substantially to create prejudice in the public mind. It is a contempt of Court to prejudice mankind for or against the party to the cause before the cause is heard. The publication of a newspaper article which is deliberately designed to create an atmosphere of sympathy for the offenders and to mobilise public opinion in their favour and which is calculated to produce the impression that the offenders are not to blame and that they are being persecuted as they happen to belong to a particular community must, therefore, be treated as a contempt of Court. It is not necessary in the case of a criminal trial that the accused should have been committed for trial or even that he should have been brought before a Magistrate provided he has been arrested and is in custody. The offence of Contempt may be committed if the writer of the offending publication either knows a proceeding or cause to be imminent or should have known that it was imminent. It is true that a criticism of an executive officer, no matter how severe, cannot amount to contempt of Court, but if such criticism contains matter which is calculated to interfere with the due course of justice it would amount to contempt. Proprietors and publishers of newspapers who set out to criticise the public administration in respect of matters which are *sub-judice* or are about to be adjudicated upon do so at their peril. 47 P.L.R. 143 =221 J.C. 195=A.I.R. 1945 Lah. 206. Where a suit was concluded by a decree of Court embodying the terms settlement between the parties one of which was an undertaking given by the defendant not to dispose of his properties until the decree was fully satisfied, and the defendant mortgaged the properties before the satisfaction of the

decree. *Held*, that the breach of the undertaking given to the Court amounted to contempt of Court. 42 C.W.N. 203. Newspaper article—Imputations against jail authorities likely to prejudice fair trial—Offence—Sentence. 26 A.L.J. 1307=113 I.C. 754=1929 A. 81 (F.B.). Proceedings for contempt—Nature of—Evidence—Receiver's report based on hearsay evidence as the basis of sentence—Legality. 118 I. C. 565=1929 C. 115.

PRACTICE AND PROCEDURE.—Proceedings taken against the offender for the contempt of the High Court are of a criminal nature as the contempt of the High Court is certainly an offence. 20 Luck. 442=1945 O. W.N. 169=A.I.R. 1945 Oudh 266. Summary proceedings taken by the High Court for contempt of itself are proceedings derived from the Common Law of England. The power to punish for contempt is a power *sui generis* and not a power which is or can be exercised under the ordinary criminal jurisdiction of the Court. 39 C.W.N. 823. A rule for contempt can be issued by any single Judge or any number of Judges of a Court of record. It is not necessary that the rule should be issued by the High Court as an entire body after consultation with all its members. 8 P. 323=117 I.C. 180 (2)=30 Cr.L.J. 741 (F.B.). *See also* 7 R. 844=122 I.C. 282 =31 Cr.L.J. 397. Where an application is made to the High Court on behalf of the Legal Remembrancer for taking proceedings against a person for contempt of Court, it is not proper that the affidavit in support of the application should be that of a clerk. 21 Pat.L.T. 980=1940 P.W.N. 902. The Legal Remembrancer of Bihar is competent to represent the Government or the Governor in proceedings for contempt in Bihar and can move the Court to take proceedings. His functions and duties are wide enough to empower him to move on behalf of the Government or the Governor and to instruct the Advocate-General to carry on proceedings for contempt in the High Court. 1940 P.W.N. 902=21 Pat.L.T. 980. Summary jurisdiction in contempt is a powerful weapon in the hands of the Court and is to be used sparingly. But its use must in large part depend upon those who by their misconduct invite its application. 1940 Sind 239 (F.B.). The summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive, is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction. Nor should tactless and intemperate statements by litigants in person be taken as contempt of Court. The appel-

lant who had been an unsuccessful plaintiff in a suit in the High Court and ordered to pay costs, took out a summons objecting to the taxation of costs and seeking to review it and appeared in person in support of his objection. In the course of the hearing, counsel for the opposite party stated that the appellant was misleading the Court as to the nature of the issues raised in the action and insisted that he should read out a paragraph in the plaint. The appellant retorted: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar who are in the habit of not doing so and misleading the Court." This led to a protest from the opposing counsel whereupon the appellant at once apologised and expressed regret. Later when dealing with the Taxing Master's statement in the order that he had considered all matters set out in the relevant rule, the appellant said: "It is customary for the Taxing Master to write what is written at the end of the paragraph, but is it considered at all?" No protest against, or comment on, this was made at the time either by counsel or by the Bench or when judgment was given. Subsequently the Court was moved to take action against the appellant and punish him for contempt in respect of his remark against the Bar and the Taxing Master, and in spite of the apology and expression of regret by the appellant the Court held the appellant guilty of contempt of Court in respect of the two remarks and sentenced him to imprisonment and fine. *Held*, on appeal to the Privy Council, (1) that the words used by the appellant respecting the Bar did not and could not amount to contempt of Court, and consequently there was no jurisdiction in the Court, to exercise its summary powers in respect of them; (2) that the words used by the appellant relating to the Taxing Master were no more than a tactless way of suggesting that Taxing Masters were apt to deal somewhat summarily with such matters as were there in question, and afforded no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of Court, and that therefore the order of imprisonment and fine should be set aside. Words used in the course of argument, however irrelevant, would not amount to contempt when they relate to an opponent, whether counsel or litigant. 1945 M.W.N. 371=58 L.W. 347=47 Bom.L.R. 733=49 C.W.N. 733=A.I.R. 1945 P.C. 134=(1945) 2 M.L.J. 109 (P.C.). There can be no doubt that a Court need not and should not interfere in all cases of contempt. It is a very arbitrary method of dealing with an offence and contempt proceedings should be sparingly instituted, and a person should not be convicted unless it is essential in the interests of justice that he should be. A mere technical contempt of Court is not sufficient to warrant the High Court interfering

and convicting the offender. There must be a substantial contempt. 1940 P.W.N. 902=21 Pat.L.T. 980.

**COSTS.**—Where the Crown appears to uphold a conviction in a criminal case, it is not the practice to award costs to the appellant in the event of the appeal succeeding. But a case of criminal contempt, is obviously in a different category from an ordinary criminal case. Where in spite of the opinion expressed by the Chief Justice and another Judge of the Court, of which the appellant was alleged to be in contempt, that no contempt had been committed, the executive deems it necessary not only to appear but to endeavour to uphold an order punishing the appellant for contempt, the successful appellant should have his costs of the appeal. 47 Bom.L.R. 733=49 C.W.N. 733=1945 A.L.J. 335=58 L.W. 347=A.I.R. 1945 P.C. 134=(1945) 2 M.L.J. 109 (P.C.).

**DISCRETION OF COURT.—INTERFERENCE ON APPEAL.**—The question of committal or non-committal for contempt is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, the Privy Council would be slow to interfere with that discretion. 1945 A.L.J. 505=1945 M.W.N. 564=A.I.R. 1945 P.C. 147=(1945) 2 M.L.J. 356 (P.C.).

**INTENTION.**—No intent to interfere with the due course of justice or to prejudice the public need be proved if the effect of the article or matter alleged to constitute contempt is to create prejudice or to interfere with the due course of justice. The writer of an article can be guilty of contempt without intending to interfere with the due course of justice. The test is not what the writer intends but what effect the words would have. The question of intention is irrelevant in considering whether the offence has been committed. 1940 P.W.N. 902=21 Pat.L.T. 980. *See also* 49 L.W. 29; 1943 Lah. 339 854; 1945 Nag. 33.

1945 N.L.J. 30. The fact that an act was done ignorantly or innocently would make no difference to the offence of contempt. It would only be relevant regarding the measure of punishment. 1945 N.L.J. 30=A.I.R. 1945 Nag. 33. In contempt proceedings before the High Court it cannot be said that in every case the party if represented must appear though an advocate instructed by an attorney. Nature of High Courts jurisdiction in matters of contempt indicated. 34 C.W.N. 928. (*See also* notes under sec. 2, *infra*.) Notice of motion for contempt—Nature of proceedings—Particulars to be stated. 86 Bom.L.R. 992=1934 B. 452.

**APPEAL.**—When the High Court punishes for a contempt of Court, it is not open to the

2. (1) Subject to the provisions of sub-section (3), the High Court of Judicature established by Letters Patent shall have and

Power of superior Courts to  
punish contempt of Court.

exercise the same jurisdiction, powers and authority,  
in accordance with the same procedure and practice,  
in respect of contempts of courts subordinate to them  
as they have and exercise in respect of contempts of themselves.

person concerned to ask the High Court for leave to appeal to His Majesty in Council. A Court of record is the sole judge of what constitutes a contempt. 39 C.W.N. 823.

SEC. 2.—The Chief Court of Sind is also a Court of Record and has power to punish in a summary way contempt of itself. I.L.R. (1944) Kar. 396. The words "*Subordinate Court*" in the Contempt of Courts Act are used in a wide sense as including any Court over which the High Court has superintendence for the purpose of sec. 85, Government of Burma Act, 1935, that is to say, all Courts subject for the time being to its appellate jurisdiction. Sub-Divisional Magistrate when holding an inquiry under sec. 176, Cr.P. Code, is acting as a Court subordinate to the High Court for the purposes of the Contempt of Courts Act. 1940 Rang.L.R. 188=41 Cr.L.J. 470=A.I.R. 1940 Rang. 68. The High Court of its own motion can issue a rule calling upon a person to show cause why he should not be committed for contempt of the High Court or for contempt of a Subordinate Court. The powers of the High Court with regard to contempt of Subordinate Courts are the same as its powers with regard to contempt of itself. Under sec. 2 (1) of the Contempt of Courts Act of 1926, the High Court can do in the case of contempt of a Subordinate Court whatever it can do in the case of contempt of the High Court itself. Therefore even if an application for taking proceedings is not competent, as being taken out by a person not competent to represent the Executive Government, the High Court can take notice of the contempt alleged of its own motion and issue a rule. 1940 P.W.N. 902=21 Pat. L.T. 980. Comment upon an Advocate which has reference to the conduct of his cases may amount to contempt of Court. 58 C. 884=35 C.W.N. 189=1931 C. 257.

**ARREST OF COUNSEL PROCEEDING TO COURT.**—The arrest of a counsel by the police in order to prevent him from filing an application the High Court under sec. 491, Cr. P. Code, for the release of a detainee and appearing on behalf of the detainee or to prevent other counsel from so appearing and to prevent the counsel from obtaining an order from the High Court for an interview with the detainee in jail amounts to interference with the due course of justice and constitutes contempt of Court. A.I.R. 1944 Lah. 196 (S.B.).

**WITHHOLDING HABEAS CORPUS PETITION FROM PERSON DETAINED IN JAIL.**—Petitions addressed by detained persons to the High Court under section

491, Cr.P. Code, must be forwarded without any delay. Whether the petition has in the events that have happened become infructuous is a matter in every case for the High Court to decide and no one has the right to take upon himself that responsibility. It is no business at all of any official to form any conclusion about an application addressed to the High Court. In order to amount to a punishable or serious contempt of Court the withholding of the application must tend substantially to interfere with the due course of justice. A.I.R. 1944 Lah. 196 (S.B.). See also 1945 Nag. 33. Where the jail Superintendent deliberately and intentionally withheld the application from the High Court and declined to forward it, *held*, he interfered with the administration of justice and was guilty of a criminal contempt. 1945 N.L.J. 30=A.I.R. 1945 Nag. 33.

**PERSON RELEASED BY COURT ON HABEAS CORPUS WRIT RE-ARRESTED UNDER REGULATION III OF 1818 WITHIN COURT PRECINCTS.**—A person who is directed by Court to be released from illegal detention in *habeas corpus* proceedings or proceedings under sec. 491, Cr.P. Code, is only free from arrest on civil process until he reaches home from Court, but not free from arrest on criminal process. As a warrant of commitment under Regulation III of 1818 is akin to criminal process, the re-arrest of that person under such a warrant in the Court room when the Court is not sitting or within the precincts of the Court even when the Court is sitting will not amount to contempt unless it is a fraudulent proceeding for evading the order of the Court which is made in *habeas corpus* proceedings or proceedings under sec. 491, Cr. P. Code, or the arrest is made in the face of the Court so to create a disturbance of the Court's business. 48 C.W.N. 854. It would amount to contempt if the person holding the warrant says to the face of the Court that he would not release the person ordered to be released by it. Such a warrant issued by the Governor-General or by the Governor of a province does not amount to a decision of a Court but is only an executive act and as such it cannot be set up against the order of the Court directing the release. 47 C.W.N. 854. When an application addressed to the High Court has been written on the 22nd but is not handed over to the jail authorities till the 23rd, the latter figure should not be added. Such tampering with a document addressed to the High Court is improper and is in itself a contempt. The jail authorities can endorse the date of receipt by them sepa-

rately if they so desire but they have no business to alter or add to or tamper with any portion of a document intended for and addressed to the High Court. It is most objectionable to add a figure to the date so as to make it appear that the document bears a different date to the one which it originally bore. 1945 N.L.J. 30=A.I.R. 1945 Nag. 33. In cases of contempt of mofussil Courts the aggrieved person should make his application direct to the High Court. Where the alleged contempt is in the form of obstruction to the receiver appointed by the Court, the application may be made either by the party or by the receiver himself or by the Court which appointed him. In contempt applications the same procedure should be followed as in applications in contempt to the High Court on the original side. 35 C.W.N. 1265. See also 36 C.W.N. 645. The Court of Commissioners appointed under the Bengal Criminal Law Amendment Act is a subordinate Court and the High Court can entertain proceedings for contempt committed before the Commissioners. 87 C.W.N. 276=1933 C. 118=60 C. 603=34 Cr.L.J. 662. The expression "man in the street has lost confidence in the administration of justice in the province" used by a lawyer in a meeting of the Bar Association within the premises of the Court is contempt of Court. 144 I.C. 63=34 Cr.L.J. 726=1933 O. 118. During the course of a trial the counsel for the accused observed in reply to a suggestion that the accused was proposing to leave the jurisdiction of the Court, that he would not be appearing if that were so. The accused in fact left during the trial. *Held*, that the accused cannot be proceeded against for contempt. 35 C.W.N. 1082. A statement made by a counsel before the Judge of a Full Bench to the effect that his instructions are that his client does not wish the matter to be argued before the bench as constituted is a deliberate and intentional insult to the Court. It is highly improper on the part of the counsel to make such a statement and the statement amounts to a contempt of Court. 1932 L. 485 (F.B.). Where a contempt of Court committed by a counsel is due to his erroneous view of law and not to any improper intention on his part, the ends of justice can be met by the Judges of the Full Bench regarding grave disapproval of his action. 138 I.C. 878=33 Cr.L.J. 675=1932 L. 502 (F.B.). Where a leading advocate commits the offence of contempt of Court unconsciously and tenders a written apology to the Court, such apology can be accepted as sufficient amends. 1933 O. 118.8 Attempts to interfere with the possession of a receiver (appointed by Court) and to intercept the rents properly payable by the tenants to the receiver undoubtedly amount to contempt of Court. (20 Beav. 332 and 18 C.W.N. 289, Ref.) 140 I.C. 140=36 C.W.N. 645=1932 C. 705. See also 35 C.W.N. 1265; 159 I.C. 180=1935 O. 684. Any person, whe-

ther a party to the suit or proceeding or an outsider, who interferes with the possession of a receiver is guilty of a contempt of Court. No decree-holder or Receiver can proceed against property of which a Receiver has been appointed by the Court and of which he has taken possession, without leave of that Court. The levying of execution clearly disturbs and interferes with the possession of the Receiver, and if execution is levied without leave of the Court, the person responsible therefor would be guilty of contempt of Court. But where the Court is of opinion that those responsible for levying execution without leave of Court did not realise that the carrying out of execution proceedings would constitute contempt, the proper order would be to direct the *status quo*, to order restoration of possession to the Receiver of which he was dispossessed in execution, leaving the parties to take any action they deem fit with regard to the possession. No further action would be justified in such a case; but it would also be improper to make any order amounting to a condonation of the contempt. I.L.R. (1944) Kar. 396=A.I.R. 1945 Sind 75. The case of interference with or obstruction to a receiver appointed by the Court is treated as a contempt of a criminal nature. It is not necessary in such a case that the order appointing receiver should be served on the respondent. It is enough if the respondent was aware of the appointment of the receiver. The act of interference or obstruction is not a matter of infringement of any order, but amounts to interference with the administration of justice and with its officers. 36 Bom.L.R. 992=1934 Bom. 452; 44 C.W.N. 925=1940 Cal. 487; 59 B. 10=36 Bom.L.R. 992=1934 Bom. 452. (Person guilty need not be party to suit). But Court would act with caution and reluctance when outsiders are concerned. (*Ibid.*) The Court has no right to punish people merely because it might disapprove of what they do, if their conduct does not clearly bring them within the four walls of some offence known to law. Where the Court does not name any officer or individual as receiver, it is not a contempt of Court for a person who knows that that decision has been arrived at to collect and disburse moneys which it is intended are to fall within the powers of the Receiver. It cannot be said that for a party bound by a judgment to do anything which will make that judgment ineffective, is in itself a contempt of Court. 1941 Rang.L.R. 747. The publication of a proceeding in Chamber in the High Court is not permitted without the express leave of the Judge, and if a newspaper does so, it amounts to contempt of Court. Proceedings relating to the appointment of a guardian *ad litem* of a minor are proceedings relating to a ward of Court, and if they are published in a newspaper without the express leave of the Judge that would amount to contempt. I.L.R. (1942) Bom. 151=44 Bom.L.R. 95

(2) Subject to the provisions of sub-section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the

=A.I.R. 1942 Bom. 86. Obstruction offered to a public servant in the discharge of his public function is an offence by itself though the public servant may not be acting under the orders of a Court of justice so long as he was performing a legal function. But if that public servant is carrying out an order of a Court the offender commits another offence, namely, the offence of contempt of the Court whose order the public servant is carrying out. Sec. 186, I.P. Code, does not take note of this second offence which can be the subject of contempt proceedings. 12 P. 172=1933 P. 204=14 Pat.L.T. 77. Where the Sheriff's officer who, accompanied by the plaintiff's men, went to serve the defendant with a writ of summons was prevented because of the threats the defendant who made offensive remarks against him. *Held*, that the defendant was in contempt. 48 C.W.N. 825. A criticism of an executive officer, no matter how severe, cannot amount to contempt of Court unless such criticism contains a matter calculated substantially to interfere with the due course of justice. It is one thing to say during the pendency of proceedings that an executive officer should not have taken a certain course. It is quite a different thing to say that the course he took was wholly illegal. A.I.R. 1948 Lah. 329 (F.B.). In so far as criminal contempts are concerned, the offence is committed if among other things, the acts complained of either obstruct, or have a tendency to obstruct, the administration of justice. It is not necessary to establish an actual obstruction or interference. 1945 N.L.J. 30=A.I.R. 1945 Nag. 33. The necessity for personal service of an order of the Court (appointing the receiver) does not exist when the contempt complained of is obstruction of the Court's officers. 140 I.O. 140=36 C.W.N. 645=1932 C. 705. Where the accused were convicted by the trial Court but were released on bail the same day by the Sessions Court which later on confirmed the conviction and issued warrants of arrest against them and the accused evaded those warrants of arrest and applied to the High Court, in revision, making it appear to the High Court that they were in jail, while in fact they were at no time in jail, it was held that both their evasion and misrepresentation amounted to contempt of Court. I.L.R. (1940) All. 507=1940 A.L.J. 309=A.I.R. 1940 All. 386. The widowed mother of a minor girl had re-married and her sister applied to the Court stating that the minor girl should be removed from the custody of the mother. The applicant was directed to take charge of the minor and she undertook not to marry the minor without the permission of the Court. Subsequently the mother under whose custody the minor continued got the minor married without the permission of the Court. *Held*, (1) that the mother was not guilty of

an offence under sec. 228, I.P. Code; (2) that the accused might be proceeded against under the Contempt of Courts Act. 12 P. 1=1933 P. 142=34 Cr.L.J. 770. Contempt of Court is either (1) criminal contempt consisting of words or acts obstructing or intending to obstruct the administration of justice or (2) contempt in procedure, consisting of disobedience to the judgments, orders for other process of the Court and involving private injury. Ordinarily a party to an action who disobey a prohibitory order, such disobedience though wilful is contempt in procedure, whereas persons who aid and abet such disobedience and are not parties to the action are guilty of criminal contempt. Where in spite of an order of prohibition a father performs the marriage of his minor daughter he is guilty of contempt along with the person who married the girl knowing of the prohibition. 189 I.O. 813=A.I.R. 1940 Nag. 203. *See also* I.L.R. (1942) Nag. 45; 31 Bom.L.R. 1120. A Guzerati applied for restoration of his minor boy from an Anglo-Indian lady who looked after him for a long time with the father's concurrence. In previous proceedings the father was appointed as the guardian of the boy and the father was ordered to have the custody of his boy and was to arrange to take the child for a change. The father made the arrangement but the lady refused to deliver the child to its father in spite of many requests. *Held*, that the lady was guilty of contempt. A.I.R. 1938 Cal. 38=174 I.O. 785. The meaning of sec. 2 (3) is that where under the I.P. Code there is already a provision for punishing a contempt of Court as a contempt of Court the Contempt of Courts Act itself shall have no application. It does not mean that when the act which has constituted the contempt of Court also constitutes an offence under the Penal Code it may not be punished under the Contempt of Courts Act. A single act may be both an offence under the Penal Code and may also be a contempt of Court and may be punishable in either or both capacities. 12 P. 1=1933 P. 142=144 I.O. 351. *See also* 159 I.C. 180=1935 C. 684; 1938 A.L.J. 430. Where an application under sec. 100, Cr.P. Code, has terminated, the filing of complaints under sec. 500, I.P. Code and sec. 195, Cr. P. Code, by the individual against whom the application was directed does not in any way affect the trial of any pending proceedings and hence an application under sec. 2 of the Contempt of Courts Act on the basis of such complaints would not be maintainable. 1942 O. 14=1943 O.W.N. 331=1943 O.A. (C. G.) 212=45 Cr.L.J. 108.

SECS. 2 (2) AND (3): CHIEF COURT OF OUDH—JURISDICTION AS REGARDS CONTEMPT OF SUBORDINATE COURTS.—The Chief Court of Oudh is by virtue of the Oudh Courts Act and secs. 219 and 220 of the Government of

same procedure and practice in respect of contempt of itself as a High Court referred to in sub-section (1).

India Act, the High Court of Oudh and the one and only Court of record and by virtue of its position akin to that of the Court of King's Bench. It has its power of superintendence over all inferior Civil and Criminal Courts and it has power to protect its subordinate Courts from improper interference in the administration of Justice. Its powers in that respect are defined and limited by the Contempt of Courts Act of 1926. The Act is silent as to the powers of the Chief Court to deal with contempts of Courts subordinate to it, but such power cannot be negatived by silence and is to be inferred from the wording of sub-cl. (2) of sec. 2 in which the words "subject to the provisions of sub-cl. (3)" would be otherwise meaningless and in fact unnecessary. 14 Luck. 492=A.I.R. 1939 Oudh 131 (F.B.). The Chief Court of Sind is also a Court of Record has power to punish in a summary way contempt of itself. I.L.R. (1944) Kar. 396=A.I.R. 1944 Sind 75.

**PRACTICE AND PROCEDURE.**—The fact that the rule for contempt is unsigned is by itself no ground for discharge of the rule. 37 C.W.N. 276=1933 G. 118=60 G. 603. When signing a petition for launching contempt proceedings a Secretary to Government should be presumed to be acting within the scope of the authority conferred on him until the contrary is shown (*Ibid.*) The legal remembrancer is ex officio public prosecutor on the Appellate Side of the High Court and as such has the power to instruct counsel, his authority to act for the local Government being in no way dependent on a vakalat-nama or warrant of attorney (*Ibid.*) Applications for contempt cannot be subject-matter of reference by the lower Court to the High Court. Such applications cannot be heard by a Bench of the High Court hearing criminal appeal unless they are specially referred by the Chief Justice. 35 C.W.N. 1265. When the contempt is committed in the face of a Court it is that Court which is the proper tribunal to decide the whole matter. 138 I.C. 878=1932 L. 502 (F.B.). In a case where a party is required to do something by order of Court, it is necessary before committing for disobedience of the Court's order, that he should have been personally served with notice of the order. Service upon his attorney is not sufficient nor is personal service after notice of motion for contempt. 34 Bom.L.R. 1416=1932 B. 633. The precise breach complained of should be set out in the notice of motion (*Ibid.*) In cases of contempt the parties charged with contempt cannot be called upon to answer to anything which is not set out specifically in the grounds used before the Court at the time when the rule was issued; where the grounds

are insufficient the only course open to the Court is to discharge the rule. 35 C.W.N. 1267. There can be no justification of contempt of Court even if the writer or speaker believes all that he states to be true; and a person guilty of contempt is not entitled to lead evidence to establish the truth of his allegations. 36 Cr.L.J. 620=1935 A.L.J. 46=1935 All. 38. The general rule is a party in contempt is not entitled to be heard but the rule has never been applied to a case in which the order, for the breach of which contempt is alleged, is challenged on the ground of want of jurisdiction. 55 B. 303=33 Bom.L.R. 725=1931 B. 402. In an enquiry by the Court for contempt consisting of alleged disobedience of the order of Court, it is unnecessary to go into the previous history of the matters which led to the passing of the order. (7 B. 5, Ref.) 34 Bom.L.R. 1416=1932 B. 638. Where the breach of an order of Court complained of is a failure to pay a sum of money, the Court has no power to commit a private party for contempt. But a receiver is an officer of Court and on his failure to comply with an order of Court he may be committed for contempt. (19 B. 152, Dist.; 4 C. 655 Foll.) 34 Bom.L.R. 1416=1932 B. 638. Sec. 556, Cr.P. Code, does not apply to summary proceedings taken for punishing a contempt. In such a case the practice has been for the Judges who have been defamed to hear the case. While it is unpleasant for any Judge to have to sit in judgment in a case in which he has been personally attacked, it is his duty to do so where he has been the subject of a malicious publication containing imputations which are obviously false. In fact he has no alternative but to sit as it is impossible to vindicate the reputation of the Court which has been attacked by taking proceedings in any Court for libel or otherwise. I.L.R. (1942) Lah. 411=44 P.L.R. 206=1942 Lah. 105 (F.B.). In a proceeding for contempt of Court, it is not open to a contemner to show that the allegations are true. Any attempt to justify a libel on a Judge by attempting to show that the libel was justified would itself be a fresh contempt. I.L.R. (1942) Lah. 411=44 P.L.R. 206=1942 Lah. 105 (F.B.). The provisions of the Code of Criminal Procedure are not applicable to summary proceedings taken for punishing a contempt. But even if sec. 344 of the Code be applicable, the Court will not be disposed to adjourn the proceedings in a case where the Court is scandalised and an attempt is made by a scurrilous publication to undermine and impair the authority of the Court, as immediate action is necessary with a view to vindicate the authority of the Court. I.L.R. (1942) Lah. 411=44 P.L.R. 206=1942 Lah. 105 (F.B.). See also 1944 A.L.J. 459.



(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

3. Save as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both :

SEC. 2 (3).—The prohibition contained in sec. 2 (3) of the Act, refers to offences punishable as contempt of Court by the Indian Penal Code and not to offences punishable there otherwise than as contempt. 1940 N.L.J. 425=1940 Nag. 407. *See also* 1938 A.L.J. 430; 1935 Cal. 684. In so far as criminal contempts are concerned, the offence is committed if among other things, the acts complained of either obstruct, or have a tendency to obstruct, the administration of justice. It is not necessary to establish an actual obstruction or interference. It is enough to show that the acts have a tendency to interfere. 1945 N.L.J. 30=A.I.R. 1945 Nag. 33. Where in answer to interrogatories, a party to a proceeding in a Magistrate's Court stated that the Chief Reader of that Court had friendly relations with and influence over the Court which acted dishonestly and imposed a fine, the statement is clearly defamatory of the presiding officer and a criminal offence under the Penal Code. But the appropriate procedure is for the officer to file a complaint under the Penal Code and the High Court will not take cognizance under the Contempt of Courts Act. 36 C.L.J. 967=1935 A.L.J. 950 (1)=1935 All. 896.

Sub-sec. (3), sec. 2, means that the contempt must be punishable as a contempt under the Penal Code and not punishable only because it otherwise is an offence. 165 I.C. 813=1936 Lah. 917. The true interpretation of cl. (3) to sec. 2 of the Contempt of Courts Act is that where there is already a provision in the Penal Code for punishing a contempt of Court as such the Contempt of Courts Act itself shall have no application. But where an act amounts to an offence under the Penal Code and also under the Contempt of Courts Act, it will be punishable under both Acts. I.L.R. (1938) All. 548=1938 A.L.J. 430=1938 All. 358. Failure to obey an order the Chief Judge of the Court of Small Causes at Bombay to furnish information as required by S. 3 of the Mussulman Wakf Act, 1923, as amended by the Bombay Amendment Act of 1935, though it is an offence under that Act, is not an offence punishable under the Indian Penal Code. The High Court is consequently not precluded from taking action in respect of it by the terms of S. 2 (3) of the Contempt of Courts Act. 1945 A.L.J. 505=A.I.R. 1945 P.C. 147=(1945) 2 M.L.J. 356 (P.C.).

SECS. 2 AND 3.—Where a leading advocate commits the offence of contempt of Court

unconsciously and tenders a written apology to the Court, such apology can be accepted as sufficient amends. 144 I.C. 63 (2)=1933 O. 118.

SEC. 3.—An allegation that a Judge hearing a case has prejudiced on issue of fact, before any evidence whatever has been called is to charge the Judge with grossly improper conduct. When a solicitor makes such an allegation in a letter written by him to another solicitor, the inevitable result would be that public confidence in the judiciary would be shaken. That is always the basis of contempt proceedings of the nature known as scandalizing the Court. 44 Bom.L.R. 796=1942 Bom. 331. Threat used by Advocate to judge an offence. Where an Advocate wrote a letter to a Judge informing him that steps were being taken to put a certain decree in execution while a revision was pending in the High Court and further stated that in case further action in execution was taken his client would institute a suit for damages against him, *held*, that the intention of the Advocate was to influence the mind of the Judge by the threat held out to him. 147 I.C. 330=1934 A.L.J. 145=1934 A. 317. *See also* 1939 N.N.L.J. 461. But *see* 18 Lah. 69 noted under sec. 1, as regards the extent of punishment that can be given under inherent power of High Court. The Court has jurisdiction to direct the payment of costs of the Crown by the person punished under the Contempt of Courts Act. 36 Cr.L.J. 1365=1935 A.L.J. 1153=1935 All. 1013. Where the contempt is of a very grave nature, the party is contempt may be punished in spite of apology tendered. (1938) 2 M.L.J. 520=1938 Mad. 975. Suggestion that High Court Judge was influenced by remarks of Secretary of State amounts to contempt. I.L.R. (1945) All. 665=1944 A.L.J. 459=A.I.R. 1945 All. 1. The proviso to sec. 3 no doubt, seems to contemplate an apology at a late stage. Where instead of apologising at the earliest possible opportunity the person charged or his counsel contends that no contempt has been committed, his apology thereafter can only be regarded as afterthought put forward in the hope of avoiding the wrath to come. 1940 O.W.N. 1197. Except in scandalous and outrageous cases an unconditional apology is ordinarily considered to purge the contempt. Where, however, in spite of several opportunities instead of apologising the person persists in justifying his action the contempt is aggravated. 1945



Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court :

<sup>1</sup>[Provided further that notwithstanding anything elsewhere contained in any law no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it.]

## THE INDIAN CONTRACT ACT (IX OF 1872).

### EFFECT OF SUBSEQUENT LEGISLATION.

S. 1, rep. in part, Act X of 1914, S. 3 and Sch. II.

S. 16, subs. Act VI of 1899, S. 2.

S. 19, rep. in part, Act VI of 1899, S. 3.

S. 19-A, ins. Act VI of 1899, S. 3.

S. 21, rep. in part, Act XXIV of 1917, S. 3 and Sch. II; am., A.O., 1937.

S. 25, am., Act XII of 1891, S. 2 and Sch. II.

S. 27, rep. in part, Act IX of 1932, S. 73 and Sch. II.

S. 28, rep. in part, Act I of 1877, S. 2 and Sch.

S. 43 and 63, am., Act XII of 1891, S. 2 and Sch. II.

S. 74, am., Act VI of 1899, S. 4, A.O., 1937.

S. 76 to 123, rep. Act III of 1930, S. 65.

S. 133, am., Act XXIV of 1917, S. 2 and Sch. I.

Ss. 178 and 178-A, subs. for the original S. 178, Act IV of 1930, S. 2.

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Sch., rep., Act X of 1914, S. 3 and Sch. II.

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N.L.J. 30=1945 Nag. 33. Where a contemner states that he is 'extremely sorry, it may amount to an expression of regret, but it is certainly not an apology—which is the word used in the Contempt of Courts Act. 1942 O.W.N. 6=1942 A.Cr.C. 28. See the same case reversed on appeal to P.C. (1943) 2 M.L.J. 568 (P.C.). An apology is not a weapon of defence forged to purge the guilty of their offences. Nor is it intended to operate as a universal panacea. It is intended to be evidence of real contriteness. Only then is it of any avail in a Court of Justice. It must be tendered at the earliest opportunity unreservedly and unconditionally. Everything depends on the circumstances as well as upon the nature of the apology and the manner in which it is tendered. 1940 N. L.J. 425=1940 Nag. 407. See also 1940 O. W.N. 1197=1940 O.A. 1137. It does not follow that because an apology is offered the Court must accept it and is disarmed. A Court can refuse to accept an apology which it does not believe is genuine; it can even when it accepts the apology, commit an offence to prison or otherwise punish him. Furthermore, there cannot be both justification and apology. The two things are incompatible. 1940 Sind 239 (F.B.). The principle underlying the case in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the protecting of either the Court as a whole or the individual Judges of the Court from a repetition of them, but the protecting of the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. An article in a newspaper containing comments on the finding of the Magistrate in an inquest under sec. 170, Cr.P. Code, into the death of a certain person amounts to contempt of Court if the comments impute deliberate perversity, incapability and partiality to the police on the part of the Magistrate in question. For the publication of this article, the publisher and editor are liable to be dealt with for contempt of Court and they cannot be allowed to go unpunished merely because they have tendered an apology. 187 I.O. 808=41 Cr. L.J. 445=(1940) 6 Rang. 70. See also 1933 Oudh 118.

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SCHEDULE.—ENACTMENTS REPEALED.  
[*Repealed.*]

THE INDIAN CONTRACT ACT (IX OF 1872).<sup>1</sup>

[25th April, 1872.

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts ; It is hereby enacted as follows :—

## PRELIMINARY.

Short title.

1. This Act may be called THE INDIAN CONTRACT Act, 1872.

## LEG. REF.

<sup>1</sup> For the Statement of Objects and Reasons for the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6th, 1866, see Gazette of India, 1867, Extraordinary, p. 34; for the Report of the Select Committee, see, *ibid.*, Extraordinary, dated 28th March, 1872; for discussions in Council, see *ibid.*, 1867, Supplement, p. 1064; *ibid.*, 1871, p. 313, and *ibid.*, 1872, p. 527.

The chapters and sections of the Transfer of Property Act, 1882 (IV of 1882) which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX of 1872; See Act IV of 1882, sec. 4.

SEC. 1: CONTRACT ACT.—Act is not retrospective. 5 M.I.A. 109; 12 Bom.L.R. 451 (458, 472). It is an amending as well as a consolidating Act. 40 B. 630=31 M.L.J. 541 (P.C.). Act is not exhaustive. It does not purport to be a complete Code dealing with the law relating to contracts, but defines and amends certain parts of that law. 40 I.C. 194=19 Bom.L.R. 370; 35 M. 728=21 M.L.J. 600; 62 C. 612=39 C.W.N. 461. See also 31 Bom.L.R. 508; 40 Bom.L.R. 989=1939 B. 23. The Court must interpret the Act itself where it applies and the natural meaning of the words of the statute should be followed uninfluenced by the previous state of the law. But the Contract Act is not exhaustive and where the Act does not cover the case with which the Court has to deal, then the Court is bound to follow the principles of the English Common Law. 56 B. 101=34 Bom.L.R. 167=1932 B. 168;; 62 C. 612=39 C.W.N. 461. Sec. 1 saves from its operation all Statutes, Acts and Regulations not expressly repealed by this Act, and also special usages and trade and mercantile customs. 18 C. 620=18 I.A. 121 (P.C.). See also 1933 L. 183=145 I.C. 188; 1935 Sind 38 (Pakki adat); 1935 Sind 38. This Act does not affect the following usages and customs—Pre-emption. 18 C. 620. Arbitrator's lien; Attorney's lien. 6 C. 1. Mercantile custom as to Hindis, Common Carriers and Maritime Law, etc. 13 C. 620 (P.C.); 98 I.C. 759=1928 N. 89. Where both parties are engaged in business and articles are purchased by one party from the other party for business purposes, the transaction falls within the term 'mercantile transaction'. 16 Luck. 357=1940 Oudh 443. It is open to a party to plead a trade usage in

conflict with the provisions of the Contract Act. If a party relies on a trade usage its incidents and details ought to be indicated with clearness and precision; and where there is an issue between the parties as to the existence of such usage the onus of proof lies upon the party propounding the same. 1931 A.L.J. 390=1931 A. 583. See also 1933 L. 183=145 I.C. 188; 1935 Sind 38; 33 P.L.R. 985=1932 L. 633. (Trade usage as to sale of khathis in shanli); 1933 L. 127 (Mercantile usage in Delhi Town Market). The Contract Act is not exhaustive so far as the law relating to common carriers is concerned. 9 I.C. 966=32 P.W.R. 1911. Where an agreement is approved and declared to be valid and binding on the parties by an Act of the Legislature, the effect of this statutory confirmation is to render every provision and stipulation of the agreement as obligatory and binding on the parties as if these provisions had been repeated in the form of statutory sections. 169 I.C. 562=1937 P.C. 214 (P.C.). Although the Contract Act purports to deal only with certain parts of the law relating to contracts, yet it should be regarded as exhaustive and binding on the Courts in India when it treats a subject in a way at variance with the English Law. 38 I.C. 915=12 N.L.R. 177. Applicability of Act to contracts regarding land. See 19 S.L.R. 337. Principle of the Act applicable to all transfers. 25 A.L.J. 708=1927 A. 693. A mercantile custom in contravention of the written terms of a contract can be of no avail in a suit under the contract, but evidence of custom not consistent with the contract can be admitted. 41 B. 518=18 Bom.L.R. 532; 1931 A.L.J. 390=1931 A.L.J. 583. Where there is reliance on custom there is necessarily a variation from the written contract, but the variation need not be in contradiction of or repugnant to it. 41 B. 518=18 Bom.L.R. 532. If, in a case of a contract in which there is an apparent inconsistency according to the literal construction of the words used, there is any other reasonably possible construction by which the apparent inconsistencies can be reconciled, that construction should be adopted. 52 L.W. 591=1940 A.L.J. 701=1940 P.C. 151 (P.C.). It is well settled that an illustration can in no event override an express provision in the contract. 1946 N.L.J. 128. English common law principles can be applied so far as they apply to Indian circumstances and are not inconsistent with this Act. See 4 I.A. 23. See also 1937 Rang. 302; 56 B. 101=34 Bom.L.R. 167=1932 B. 168; 1937 O.W.N. 136=1937

Extent and commencement.	It extends to the whole of British India <sup>1</sup> ; and it shall come into force on the first day of September, 1872.
2* * *	* nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.
Enactments repealed.	

## LEG. REF.

<sup>1</sup> Act IX of 1872 has been declared in force in—  
the Southal Parganas—*see* the Southal Parganas Settlement Regulation (III of 1872) as amended by the Southal Parganas Justice and Laws Regulation (III of 1899), *sec.* 3.

British Baluchistan—*see* the British Baluchistan Laws Regulation (II of 1913), *sec.* 3.  
Panth Piplooda—*see* the Panth Piplooda Laws Regulation (I of 1929), *sec.* 2.

It has been declared, by notification under *sec.* 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in—

the tract of the Province of Agra—*see* Gazette of India, 1876, Pt. I, p. 505;

the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—*see* Gazette of India, 1881, Pt. I, p. 504.

(The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—*see* Calcutta Gazette, 1899, Pt. I, p. 44.)

<sup>2</sup> The words "The enactments mentioned in the Schedule hereto are repealed to the extent specified in the third column thereof; but" were repealed by *sec.* 3 and Sch. II of the Repealing and Amending Act (X of 1914).

O. 82. Cause of action with reference to cases on contracts explained. 53 C. 539=134 I.C. 65=1031 C. 659. Where the deed forming the contract between the parties is not properly stamped, it cannot form the basis of a suit, nor is it permissible to fall back upon the previous oral negotiations. 41 P.L.R. 98=1939 Lah. 266. The fact that a hire purchase agreement is insufficiently stamped does not render the document invalid, although an objection might be taken to its admissibility in evidence. 1938 Cal. 654. There is no universal rule that a stranger to a contract can in no circumstances claim a benefit thereunder. 77 I.C. 261=35 C.L.J. 493=1923 C. 25; 153 I.C. 102=1935 M. 141. *See also* 165 I.C. 231=1936 A.L.J. 1012=1936 A. 700; 70 M.L.J. 581; 17 Pat. 751; 1929 A.L.J. 228=1939 All. 190=I.L.R. (1939) All. 185; 42 C.W.N. 1212; 40 Bom. L.R. 155=1938 Bom. 217; 39 P.L.R. 499; 41 C.W.N. 1008; 1940 Lah. 471; 1940 O. 425; 1939 A.L.J. 1139=1940 All. 98; 17 Pat. 751; 38 Bom.L.R. 610=1936 B. 344; 162 I.C. 754=1936 C. 260; 165 I.C. 113=1936 O.W.N. 1021=1937 O. 99; 1935 L. 354=16 L. 118; 1935 O. 496=158 I.C. 48; 62 C.L.J. 55. A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian Law even

though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine: The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party. Where the consideration for a sale of a property is that the purchaser would satisfy certain creditors of the vendor and release the latter from his liability in respect of the debts, and the property is not sold for a fixed consideration and the purchaser does not retain out of it a definite sum of money for payment to the creditors, the purchaser cannot be said to have constituted himself a trustee in respect of the property sold or the consideration money payable for it for the benefit of the creditors, and the latter cannot sue the purchaser for enforcement of his obligation under the contract of sale. 74 C. L.J. 327. *See also* 1937 Oudh 99=1937 O. W.N. 1021; 1937 M.W.N. 408. A stranger to a contract can sue upon it at any rate in the following circumstances, namely, (a) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally and (b) where the contract creates a trust in favour of the stranger. 1940 Rang. L.R. 237=1940 Rang. 91; I.L.R. (1945) Nag. 581=1945 N.L.J. 258=1945 Nag. 261; 46 C.W.N. 371; 1943 Sind 190; 1943 Sind 221; 1943 Nag. 266; 24 Pat.L.T. 33; I.L.R. (1944) Nag. 46=1944 N.L.J. 110=1944 Nag. 120; (1944) 2 M.L.J. 187; 1942 Cal. 251. Though the applicability of the rule in *Tweedle v. Atkinson* to Courts in India has been the subject of considerable discussion, opinions expressed have by no means been uniform. A general statement that where a person makes a contract with another for the benefit of a third person, that third person can sue on the contract apart from any reference to agency or trust, is a proposition not supported either by principle or authority. I.L.R. (1937) 2 Cal. 698=66 C.L.J. 373. *See also* 114 I.C. 658; 1942 Pat. 460. A stranger is not entitled to sue on a covenant, in the performance of which he has only an indirect interest. 178 I.C. 322=1938 Cal. 578. It is well settled that a person who is not a party to the contract cannot sue on it. Such rights can be enforced by way of suit, as for example under a trust, or because of estoppel, or by way of charge,



or under a family arrangement, but unless something over and beyond a mere contract can be inferred the suit will not lie. A trust does not arise simply because a party to a contract undertakes to confer a benefit on a stranger. A person who contracts to do a certain thing for consideration does not intend to create a trust. I.L.R. (1943) Nag. 643=1943 N.L.J. 363=A.I.R. 1943 Nag. 206. A person who is not a party can sue if he is claiming through a party to the contract or if he is in the position of a *cestui que trust* or of a principal suing through an agent, or if he claims under a family settlement. A person who merely takes a benefit under a contract to which he was not party cannot sue directly upon that contract without invoking the doctrine of trust or agency. 41 Bom.L.R. 538=1939 Bom. 309; 46 O.W.N. 371; 21 Pat. 377=1942 Pat. 460 (Sec. 23 (c) Specific Relief Act, which refers to a family settlement is a statutory exception to the general rule that only parties to contract can sue thereon). A stranger who renders services to an arbitrator as his legal adviser, and indirectly to the parties, not being a party to the award itself, and there being no privity of contract between him and the parties to the award, cannot sue for an amount agreed to be paid to him under the same; for the principles of justice, equity and good conscience cannot be extended to cover all cases where parties contract to confer benefit upon a stranger so as to enable him to sue upon the contract; but where it is clear on facts that some measure of privity is established between the third person and the contract, he may sue on it. I.L.R. (1939) Kar. 422=1939 Sind 125. Where the plaintiff is a beneficiary under a deed of settlement, the rule of law that third parties to a contract cannot take the benefit of the contract does not apply. 153 I.C. 102=1935 M. 141; 165 I.C. 113=1936 O.W.N. 1021=1937 O. 99. See also notes under sec. 37, *infra*. A mortgagee is not entitled to rely on the terms of a sale-deed executed by the mortgagor in favour of a third person, as he is not a party to the sale-deed. 123 I.C. 42=1930 M. 567. But see also 134 I.C. 1011. A person who is not a party to a contract cannot ordinarily sue for specific performance of the contract but where a third person acquires some benefit under the contract he is entitled to enforce such benefit by way of equitable relief and what the Courts enforce in such circumstances is not the contract itself but equities arising under the contract. 121 I.C. 337; 141 I.C. 490=1933 L. 78. See also 138 I.C. 263=1932 L. 566; 940 A. 98; 131 I.C. 210; 134 I.C. 1011=1931 Luck. 292 (Vendee undertaking to discharge obligation of vendor can be sued on such undertaking); 131 I.O. 575=1931 A.L.J. 614. But see also 134 I.C. 100=32 P.L.R. 876; 55 M. 436=1932 M. 457=62 M.J. 533. The general rule in India is that although consideration for an agreement may proceed from a third party, a person not a party to an agreement cannot sue upon it. The rule, however, is subject to certain well-

recognised exceptions, where it is clear on the facts that some measure of privity is established between the third person and the contract on which he sues and which would enable him to get judgment in his favour in a Court of equity. This rule also applies in insolvency and creditors of an insolvent who are not parties to an arrangement cannot take advantage of it. In an insolvency, therefore, creditors cannot claim benefits under a contract which benefits would not be available to them in action by suit. A petition for adjudicating a debtor cannot therefore be presented by a person who claims a benefit under an agreement made by the debtor but to which he is not a party and which agreement does not render the debtor personally liable in respect of any debt due to the applicant creditor. I.L.R. (1943) Kar. 238=A.I.R. 1943 Sind 190.

The only exception recognised to the general rule that a third person cannot sue upon a contract is where the third party is in the position of a *cestui que trust*, e.g., where a family arrangement makes provision for the maintenance or marriage of a minor or of a female member of the family. Where, in a family partition suit an arbitrator is appointed and an award is made under which, it is provided that the debts of the father who receives no property should be a charge on the immovable property allotted to and taken by one of the sons, it cannot be said that any trust is created in favour of the creditor to whom the debts are due by the father, so as to entitle him to sue the son for recovery of his debts on the basis of the award to which he has not been a party. It matters nothing that the parties to the contract are father and sons. The creditor has no right to sue upon this award and to obtain a charge. The creditor can only obtain a decree against the son limited to the assets of his deceased father in his hands. I.L.R. (1943) Kar. 338=A.I.R. 1943 Sind 221. A purchaser from a mortgagor who undertakes to discharge the mortgage debt and communicates to the mortgagee that he (the purchaser) held certain moneys for the mortgagee and asking the mortgagee not to press for payment of the mortgage amount is personally liable to pay the amount to the mortgagee in a suit by the latter. 41 L.W. 123=1935 M. 115=68 M.L.J. 159. Where a person transfers property to another and the deed of transfer contains a stipulation that the transferee should pay a certain sum of money to a creditor of the transferor, the creditor cannot enforce the stipulation as he is a stranger to the contract and the fact that the transferor also is impleaded as a party to the suit and is before the Court does not make any difference. 53 M. 270=68 M.L.J. 420 (F.B.) (43 M.L.J. 129; 47 M.L.J. 517; 25 L.W. 120, overruled). Compare however, 141 I.C. 490=1933 L. 178. See also 68 M.L.J. 159; 16 Lah. 113. Cases where a trust, express or implied, has been created in favour of such a creditor of the transferor, or where there has been novation or obligation undertaken by the transferee



2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Interpretation clause. (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise :

to the creditor or where the transferee is estopped owing to transactions between him and the creditor stand on a different footing, as also cases of family settlement. 53 M. 270=1930 M. 382=58 M.L.J. 420 (F.B.). It is competent to a tenant to invoke the benefit of a contract between the Government and settlement holder, even though he may not be a party thereto. 53 M. 210. Though a party to a contract can constitute himself a trustee for a third party, of a right under the contract, and thus confer such rights enforceable in equity on the third party, the intention to constitute the trust must be affirmatively proved. It cannot be inferred from the general words in a policy of insurance. 1933 A.C. 70=1933 P.C. 11=64 M.L.J. 133 (P.C.). The assignee of a party to a contract is bound by an arbitration clause in the contract where the subject-matter of the reference is capable of assignment. A submission clause can be incorporated into a contract by reference. 140 I.C. 626=1933 S. 75. If the parties to a building contract choose to agree to abide by the certificate of an architect whom they have named in the agreement, then they must accept the decision of the architect, however, wrong and erroneous it may be. A final certificate given by the architect can be challenged by the owner of the building only on three grounds, viz., fraud, collusion or misconduct on the part of the architect. If there is an arbitration clause in the contract and if there are pending disputes between the parties, then the power given to the architect under the terms of the contract to give a final certificate comes to an end, and the architect can only act under the arbitration clause as arbitrator and cannot act as a certifier. 1943 Bom. 334=44 Bom.L.R. 692. The total repudiation by a person of any liability under a contract to which he is a party operates as a bar to a plea by him that the contract is subject to an arbitration in a suit by the other party on the contract. It is not open to him to say that though he is not bound by the contract the other party is bound by the arbitration clause in it. By repudiating liability he loses all right to insist upon compliance with the arbitration clause. 44 Bom.L.R. 692=A.I.R. 1942 Bom. 297.

SEC. (2) (a).—The definition of "contract" in sec. 2 appears to be built upon a succession of definitions of the elements which go to make a contract, that is to say, proposal, acceptance, promise, promisor, promisee, consideration and agreement. The expression "reciprocal promises" is explained and

finally a contract is defined as an agreement enforceable by law. On the other hand an agreement not enforceable by law is said to be void; that is to say, it is not a contract at all. 161 I.C. 579=1936 P. 153. An offer must be distinguished from an invitation for an offer. 65 I.C. 282=1922 L. 100. Catalogue of goods is not offer, but only an invitation for offer. 12 O.C. 17; so also statement of lowest price in answer to enquiry. 8 I.C. 601. A letter from a prospective buyer asking for quotations from a merchant is an invitation for an offer. 65 I.C. 282=1922 L. 100. See also 1939 Oudh 249=14 Luck. 710. If the merchant sends his quotations and the buyer accepts them and orders goods, that constitutes the proposal which the seller may or may not accept. 65 I.C. 282. A quotation submitted by a trader as the basis of a possible order from customers is distinct from an offer to sell, which, if accepted, creates a contract for the breach of which damages may be recovered. 37 M.L.J. 712=54 I.C. 550. But see also 7 Bur.L. T. 136=23 I.C. 322. A letter communicating willingness to sell certain property for a certain sum in reply to a later inquiring whether the property is to be sold amounts to an offer or proposal within the meaning of sec. 2 and is not merely an invitation to an offer. 161 I.C. 224=63 C.L.J. 86=1936 C. 87. A bid at an auction is nothing more than an offer and can be withdrawn like all other offers before it is accepted by the fall of the hammer. 43 M.L.J. 132=45 M. 799; 19 I. C. 904=18 C.L.J. 53. An offer to sell and to keep the offer open tell a certain time is *nudum pactum* and can, at any time before acceptance, be re-called. 31 I.C. 890. Where there was a completed contract, reduction to writing is merely incidental to the completion of the contract. 21 M.L.J. 182=9 I.C. 104. Letter of request for a loan is only a proposal. 71 I.C. 698. See also 13 B. 669; 16 M. 263. It cannot be sued on as a promissory note. 71 I.C. 968. Where a boy runs away from home and the boy's father advertises reward to any one tracing him bringing him home, taking boy to Police Station, making report and sending telegram to boy's father are substantial performance of condition, for which reward may be claimed. See 23 A.L.J. 655=88 I.C. 908=1925 A. 539.

SEC. 2 (b).—As to when communication of acceptance becomes complete, see sec. 4, III. *infra*. As to contract by offer and acceptance, see 20 I.C. 282=277 P.L.R. 1913; 36 B. 357=14 Bom.L.R. 648. Offer by letter

(c) The person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee":

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

—Acceptance in minute—Terms partly incorporated therein—Variance between letter and minute. 27 M.L.J. 74=18 C.W.N. 1185=24 I.C. 506 (P.C.). Whether a particular transaction is a standing offer or completed transaction, *see* 142 I.C. 315=1933 M. 322=64 M.L.J. 354 (F.B.). Where a contract is made by letters, the place where the final assent is given to the offer is the place where the contract is made. 6 A.L.J. 213; 27 M. 535; 12 O.C. 17. A promise need not be in writing. 23 M. 94. Silence to a letter does not amount to an acceptance of the terms proposed. When a contract of sale of goods has been embodied in a written deed the previous offers and acceptances lose all importance and the only contract between the parties is the written contract. The previous offers and acceptances are merely stages in the negotiations between the parties. A.I.R. 1945 Lah. 35; 1941 Rang. 270. What is proposal and promise in auction sales. 14 M. 235. Incomplete negotiation, not being complete contract cannot be sued upon. 39 B. 529. *See also* 39 C.W.N. 174. Reward offered for the search of a missing boy, for whose search a servant was already sent, cannot be claimed by the servant though he found the boy out; the servant did not undertake the search after the offer nor on its strength and hence the finding out by him does not amount to acceptance by conduct. 19 I.C. 576=11 A.L.J. 489. *See also* 23 A.L.J. 655=88 I.C. 908=1925 A. 539.

The relevant words of a letter signed by the plaintiff, and addressed to the defendants were as follows—"We hereby request you to supply or to instruct your friends abroad to buy and to ship, if possible, on our account and risk," and then the contract goods were set out with the terms. The defendants wrote to the plaintiff as follows—"We beg to inform you without any engagement on our part that your under-mentioned valued indent has been placed with thanks." *Held*, that the contract between the parties was one of sale and purchase, and that the defendants did not merely act as correspondents passing on the plaintiff's order to persons abroad. 47 C.W.N. 86.

SEC. 2 (c).—PROMISOR AND PROMISEE—MERGER.—No man can in his own right be under any obligation to himself. Hence when a *hatchita* is executed by a person in favour of himself and some others, such person cannot in law be said to be one of the promisees. In other words the promisees must be taken in law to be the person mentioned in *hatchita* other than such person. Even if all the promisees are assumed to be a person distinct from the promisor the position is not different because the debtor can

make payment of such debt to the several creditors and get valid discharge in respect of the share of the creditor concerned. This being so, that portion of the debt of the promisor which is ascribable to himself as one of the promisees will stand discharged by the doctrine of merger or *confusio*. 1941 Cal. 395. Where an offer containing certain conditions has been made to a party and that party by adding to the conditions makes a counter-offer, the counter-offer amounts to rejection of the offer made to him. 173 I.C. 23=1938 Lah. 341. *See also* 1938 Cal. 343; 1938 Cal. 423; 50 L.W. 597=1940 M. 49.

SEC. 2 (d).—"Consideration" as defined in this section is wider than the meaning of the term in English law. 61 C. 841=38 C.W.N. 682=1934 C. 682; 165 I.C. 338=38 Bom.L.R. 610=1936 B. 344. There is nothing in sec. 2 to show that a promise to afford future personal service is not good consideration. In most cases where the personal services are promised on the one side specific performance cannot be enforced from the other. Neither the mere fact that specific performance of such a contract cannot be enforced nor the mere fact that in the nature of things one of the promisors is bound to perform his part of the agreement first, renders the contract bad. So long as there is a promise coming from each side and each side promises a thing which can be done, and can legally be done there is consideration. 1942 O.W.N. 652=1942 A.W.R. (C.C.) 349=1943 Oudh 99. Consideration may move from a third party. 6 M. 351; 136 I.C. 17=1932 L. 185; 134 I.C. 1011; 1940 Rang.L.R. 237=1940 Rang. 91; 1939 Pat. 477; 1937 A.M.L.J. 110 (Cancellation or closing of accounts of a third party). Benefit received by third party would be good consideration for a promise. 147 I.C. 443=1934 A. 271; 165 I.C. 338=38 Bom.L.R. 610=1936 B. 344. An agreement to pay debt due from a third person is good consideration in law. Where a son signs an acknowledgment in respect of money due from his deceased father to save the estate of his father from sale in execution of any decrees that may have been passed against such estate, there is consideration for the acknowledgment and for assumption of personal liability by the son. 38 P.L.R. 85. Thus brokers undertaking to pay the premium is good consideration in marine insurance contract. 27 Bom.L.R. 1310=1926 B. 82. Old debts would be good consideration for a mortgage or transfer of property. 50 I.C. 117; 12 A.L.J. 629=23 I.C. 900=36 A. 365. So also a compromise of disputed claim. 3 C. 602; 90 I.C. 766=2 O.W.N. 849; 2 O.C. 300; 1925 P. 68 (S.B.); 116 I.C. 719. As well as the abandonment of a disputed claim. 1933 L. 121=34 P.L.R. 663; 20 C.W.N. 210

(P.C.). So also promise of marriage is good consideration for settlement. 9 L.W. 132. Time-barred debts may be valid consideration. 1925 O. 267; 27 A.L.J. 1132=1929 A. 657; 1924 A. 551. As to act done in pursuance of moral obligation for joint benefit received, *see* 1934 L. 789. A subscription gratuitously promised to an institution cannot be recovered even if the promisor is the treasurer thereof. 36 A. 268=12 A.L.J. 351. *See also* 58 B. 660=36 Bom.L.R. 568; 1934 L. 789=153 I.C. 228; 14 C. 64; 49 C.L.J. 278=1929 C. 369. A gift in consideration of the donee performing certain religious services at a temple is a transfer for valuable consideration. 46 I.C. 19=20 Bom.L.R. 441; 18 Luck. 647. If the promisee does some act from which a third person is benefited which he would not have done but for the promise, the consideration is sufficient. 45 C. 774=22 C.W.N. 188. *See also* 147 I.C. 443=1934 A. 271; 36 Bom.L.R. 568=1934 B. 277; 80 I.C. 819 (Benefit to one co-promisor is enough). A compromise is an agreement to put an end to disputes and to terminate or avoid litigation. The real consideration is not the sacrifice of a right but the abandonment of a claim. 20 C.W.N. 210=32 I.A. 468 (P.C.). But *see also* 53 I.C. 497=137 P.R. 1919; 1925 P. 68 (F.B.). Whether an agreement by a landlord to accept rent at a lower rate is unenforceable for want of consideration is doubtful. 32 I.C. 185=20 C.W.N. 680. Payment and acceptance of rent at a reduced rate may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver. 20 C.W.N. 680. *See also* 146 I.C. 524=52 C.L.J. 202=1933 C. 725. Release of original debtor may be a consideration for liability of another. 31 I.C. 29=22 C.L.J. 235. Discharge of a person from liability is a sufficient consideration for a contract. 1939 M.L.R. 12 (C.). Agreement by creditor to give up a part of his claim—No consideration is necessary. *See* 1925 M. 660=48 M.L.J. 721; 89 I.C. 174=1925 N. 455. Where the members of a community, who had rendered some help to the defendant, stipulated for payment by him of a certain sum of money to the community as a whole, and he promised to do so. *Held*, that the promise was for consideration and was enforceable. 44 M.L.J. 240=72 I.C. 95=1923 M. 434. A forbearance to sue a debtor on his promise is a good consideration for the latter executing a security bond for payment of the debt. An agreement for forbearance need not be for any definite or particular time. It is enough if an implied request for forbearance be inferred. 51 I.C. 963=36 M.L.J. 618. *See also* 60 C.L.J. 477; 119 I.C. 766=1929 L. 466; 32 P.L.R. 667=1931 Lah. 756 (Some liability must exist); 26 N.L.R. 320; 23 A.L.J. 561=88 I.C. 768=47 A. 637=1925 A. 503; 22 Pat.L.T. 278=1941 P.W.N. 571=1941 Pat. 282. Any detriment suffered by defendant on the faith of the promise of the plaintiff will be sufficient consideration to make

the plaintiffs promise, enforceable. 14 I.C. 479=1918 M.W.N. 173. Mortgage by a person after attaining majority—Payment by mortgagee to creditor who has advanced money to mortgagor during his infancy—Consideration valid. 1933 A.L.J. 1299=1933 A. 659. Advance to minor is not good consideration for promise to pay after maturity. 16 L. 546=1935 L. 561 (F.B.). If a debtor pays his creditor some portion of the amount which is due, that payment cannot amount to consideration for a contract obliging the decree-holder to have the payment certified under O. 21, r.2, C.P. Code. 1933 A.L.J. 670=1933 A. 511. Consideration may consist in abstention from taking legal proceedings. 32 I.C. 416; 65 I.C. 52=1922 L. 249. *See also* 17 B. 457. The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter constitutes good consideration for a fresh agreement, although the original contract had been in the nature of a wagering transaction and the plaintiff is entitled to recover on the fresh agreement. The defendant is estopped from setting up the defence that the transaction was wagering. [(1908) 2 K.B. 620, Foll.] 1938 Lah. 781. Adjustment of decree—Agreement to accept less than amount of decree—Portion to be paid immediately and balance within time fixed—Default. *Held*, that in case of default the entire amount of the original decree could not be realised as it was not expressly stipulated that in case of non-payment the amount remitted would not be allowed. 65 C.L.J. 210. *See also* 134 I.C. 1105=32 P.L.R. 632; 1941 Pat. 282. Threat of bringing a false suit is really a form of blackmail and cannot be considered as a good consideration for a contract. 161 I.C. 347=1936 L. 6. The release of a claim by one person is a consideration for guarantee of payment by another only when that claim is given up and not when there is a mere promise. 29 I.C. 422=4 L.W. 553. *See also* 157 I.C. 811=1935 L. 527. An agreement not to appeal, the consideration for which is the mutual consent of the parties to refer the matter in dispute to the Court itself is binding on the parties. 26 I.C. 355. A consideration in law must be good and valuable. 27 M.L.J. 249=25 I.C. 726. A consideration paid to one joint promisor is legally sufficient to support a promise made by others. 38 M. 680=22 I.C. 1=26 M.L.J. 113; 26 M.L.J. 127=23 I.C. 951=38 M. 753. *See also* 1913 M.W.N. 930. An agreement in pursuance of which a member of a Hindu family declines to take share in the family property at a partition on the consideration that the others shall maintain their sister forms a good consideration for the sister to enforce her rights of maintenance against her brothers. 14 I.C. 517; 36 M. 157=12 I.C. 458=22 M.L.J. 281. As to when a third party can sue upon a contract, *see* 32 C.W.N. 634=47 C.L.J. 587; 114 I.C. 567; 1920 M. 567; 53 M. 270; 121 I.C. 337. (*See also* cases cited under sec. 1. 138 I.C. 263; 131 I.C. 575=1931 C. 401; 134 I.C. 100=1932 L. 66; 62 M.L.J. 533.) A mere Ruza

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement :

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises :

(g) An agreement not enforceable by law is said to be void :

(h) An agreement enforceable by law is a contract :

Khata unsupported by oral agreement or consideration does not form a fresh contract. 58 I.C. 30. Forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed is a good consideration. 17 I.C. 466=15 O.C. 314; 74 I.C. 316=26 O.C. 204. Creditors' forbearance to sue the debtor was sufficient consideration for promise by third party. 11 I.C. 773; 4 Bur.L.T. 156; 119 I.C. 766=1929 L. 466; 134 I.C. 819=1931 L. 756; 134 I.C. 1105=32 P.L.R. 632. So also settlement of doubtful claim is good consideration. 60 C.L.J. 477. An agreement by which a party agreed to pay a sum of Rs. 60,000 to the other party in consideration of the latter supplying funds to the former and otherwise assisting him in a certain litigation is supported by consideration and binding on the parties. 138 I.C. 900 (P.C.). Promise by agent without consideration is not enforceable either against agent or principal. 105 I.C. 214. Past co-habitation as good consideration for pro-note; see 1929 M.W.N. 828. Sale-deed executed by a Mahomedan mother-in-law in consideration of the dower of daughter-in-law is sale for good consideration. 1930 A. 434. Loan to minor, if good consideration for fresh promise to pay after majority; see 51 A. 164. An agreement to reconvey property is not without consideration, and is capable of being specifically enforced. 1931 A.L.J. 571=1931 A. 113. As to what constitutes failure of consideration, see 22 Pat.L.T. 12=1941 Pat. 333.

EVIDENCE.—Recitals as to consideration in documents is *prima facie* evidence thereof as between the parties. 27 A. 71; 23 C. 950 (P.C.); but can be rebutted by order evidence, oral or documentary. 5 M. 6; 8 A. 641; 27 I.A. 93. Evidence Act, S. 92, is not bar. (*Ibid.*)

SEC. 2 (e).—See 86 I.C. 509=1925 M. 943.

SEC. 2 (g).—Where a contract is illegal only in part, if such part is separable from the rest, the illegal portion alone is void; but, if it is not so separable, the whole is void, 9 B. 176.

SEC. 2 (g) AND (j) : RELATIVE SCOPE OF.—Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal such as a contract with an alien enemy, would be avoided by S. 2 (g) of the Contract Act and one which became illegal in the course of its performance, such as a contract with one who had been an

alien friend but later became an alien enemy would be avoided by S. 2 (j). A mere failure to sue within the time specified by the statute of limitation or an inability to sue by reason of the provisions of one of the orders under the C. P. Code would not cause a contract to become void. 43 C.W. N. 641=41 Bom.L.R. 742=1939 A.L.J. 697=1939 P.C. 110=(1939) 2 M.L.J. 253 (P.C.). To say that the contract is void from its inception is a contradiction in terms. A contract void in its inception is not a contract at all; it has not passed from the stage of an agreement to the stage of a contract, but comes within the broad and general principle that a contract void from its inception is no contract at all but an agreement not enforceable at law and therefore void. 31 S.L.R. 170=171 I.C. 1005=1937 Sind 211.

SEC. 2 (h).—A representation as to a fact may be a term of the contract and the party misrepresenting is bound to make good the representation. 31 I.C. 708=17 Bom.L.R. 783.

ORAL AND WRITTEN CONTRACT.—An offer and acceptance may be oral, and yet the terms may be embodied in a document. In such a case the contract is in writing, and not oral. Equally the offer and acceptance may be in writing and yet the terms may be oral, and then the contract is an oral one, not a written one, for it is the terms of the contract which must be embodied in a written instrument before the contract can be considered a written one, and not merely the offer and the acceptance. So also the contract may actually be contained in several documents which, when read together, constitute the entire contract, and they are then regarded as one instrument in the eye of the law, even as they form but one contract. 171 I.C. 553=1937 Nag. 289.

ORAL AGREEMENT—PROOF REQUIRED.—An oral agreement must be proved by the clearest and most satisfactory evidence of credible witnesses, and it would be unwise to act upon oral evidence unless there is contemporaneous written evidence to corroborate it. 43 P.L.R. 97. In the case of joint contractors the death of one does not put an end to the relationship, but the surviving contractor still remains a joint contractor with the heirs of the deceased. 66 C.L.J. 104=42 C.W.N. 18. As to the effect of apparent inconsistency in contract, see 43 Bom.L.R. 403=1940 P.C. 151 (P.C.). As to effect of a contract on printed form, when there is a variation between the printed portion and type-written matter, see (1941) 2 M.L.J. 281. Where the terms of a contract are partly printed and partly

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

written or typed, the position in law is that if the printed terms are inconsistent with what has been written or typed, the latter must prevail over what is printed. 45 Bom. L.R. 405=A.I.R. 1943 Bom. 229. In case of conflict between printed and written portion of a contract, the latter prevails. 19 Bom.L.R. 845; but see 30 Bom. 1. Where when an agreement is reached as to the terms of a lease and sale the parties contemplate the execution of a formal deed of lease and sale, that would not *per se* make the agreement incomplete. 1941 A.L.J. 570=1941 All. 377. Where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed. The most common instance perhaps of this merger is a contract for the sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied. There may, no doubt, be provisions of the contract which, from their nature or from the terms of the contract, survive after completion. 173 I.C. 88 (P. C.). If a document relied upon as constituting a contract contemplates the execution of a further document between the parties, it is always a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the mere formal document may be ignored. 47 Bom.L.R. 878; 1942 Pesh. 33. (The conduct of the parties in acting on the contract before the formal agreement was drawn up is clear evidence of the contract being binding.) In the case of a contract in which a draft agreement and engrossment are evidently contemplated by the parties, the contract cannot be said to be complete without the formal agreement being signed and executed, even though all the terms have been settled one by one and embodied in the draft. Once it is clear that the parties intended that the terms of their bargain are to be reduced to a formal contract, although that understanding is not in writing but is only a matter of oral agreement or of inference from the conduct of the parties, the consequence is that there must be a formal contract signed and executed by the parties before the contract can

be said to be complete. I.L.R. (1941) Bom. 361=43 Bom.L.R. 293=1941 Bom. 247. In an action on an alleged contract the burden of proof is upon the plaintiff to show that a firm contract had been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence must be looked at as a whole to see whether the parties have concluded a binding contract or not. Where only certain terms of the contract were settled and the other terms of the agreement were left open there is no concluded contract. Moreover, when a party to the contract has given the other party to the contract an *option for renewal of the contract* on terms which would be mutually agreed upon, this does not in any way imply that the terms of the prior contract, or any of them should be incorporated in the new one. In other words, the party does not bind himself in any way to renew the contract upon the old terms. 1939 Rang. 423.

**CONTRACT BY GOVERNMENT OFFICERS.**—It will be in the public interest and desirable from every point of view if the Government Officers, after an agreement is reached take the precaution of preparing a memorandum signed by both parties, setting out the terms which are reached. The practice of leaving the agreement in the form of correspondence and tenders in anticipation of a formal deed to be executed later on is irregular and has nothing to recommend it. The proper procedure should be that after an agreement is reached, a memorandum of the agreement should be contemporaneously prepared and signed by both parties as evidence of the agreement to be followed later on by a formal document drawn up by a Government conveyancer; but it cannot be said that the law requires that contemporaneously with an oral agreement a document should also be prepared and signed. It is permissible to record the agreement, arrived at orally, later on by correspondence. 1941 A.L.J. 570=1941 O.A. (Supp.) 776=1941 A.W.R. (Rev.) 891=4 F.L.J. (H.C.) 361=1941 All. 377=I.L.R. (1941) All. 741. Though the actual figure of the rent payable under a lease is not determined, if there is no uncertainty regarding the way in which it should be fixed, there being a definite fixation of rent on an agreed basis, namely, half the net proceeds, it cannot be said that the agreement of lease is bad for uncertainty and so unenforceable. A.I.R. 1944 Mad. 518=(1944) 2 M.L.J. 131.

Sec. 2 (i).—S. 2 cannot be invoked as a clause importing the doctrine of "mutuality" into the law of contract in India. 118 I.C. 220=1929 S. 83. See also 152 I.C. 947=1934 B. 277=58 B. 660. If an arbitration clause in a contract does not speak of arbi-

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

## CHAPTER I.

### OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication when complete. 4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

tration under the *Indian* Arbitration Act of 1897 but the words used are simply. "Arbitration Act," and the overriding intention of the parties as can be gathered from the contract is that in the matters specified therein their differences should be settled by arbitration, that general intention is to be given effect by taking the words "Arbitration Act" to mean "statutory provisions relating to arbitration" in a case to which the Indian Arbitration Act has no application. This construction will include arbitration under Sch. II, C. P. Code. I.L.R. (1939) 2 Cal. 181=70 C.L.J. 148=43 C.W.N. 879. See now the new Arbitration Act, 1940. As to construction of arbitration clause in a contract, see I.L.R. (1937) 1 Cal. 606; 1940 Cal. 105. As to distinction between void and voidable contracts, see 1938 Nag. 335 (F.B.).

Sec. 3.—Offer must be intended to create legal relations. 23 B. 420. Thus mere invitation to dinner is no offer. 23 B. 420. A promise to keep an offer open for a certain time is binding if supported by consideration. 2 M.L.J. 52. Acceptance must be absolute and correspond with the offer. 24 B. 510. Else it is only a counter-offer. 24 B. 510; 37 I.C. 792. (See also notes under S. 7.) Though a contract implies two parties, a contract in writing does not require the signature of both parties. 22 C.L.J. 311=20 C.W.N. 408. A bond executed and delivered by one party which is accepted by another is a contract in writing. 20 C.W.N. 408. Revocation of contract

requires concurrence of both parties. 1925 P.C. 232=23 L.W. 182 (P.C.) Evidence of completion of contract. See 16 I.C. 75 (P.C.). In the case of an ordinary member of public the contract to take shares in a company is completed when an application for shares has been submitted, and allotment on the foot of that application has been made and the notice of the allotment has been communicated to the applicant. In the case of directors, the company is under obligation to allot shares. In such cases it often happens that the company is regarded as making an offer to the directors to take shares; the director's subsequent application for shares is an acceptance of that offer and when the application is made the bargain is completed. 1929 L. 656.

Sec. 4.—An offer is made not at the place from which it is sent but at the place where it reaches the acceptor. 37 M.L.J. 712=54 I.C. 550. See also 1941 N.L.J. 37; 4 Bom. L.R. 215 (Proposal made through agent). An insurance policy was effected by means of the local agent in Madras of the insurance company; it was accepted by the company by its directors in Calcutta. The local agent at Madras was not authorised to accept proposals: he was merely a post office. Held, that the policy was effected in Calcutta and not in Madras. 38 L.W. 504=1933 M. 764=65 M.L.J. 455; 1941 N.L.J. 37. As to acceptance of insurance proposal and communication of the same, see 148 I.C. 522=1934 A.L.J. 719=1934 A. 298; 16 C. 702 (Revocation of proposal when can be made).



*Illustrations.*

(a) *A* proposes, by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete,—

as against *A*, when the letter is posted ;

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

*B* revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

Revocation of proposals and acceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

*Illustrations.*

*A* proposes, by a letter sent by post, to sell his house to *B*.

*B* accepts the proposal by a letter sent by post.

*A* may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

*B* may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

Revocation how made.

6. A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party ;

(2) by the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(4) by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

7. In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified ;

SECS. 4 AND 5.—See 30 Rom.L.R. 570=1928 B. 201.

SEC. 5.—Where there is no unqualified acceptance before revocation which does not reach the person owing to his own misrepresentation about his address, the offeror must be deemed to have validly revoked his proposal. 51 I.C. 860.

SEC. 6 (2).—Scope and effect—Offer and acceptance—Communication—Revocation. 6 Mys.L.J. 587. If a proposer revokes his offer before its acceptance, then S. 6 (1) applies; even if he does not revoke, S. 6 (2) applies unless of course the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time. Where allotment of

shares was made more than five months after the application and it was not even communicated, held that the offer to take shares must be deemed to have been revoked. 1939 N.L.J. 305=I.L.R. (1941) Nag. 567=1939 Nag. 225.

SEC. 7.—Where a letter by an intending seller making an offer for the sale of certain property directs that the purchaser will have to write about the acceptance of the offer to a certain person at a particular address, the letter is to be read in a reasonable and a sensible manner and it does not exclude the case where the intending purchaser instead of writing to the person concerned puts himself into communication with him, and where the intending pur-



(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Acceptance by performing conditions, or receiving considerations.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

chaser does so, it cannot be said that there is any contravention of S. 7, as to render the contract not binding on intending seller. 63 C.L.J. 86=1936 C. 87. See also 162 I.C. 327 (P.C.). Mortgage by deposit of title-deeds—Creditor asking debtor to send title-deeds by post—Debtor posting them accordingly—Effect—Transaction when complete—Equitable mortgage not created. 38 Bom.L.R. 1222=1937 B. 39.

SECS. 7 TO 9.—To convert a proposal into a promise the acceptance must be absolute, unqualified and without condition. 1922 P. 24. See also 120 I.C. 482=1930 L. 374; 134 I.C. 1110=1931 L. 260; 37 I.C. 792. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract. 1922 P. 24=80 I.C. 308. The acceptance of a proposal must be unqualified and proposer cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent or attach to his silence the legal result that he must be deemed to have accepted it. 54 I.C. 437=18 A.L.J. 73. See also 37 I.C. 792=5 L.W. 149; 18 A.L.J. 73; 24 B. 510. Acceptance of a proposal may be made without express communication, by conduct of the acceptor. 54 I.C. 437=18 A.L.J. 73. See also 92 P.R. 1913=22 I.C. 811; 49 A. 674=25 A.L.J. 372=1927 A. 407; 113 I.C. 780=1928 L. 938. A written offer to take goods accompanied by a sum of money representing the price is acceptance, if the purchaser credits the money received to his account. 54 I.C. 437=18 A.L.J. 73. Acceptance of an offer with a variation is no acceptance at all; it is simply a counter-proposal which should be accepted by the original promisor before a contract can be made and such an acceptance need not be in writing. 92 P.R. 1913=22 I.C. 811; 120 I.C. 482=1930 L. 374. Mere failure to reply to a counter-proposal would not *per se* amount to an acceptance thereof. 120 I.C. 482=1930 L. 374. Acceptance is not conditional, merely by an immaterial addition, or by the mere fact that some other terms are discussed in subsequent letters. 5 Bom.L.R. 9=36 B. 110. A qualified acceptance of a proposal is but a counter-proposal, omission to reply to which would not be an acceptance of it. 5 L.W. 149=37 I.C. 792=1917 M.W.N. 91. Accep-

tance "subject to confirmation by mail" is only conditional acceptance. 1930 L. 325. See also 123 I.C. 838=1930 L. 114; 120 I.C. 482=1930 L. 374; 18 A.L.J. 73; 45 B. 8=57 I.C. 971=22 Bom.L.R. 872.

SECS. 7 AND 8.—A contract is concluded as soon as all the essential terms are settled, though the formal documents have yet to be executed. 54 I.C. 550=37 M.L.J. 712; 21 M.L.J. 182. See also 148 I.C. 522=1934 A.L.J. 719=1934 A. 298 (Acceptance and communication of the same in respect of contract of insurance). An acceptance must be absolute and unconditional and must correspond with the terms of the offer, without leaving any term open to future negotiation. If it contains a material variation of the terms of the offer there is no *consensus ad idem* or agreement upon which a contract can be founded. If it introduces terms not comprised in the offer, no contract is made; the original offer must be deemed to have been refused and a counter offer made. A qualified acceptance is equivalent to a new offer which may be either accepted or rejected. But the person making the counter-proposal cannot subsequently make a binding contract by accepting the original offer. 12 Mys. L. J. 81=39 Mys. H.C.R. 263. Mistake of telegraph officials in transmitting terms of proposal will prevent the proposal from maturing into a contract. 1910 M.W.N. 513. If a contract has to be made out from the correspondence between the parties, the whole of the correspondence is to be seen in order to determine whether there was a completed contract. 54 I.C. 550=37 M.L.J. 712. When the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted. 73 I.C. 205=1923 L. 427. See also 39 M. 509=31 M.L.J. 58=34 I.C. 921 (P.C.).

SEC. 8.—Prospectus of company in case of insurance policy, railway receipts, etc., are deemed part of the contract. 25 M. 183; 21 M. 172. Acceptance may be implied from conduct. 49 A. 674=1927 A. 407.

AUCTION SALES.—In the absence of any restriction to the contrary in the conditions of sale, a person may bid as *benamidar* for another and the fact that the bidder did not disclose his character of *benamidar* does

9. In so far as the proposal or acceptance of any promise is made in words, Promises, express and implied. the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

## CHAPTER II.

### OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

What agreements are contracts.

not entitle the principal to revoke the auction sale. 29 I.C. 12=28 M.L.J. 617. When an amin holding an auction sale accepts the highest bid on behalf of his principal subject to the principal giving his assent to it, there is a valid and enforceable contract when that assent has been given. 28 M.L.J. 617.

SEC. 9.—Implied contracts are as much binding as express contracts on the parties. 16 I.C. 609; 31 I.C. 783=29 M.L.J. 749; 49 A. 674=1927 A. 407. *See also* 9 M.I.A. 256 (Contract to pay interest implied from mercantile usage). S. 9 proclaims the existence of both express or implied promises. 1939 A.M.L.J. 137. Agreement to pay compound interest may be inferred from course of business for a long period. 38 M.L.J. 387=44 B. 474=47 I.A. 17 (P.C.). Agent's claim for extra remuneration on implied contract is enforceable. 31 I.C. 783=29 M.L.J. 749.

SEC. 10: CONSTRUCTION OF CONTRACT.—Each contract must be construed with reference to its own terms, and not by reference to any other contract. 19 C.W.N. 623. Evidence of what took place after the contract is not good evidence as to construction of contract. 36 B. 387 (P.C.). As to construction of contracts, *see also* 1933 M. 322=64 M.L.J. 354=56 M. 433 (F.B.); 1931 M. 799=135 I.C. 540; 1931 L. 657=132 I.C. 489. If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract was intended as a condition or term of the bargain or whether it was a mere expression of the desire of the parties for a formal agreement. In the former case there is no concluded or enforceable contract until the condition is fulfilled, i.e., until the former agreement has been executed. In the latter case there is a binding contract and the reference to the more formal document may be ignored. 1933 P.C. 29=37 C. W.N. 265=64 M.L.J. 103 (P.C.). If a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. The document does not amount to real agreement between the

parties and the other party cannot sue on it. 63 I.A. 126=59 M. 446=40 C.W.N. 353=70 M.L.J. 232 (P.C.). Where a written contract is doubtful in its meaning the surrounding circumstances existing at the creation of the contract and the subject-matter to which it is designed and intended to apply can be looked into. The Court may also look into the conduct of the parties to obtain a true meaning of the contract. 1932 A.L.J. 329=1932 A. 600. In case of conflict between printed portion of a contract and the written portion, the written portion prevails. 19 Bom.L.R. 845. *But see* 30 B. 1. A Barrister-at-Law practising as an Advocate in the High Court is not disentitled to sue his client for recover of fees due. 55 A. 570=1933 A. 417=1933 A.L.J. 451 (F.B.) [overruling 25 A. 509]. A Subordinate Judge is a person and is capable of entering into a contract. 52 A. 844=1931 A.L.J. 41=1931 A. 189 (F.B.). But there is no provision in the C. P. Code or any other statute empowering a Judge to enter into a contract on behalf of the Secretary of State. The Courts are given statutory power to pass decrees and orders and to perform certain acts but not enter into contracts. 52 A. 844. A bare promise to pay is not a contract enforceable at law unless it is supported by consideration. Where the original debt, which is the consideration, is not proved the contract is not legally enforceable. 8 O.W.N. 1210. A deed of sale supported by ample consideration and executed by persons who have attained majority and are otherwise competent to act and dispose of their property is binding upon them, in the absence of evidence that they were wrongfully induced so to act. 44 C.W.N. 1=1939 A.L.J. 844=1939 P.C. 219 (P.C.).

ILLUSTRATIVE CASES.—A mortgage without consideration is a nullity and inoperative. 35 I.C. 455. An agreement to give time to judgment-debtor like all other agreements must be supported by consideration. 24 I.C. 391. An entry by a broker embodying the terms of the contract signed by the broker is a written intimation by the broker to each party that a contract has been effected. 19 I.C. 925=6 S.L.R. 278. *See also* 39 B. 528=29 I.C. 943=17 Bom.L.R. 566.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Who are competent to contract.

SEC. 11: CONTRACT BY MINOR.—A minor is not estopped from pleading his minority at the time of a contract and the minor is not liable on the contract. 21 C.W.N. 257 = 19 Bom.L.R. 157=43 I.A. 256 (P.C.). See also 54 I.C. 876=162 P.R. 1919; 1924 L. 294; 66 P.W.R. 1921. Minority at the time of contract must be proved beyond reasonable doubt by the party pleading the same. 89 I.C. 108=1925 O. 487. (As to duration of minority when guardian is appointed by Court, see 134 I.C. 293=1931 L. 394; Majority Act, S. 3.) A mortgage made by a minor is wholly void and the mortgagee is not entitled to enforce his security created under the mortgage. 162 P.R. 1919=54 I.C. 876. Where a partition is alleged to have taken place between a father and his minor children by an agreement, entered into between them, the partition is not valid. 1934 R. 2. A promissory note executed by a person for whom a guardian of person has been appointed by the Court before he attained eighteen years is a void contract if it was executed by him before he attained twenty-one years. 57 I.C. 678=11 L.W. 596 (30 C. 539, Ref. to). See also 134 I.C. 293 = 1931 L. 394; 152 I.C. 262=1934 M. 560=67 M.L.J. 257. (Fraudulent misrepresentation as to age makes no difference as regards the liability of the minor). Estoppel cannot overrule a plain provision of law or form the basis of a cause of action for a suit upon a contract when the contract itself is void. 57 I.C. 678=11 L.W. 596; 152 I.C. 262=67 M.L.J. 257. See also cases under heading *Estoppel, infra*. Where a person under the Court of Wards borrows money, a debt comes into existence though the person is not liable and a subsequent bond by his son for that debt is not merely ratification of a former void contract but is a fresh contract. 46 I.C. 974. A judgment-debtor to whom Sch. III, para. 11, C.P. Code, applies is a person disqualified within the meaning of S. 11 to the extent stated in the paragraph and any transaction entered with him in contravention thereof is a mere nullity incapable of subsequent ratification or of enforcement in equity. 42 I.C. 200=13 N.L.R. 130 (F.B.). See also 1941 N. L.J. 363; 171 I.C. 96=1937 O.W.N. 1034=1938 Oudh 14. Vakalatnama—Competency of minor to execute in favour of advocate to conduct criminal case—Minor—Competent. See 44 Mys.H.C.R. 119=18 Mys.L.J. 26.

MINOR BENEFICIARY.—A person competent to contract.

tent to contract may validly create a trust by purchasing property in the name of a minor. If a minor is not a contracting party himself but is the beneficiary under a sale, the transaction will be upheld. 18 I.C. 963=24 M.L.J. 352. When a contract by the minor is not a necessary condition for upholding the rights of the minor in the property, his rights should be maintained; when it is a necessary condition preliminary to the transaction or contractual obligations flow from the transaction, the transaction is void. 18 I.C. 963=24 M.L.J. 352.

MINOR COPARCENER.—Minor member of a joint Hindu family of whose person a guardian is appointed cannot contract. 57 I.C. 678=11 L.W. 596.

MINOR PARTNER.—A minor coparcener cannot sue as partner for dissolution of a partnership. 38 I.C. 111. A minor in India cannot become a partner in his own rights, as he is incapable of contracting under S. 11. (*Ibid.*)

MINOR PROMISEE.—A contract of sale negotiated by a minor who settled the terms, paid consideration and got a sale-deed executed in his name is altogether void *ab initio* and no title passes thereby to the minor. 27 I.C. 733=13 A.L.J. 185; 10 I.C. 906. See also 32 I.C. 636. The subsequent ratification of a contract entered into by a minor cannot form a valid contract on which suit can be maintained. Hence nothing could be recovered on a pronote which is in novation of a prior pronote which is entirely void, by reason of its having been executed during minority. 1941 N.L.J. 363. See also 1937 O.W.N. 1034; 196 I.C. 785=1941 O.A. 1028 (P.C.). There is a fundamental difference between a contract of sale and a completed conveyance. 27 I.C. 733=13 A.L.J. 185; 10 I.C. 906; 32 I.C. 636 (39 C. 232; 33 M. 12; 33 A. 657; 31 A. 68, Ref. to). A sale in favour of a minor is valid. 33 A. 657=11 I.C. 20=8 A.L.J. 670; 18 O.C. 115=30 I.C. 200. See also 18 I.C. 451. Where a certificated guardian sells his property to his ward there is a presumption that the guardian accepts the sale on behalf of his ward. (*Ibid.*) A mortgage bond executed by a person of full age in favour of minors as a security for a loan is not void and is enforceable at their instance. 33 I.C. 994=22 C.W.N. 130. 4 P.L.J. 682=52 I.C. 338. See also 161 I.C. 579=1936 P. 153. An infant can purchase property. 39 I.C. 44 (33 A. 657; 38 A. 62; 38 A. 154; 18 I.C. 451; 30 I.C. 200; 24 M.

L.J. 352, Ref.; 33 M. 312, Disappr.). There is nothing in the Contract Act that prevents an infant from being a promisee. When consideration passes from a minor he can enforce the contract. 40 M. 308=31 M.L.J. 575=36 I.C. 921 (F.B.). A purchase of property for the benefit of a minor by his maternal uncle is valid and if the property is alienated by the minor's father the minor can recover. 26 I.C. 195=37 M. 390; 24 I.C. 927=1 L.W. 379. *See also* 59 B. 656=37 Bom.L.R. 461=1935 B. 353. A contract creating only rights in favour of a minor and not involving any contractual obligation on his part is valid. 18 I.C. 968=24 M.L.J. 363. A promote executed in favour of a minor is valid though he does not incur liability by endorsing it. 18 I.C. 968=24 M.L.J. 363. *See also* 76 I.C. 810=1924 R. 136. A lease in a minor's favour imposing a liability on him is null and void. 3 Pat.L.J. 518=46 I.C. 670.

**MINOR PROMISOR.**—Where a minor purports to contract, his alleged contract is void and not merely voidable; he is a person who is not competent to contract. 18 A.L.J. 335=22 Bom.L.R. 531=38 M.L.J. 353 (P.C.). Fresh bond executed by minor on attaining majority in lieu of one executed during minority is void and unenforceable. 1937 O.L.R. 522=1937 O.W.N. 1034. Where a minor on attaining majority records his approval of the action of his guardian in granting a lease of his land and strikes his own bargain with the lessee by executing a new patta, that patta and the corresponding kabuliyat alone record the bargain between the parties, and govern their respective rights and liabilities, and the terms of the lease granted by the guardian cannot be treated as incorporated in that patta. 196 I.C. 785=1941 O.A. 1028 (P.C.). A minor cannot make a valid contract of sale of land. He can sue for recovery of the property on attaining majority. 33 I.C. 133; 21 A.L.J. 596=45 A. 644=1924 A. 156. A contract by a minor is void, not merely voidable. 26 I.C. 195=37 M. 390. *See also* 33 I.C. 132. Execution of bond—Consideration—Suit for cancellation of bond—Duty to restore. 69 I.C. 888=25 O.C. 237.

**MUTUALITY.**—It is not within the competence of the guardian of a minor or the manager of his estate, to bind the minor or his estate by a contract for the purchase of immovable property. If the guardian or manager of the minor's estate enters into such a contract for the minor, there is no mutuality in the contract as the minor is not bound by it and the minor cannot, on attaining majority, obtain specific performance of the contract. 39 C. 232=39 I.A. 1=21 M.L.J. 1156 (P.C.). A contract for the minor's benefit may be specifically enforced against him. 13 I.C. 673=16 C.W.N. 297.

**ESTOPPEL.**—A deed executed by a minor is a nullity and incapable of founding a plea of estoppel. 47 C.L.J. 628=1928 P.C. 152

=55 M.L.J. 88 (P.C.); 1930 M.W.N. 891=1930 M. 945; 122 I.C. 266=25 N.L.R. 85=1929 N. 156. But *see also* 122 I.C. 466=11 L. 167; 31 Bom.L.R. 340; 30 Punj.L.R. 584=1929 L. 880. Mere misrepresentation as to age, in the absence of fraud, will not operate as an estoppel against the minor. 140 I.C. 325=1933 M. 94. *See also* 58 C. 224=132 I.C. 84=1931 C. 393; 55 B. 741=33 Bom.L.R. 1313=1931 B. 561 (F.B.) (55 M.L.J. 88 (P.C.), Rel. on.); 1937 Lah. 598 (failure of minor to reveal his age, if and when fraud). When granting relief to minor on ground of minority, Court can direct refund of money received and applied for benefit of the minor. 141 I.C. 152=1933 A. 372; 45 A. 644=1924 A. 156; 69 I.C. 888=25 O.C. 237.

**RATIFICATION.**—A contract by a minor is void and cannot be ratified by him after attaining majority. 46 I.C. 765; 53 I.C. 123; 99 I.C. 318=1927 L. 24; 130 I.C. 598=33 Bom.L.R. 111=1931 B. 178; 16 L. 546=1935 L. 561 (F.B.). But *see* 1937 Sind 310=31 S.L.R. 502. Fresh bond on attaining majority ratifying previous bond given while minor is unenforceable. 49 A. 137=25 A.L.J. 132=1927 A. 242. *See also* 1937 O. W.N. 1034; 51 I.C. 410; 31 Punj.L.R. 471; 33 Bom.L.R. 111. It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole. *Held*, though the original agreement with a minor was void, if the relation was continued after the minor attained majority and the business was carried on jointly by the parties, and the minor had so acted as to bind himself by the contract, it would be grossly unjust if the minor, after quietly carrying out fresh dealings from day to day for a fairly long period and taken all the benefits, were allowed to turn round and disclaim everything he had done and refuse to render an account on the ground that when the dealings commenced at first his age was short of the age of majority by nine days. The new transactions made after minority had passed were not merely ratifying the void agreement, but fresh business conducted on terms which could be ascertained from that agreement. 45 Bom.L.R. 761=A.I.R. 1943 Bom. 362. A contract of exchange made by a minor is void and as such cannot be ratified by him after attaining majority or by his mother. 51 I.C. 410=38 P.R. 1919 (30 C. 539, Ref.). A minor has no right to enforce a fraudulent contract of his guardian. 65 I.C. 459=11 L.B.R. 83.

**REFUND OF CONSIDERATION RECEIVED BY MINOR.**—Where a minor brings a suit to set aside a sale brought about by him by misrepresenting his age to the vendee, it is open to the Court under S. 41 of the Specific Relief Act, at the time of setting aside the sale, to direct the minor to refund the

12. A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

#### *Illustrations.*

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

"Consent" defined.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

consideration to the vendee. 141 I.C. 152=1933 A. 372. As to refunding of benefit received by minor, *see also* 1924 A. 156=45 A. 644.

**BARRISTER-AT-LAW—RIGHT TO SUE FOR FEES.**—A barrister-at-law practising as an advocate in the High Court is not disentitled to sue his client for recover of fees due. (25 A. 509, *Overr.*) 55 A. 570=1933 A.L.J. 451=1933 A. 417 (F.B.).

**SEC. 12: SCOPE.**—The contract of a lunatic is void. 17 M.L.J. 78. Original presumption is in favour of sanity. 1 M.H.C. R. 214. Test of soundness of mind. 68 I.C. 372=4 Pat.L.T. 7. *See also* 27 A. 1 (P.C.). For the purposes of S. 12, the test of unsoundness of mind is whether the person is incapable of understanding the business concerned and its implications and mere weakness of mind is not sufficient. I.L.R. 1944 Nag. 698=1944 N.L.J. 212=A.I.R. 1944 Nag. 232. As to validity of mortgage in favour of a lunatic, *see* 27 O.C. 214=1925 O. 37. Unsoundness to render a contract invalid must exist at the time of contract. 104 I.C. 527=1927 C. 889. Proof of unsoundness of mind. 1927 C. 889. Unsoundness of mind and undue influence are totally different things. 1927 C. 889.

**BURDEN OF PROOF AND PRESUMPTION.**—The question whether a contract is invalidated by unsoundness of mind does not depend merely on belief or unbelief of the witnesses before the Court, but depends largely upon inferences to be drawn from the evidence. (1927 C. 889, *Foll.*) 144 I.C. 741=34 P.L.R. 297=1933 L. 458. The onus of proving insanity or unsoundness of mind is in the first place on the person who alleges it, the normal presumption being of sanity. But where there is sufficient evidence to discharge that primary burden then the burden shifts to the person who alleges his sanity to prove that the contract was made during a lucid interval. I.L.R. (1942) Nag. 236=1941 N.L.J. 287=1941 Nag. 251. Where the fact of undue influence was not seriously disputed the burden lies on him who denies

to show that no undue influence was used and the transaction was made in good faith. 1934 A.L.J. 817=1934 A. 507. As to burden of proof of lucid intervals, *see* 137 I.C. 766=1932 R. 24 (case-law reviewed). Effect of deep drunkenness leading to frequent in-sobriety and unsoundness of mind. *See* 13 O.L.J. 574=2 Luck. 226. Where mental incapacity is proved, such as senile dementia in the case of an old man, it is reasonable to presume its continuance, and the onus will be on person who wish the Court to uphold transactions entered into by the patient subsequent to the date when it was proved, to prove that the transactions were not vitiated on the ground of his incapacity. 1940 Mad. 73=50 L.W. 668=1939 M.W.N. 1023. Old age—Loss of vigour owing to old age is not sufficient to invalidate contract. 104 I.C. 527=1927 C. 889. Where a party executing a deed seeks to avoid the effect of the same by pleading insanity at the time of executing the same, it is of the utmost importance that the pleadings and evidence of parties on record are scrutinized with advertence to the law of contract as contained in S. 12. 177 I.C. 80=1938 Nag. 204.

**LUCID INTERVAL—CONTRACT MADE DURING—VALIDITY.**—When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. The Court will not recognise such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed but will treat the deed as entirely null and void. (*Walker, In re*, (1905) 1 Ch. 160, *Foll.*) 56 M. 904=1933 M. 624=65 M.L.J. 279.

**SECS. 14 TO 17.**—Fraud, undue influence and coercion are separate categories in law. Specific allegations and particulars must be given in respect of each. 39 B. 441=27 M.L.J. 34=42 I.A. 135 (P.C.).

"Free consent" defined. 14. Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

*Explanation.*—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

*Illustration.*

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

Sec. 14.—Consent, when free. Per *Pal, J.*—Consent is free when the activity of man by which it is effected works without obstacles to impede its exercise. The obstacles are named in S. 14. 78 C.L.J. 129 =1945 Cal. 218.

Sec. 15.—Every conceivable form of improper pressure falls under S. 15. 25 B. 10; 4 A. 352; 22 A. 224 (as threat of suicide); 41 M. 33. S. 15 does not control S. 72 and coercion in S. 72 is not the same as defined in S. 15. 40 C. 598=40 I.A. 56 =25 M.L.J. 104 (P.C.). Coercion—Plea of, and proof. 39 B. 149=28 I.C. 921=17 Bom.L.R. 157. A suspicion or mere probability is not sufficient to support a plea of coercion. (*Ibid.*) The essence of contract is that the parties should be free to enter into the contract or not as they please and no penalty is attached to either for a refusal to do so. A transaction (to accept assessment offered) made and signed under duress, even when the duress is legal, cannot be termed a contract. I.L.R. (1944) Nag. 180=A.I.R. 1944 Nag. 201. A mortgagee who refuses to re-convey the mortgaged properties to the mortgagor except on certain terms is not guilty of coercion. 45 I.C. 738=27 C.L.J. 78. In dealing with a case of "coercion" as invalidating a contract, the Court should decide whether the alleged act of coercion amounts to an offence under the I.P. Code. 34 I.C. 578=3 L.W. 490. A threat to commit suicide to induce a document to be executed by a person is a threat to commit an act forbidden by the Indian Penal Code and amounts to a 'coercion' and the document executed in pursuance of that threat is invalid and inoperative. Though suicide itself is not punishable its attempt is. 41 M. 33=32 M.L.J. 494 (F.B.). The

'coercion' need not proceed from a party to the contract or be immediately directed against the party whom it is intended to coerce, to enter into the contract or specifically prejudice him or his property. 3 L. W. 490=34 I.C. 578. A threat even from a third person amounts to coercion. 16 I.C. 344=15 O.C. 192. The law of duress of English Common Law is not applicable in India, as the law laid down in S. 15 is other than that contained in English Law texts. 16 I.C. 344=15 O.C. 192. In order to establish coercion, a person must prove (1) the utterance of threat, (2) of an act forbidden by law, (3) with the intention of compelling the plaintiff to make the agreement complained of. 16 I.C. 344; 1927 M.W.N. 761. Mere threat of bringing a criminal charge does not amount to coercion as defined in the Act, as it is not *per se* forbidden by Penal Code. 1927 M.W.N. 761; 13 L. 356; 140 I.C. 220=1932 L. 541. But the case is different when the threat is bringing false charge. 1927 M.W.N. 761. As to threat of bringing a false suit, see 161 I.C. 347=38 P.L.R. 727=1936 L. 6. Coercion may consist in the unlawful detaining or threatening to detain property. 55 I. C. 741=12 Bur.L.T. 195; 1927 M.W.N. 761; 13 L. 356 =1932 L. 546. According to S. 15 'coercion' among other things, includes the unlawful detention of another man's property with the intention of causing him to enter into an agreement. Where in order to recover a fine imposed on a son the property belonging both to the father and son is attached and the father, to save the property from sale, pays the amount of the fine, his payment can in no sense be said to be voluntary. This amounts to coercion and the father can sue to recover it back. 1939 All.



<sup>1</sup>[16. (1) A contract is said to be induced by "undue influence" where the "Undue influence" defined relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

## LEG. REF.

<sup>1</sup> This section was substituted by S. 2 of Act VI of 1899.

373=183 I.C. 134. Release deed executed by principal to agent under coercion is not valid. 1927 M. 852=53 M.L.J. 606. Mere need for borrowing money is no proof of coercion. 1936 A.W.R. 84. Coercion can be pleaded only where the end arrived at was achieved by the use of something in the nature of unlawful force, or the threat of unlawful force, against the person or mind of the other contracting party. 78 C.L.J. 129=1945 Cal. 218.

Sec. 16.—Section whether exhaustive. See 29 A. 303 (307); 32 B. 208 (211 and 122). See also 1938 Bom. 97.

ESSENTIALS OF UNDUE INFLUENCE.—Acts of undue influence range themselves under one or other of these heads—Coercion or fraud. Therefore a case of misrepresentation fails when its evidence falls under neither of these heads. 61 I.A. 224=9 Luck. 178=67 M.L.J. 7 (P.C.). The fact that a person accepted the terms of a compromise, as he had no other option, cannot be the test to determine whether compromise is liable to be attacked as vitiated by undue influence. 183 I.C. 855=1939 Pat. 477. S. 16 relates to transactions entered into by persons between whom there is fiduciary relationship. 165 I. C. 597=1936 O.W.N. 1106=1937 O. 56. Advice and persuasion in the case of a person who does not readily agree to do a thing would not be proof of undue influence. Persuasion, appeals to the affections or ties of kindred, to a gratitude of sentiment for past services, or pity for future destitution or the like,—these are all legitimate, and may be fairly pressed on a promisor. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid contract or transaction can be made. Importunity or threats, such as the promisor has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the promisor's judgment, discretion or wish is overborne, will constitute undue influence, though no force is either used or threatened. A party may be led but not driven; and his will must be the offspring of his own volition and not the record of someone else's. Where a party has entered into a transaction when he is surrounded and pressed by those whose interest clearly lies in his entering into it,

without any independent advice or opportunity to acquaint himself as to his rights, S. 16 of the Contract Act will apply, and a Court of Equity will protect a young man of tender age who has entered into such a transaction at the instance of those who are in a position to dominate his will. The righteousness of the transaction is one of the factors to be considered, but it is not the only one. All the circumstances connected with it must be taken as a whole. 39 Bom.L.R. 1233=1938 Bom. 97. Under S. 16 of the Act contracts are not avoided simply because they are hard or harsh. They are avoided because there is no such consent on the part of the other party as, in principle, can be regarded as a contract by him. In order to establish undue influence, two things must be shown; the person in a position to dominate the other's will and using that position to obtain an unfair advantage. Where the transaction was finished through an attorney and the borrower had also other advice. *Held*, that undue influence was not proved. 61 C.L.J. 283. See also 160 I.C. 1073=1936 P. 78. The essentials to constitute undue influence are (1) that the transaction was not a righteous transaction, that is, that it was not a thing which a right-minded person might be expected to do; (2) that it was improvident, that is to say, that it showed so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) that it was a matter requiring a legal adviser. 118 I.C. 737. Under S. 16 (1) of the Contract Act, three things must be proved before a contract can be said to be induced by undue influence, namely (1) that the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other; (2) that he used that position; and (3) that an unfair advantage over the other was obtained by the use of that position. 1937 O.L.R. 114=1937 O.W.N. 277=1937 Oudh 254; 1937 C. 492. To establish a plea of undue influence it must be shown that plaintiff (mortgagee) was in a position to dominate the will of the defendants (mortgagors) and secondly that he used that position to obtain unfair advantage. If the terms of the contract appear on the face of them to be unconscionable or are shown to be so, the second point may be presumed. 38 M.L.J. 349=43 M. 546=47 I.A. 1 (P.C.); 48 A. 666=96 I.C. 684=24 A.L.J. 822; (1937) I M.L.J. 719 (P.C.). In the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. 43 M. 546.



(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

=47 I.A. 1=38 M.L.J. 340 (P.C.). To avoid contract for undue influence the promisee must have used his dominating position to obtain an unfair advantage. 24 I.C. 67=7 Bur.L.T. 90. See also 32 B. 37; 11 O.C. 295; 10 Lah.L.J. 27.

**TRANSACTION UNCONSCIONABLE.**—Even if a transaction of mortgage be unconscionable, that fact alone is not sufficient to shift the burden of proof to the mortgagees by raising a presumption of undue influence. 145 I.C. 432=1933 L. 682. The mere fact that a party to an agreement has very strong motive for executing it raises no presumption that he has been unduly influenced. 14 L. 827=144 I.C. 497=1933 L. 835; 10 Lah. 613=1929 Lah. 295 (Assignment by Hindu reversioner).

**CONFIDENTIAL RELATIONS GIVING RISE TO UNDUPLICATE INFLUENCE.**—When a person obtains any benefit from another, whether under a contract or as a gift by exerting his influence which, in the opinion of Court, prevents the grantor from exercising an independent judgment in the matter in question, the latter can, in a Court of Equity, set aside the contract or recover the gift. The Court of Equity imposes on the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. This rule of equity is not restricted to cases where strictly or technically fiduciary relationship is established. It extends to cases where the possibility of exercising influence exists from confidence created or established by the relation between the donor and donee. The principle has been established to cases of *pardanashin ladies*. The rule must apply to all variety of relations in which the court is satisfied that the possibility of exercise of dominion and influence exists; that is the relation of active confidence justifying the raising of the presumption of undue influence. The application of the rule of presumption must, however, depend not merely upon the circumstances attending the transaction but upon the relationship itself. The relation of *paramour and mistress* may be included in such cases if the party obtaining the

benefit is in a position to dominate and influence the will of the other. When the power of influence and the influence itself are established, something more than a bare assertion of affection or a generous feeling of gratitude must be furnished to turn the scale. 40 Bom.L.R. 132=1938 Bom. 304.

(1) **PARENT AND CHILD**, 30 M. 169; see also 53 M.L.J. 842. The influence is to be inferred from the special relationship between the parties, quite apart from proof of actual fraud or unfair advantage. In English law a special relationship of confidence does exist between parent and child, notwithstanding that the child is actually of age at the time the transaction takes place. These principles are equally applicable to a case under S. 16. 1940 Rang. L. R. 35=1940 Rang. 278.

(2) **GUARDIAN AND WARD**, 6 C.W.N. 716; 36 C. 493; 5 M.L.J. 234; 53 M.L.J. 842; 1939 Rang.L.R. 35=1939 Rang. 278.

(2-a) **LANDLORD AND TENANT**. See 158 I.C. 257=1935 L. 479; 1942 A.L.J. (Supp.) 4.

(3) **SOLICITOR AND CLIENT**. 1935 L. 479; 21 B. 699.

(4) **ALSO ATTORNEY'S CLERK AND CLIENT**, 21 B. 699.

(5) **PATIENT AND DOCTOR**, 30 B. 578.

(6) **TRUSTEE AND BENEFICIARY**, see 1939 Rang. 278.

(7) **SPIRITUAL ADVISOR AND CLIENT**, 12 A. 523.

(8) **EXPECTANT HEIRS.**—In case of a sale of reversion by expectant heirs, of transfers by persons under pressure without adequate protection, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. The Court protects expectant heirs against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them. Inadequacy of price is not alone sufficient to authorise the vacating of a contract for the sale of a reversion, but inadequacy of price coupled with the inexperience and absence of any competent advice on the part of the seller

*Illustrations.*

(a) *A* having advanced money to his son, *B*, during his minority, upon *B*'s coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B*'s influence over him as his medical attendant to agree to pay *B* an unreasonable sum for his professional services. *B* employs undue influence.

(c) *A*, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money-market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]

are sufficient to set in motion the protective powers of the Court of Equity. 46 L.W. 429=1937 P.C. 14=(1937) 2 M.L.J. 87 (P.C.).

(9) HUSBAND AND WIFE do not necessarily and always stand in such relation. 33 C. 773 (P.C.). There is no presumption that a young wife is always in a position to dominate the will of her husband. 123 I.C. 369=1930 A. 169. A wife does not fall within the class of "protected" persons in respect of whom in certain relationships there is a presumption of undue influence, though in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected class to show that a particular contract was, in fact, procured by the undue influence of her husband. 1934 A.L.J. 763=40 L.W. 400=1934 P.C. 210 (P.C.). Where a mortgage of her "stridhanam" property is executed by a wife as security for the debts of her husband who is shown to be heavily involved, and the circumstances show that the wife knew nothing of the nature of the transaction and simply did as she was told by her husband (who has been managing her property always) and signed whatever document she was asked to execute, a presumption that she is acting under the influence of her husband is justified. In order to establish the presumption, it is not necessary that the parties should stand in any particular category of relationship to each other; it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred. It is not necessary to decide whether there was any actual fraud by the husband; it is enough to show that the wife was acting under the influence of her husband and not as a free agent. A third party benefitting by a transaction and having notice of the facts which raise the presumption is in no better position than the person who exercises in influence. 49 C.W.N. 55=57 L.W. 605=1944 M.W.N. 664=(1944) 2 M.L.J. 350=I.L.R. 1945 Bom. 189=47 Bom.L.R. 242 (P.C.).

(10) TRANSFER BY ELDERLY INVALID PERSON TO ONE NURSING HIM.—When people who are nursing an elderly invalid get a transfer of practically the whole of his remaining property in their favour to the complete exclusion of his heir, the transaction being

made without the knowledge of his heir, it is for them to prove the *bona fides* of the transfer. 144 I.C. 673=1933 R. 90. Where the donor was a very old man whose vision was defective and whose sole companion in life was lying dangerously ill when the deed of gift was executed, it was held that the onus was on the donee to prove that the gift was not induced by undue influence inasmuch as the donee was in a position to dominate the will of the donor within the meaning of S. 16 (2) (b). 1942 A.L.W. 666.

(10-a) PARAMOUR AND MISTRESS. See 40 Bom.L.R. 132=1938 Bom. 304.

(11) PRINCIPAL AND AGENT.—Release deed by principal to agent—Agent in possession of documents, account books and cash refusing to hand over the same to new agent till release was executed constitutes coercion and undue influence—Release deed not enforceable. 50 M. 786=1927 M. 852=53 M.L.J. 606.

(12) LANDLORD AND TENANT.—A presumption of undue influence is not warranted by the mere fact of the existence of the relationship of landlord and tenant between the parties to a transaction. Before such a presumption could arise there must be some positive evidence to show that the landlord exercised some undue influence on the tenant. 1942 O.W.N. (B.R.) 27=1942 A. L.J. (Supp.) 4.

(13) DEBTOR AND CREDITOR.—As to lending money to a profligate young man, see 90 I.C. 39=26 Punj.L.R. 506=1925 L. 430. See also 1931 M. W. N. 215; 166 I. C. 834=1937 P.C. 14. (Sale by reversionary expectant heir to his creditor); see also 1935 L. 479=158 I.C. 257. Defendants 1 and 2 were two Hindu brothers and 3rd defendant was their nephew. The latter had from his infancy been living with his uncles and under their protection. The brothers stood in a fiduciary relation to the 3rd defendant and they used their influence to obtain an undue advantage and got him to undertake on their behalf certain liabilities to their creditor, the plaintiff. The plaintiff gained a substantial advantage in that the 3rd defendant made himself jointly liable for the amounts advanced by him (plaintiff) to defendants 1 and 2. It was clear from the evidence that the plaintiff knew of the circumstances and that the 3rd

defendant had only recently come of age and it was at the instance of his uncles that the 3rd defendant entered into the transaction. *Held*, that S. 16, Contract Act, did not apply. That section deals only with the exercise of undue influence by one party to the contract to another. But according to the principles of English law, as embodied in S. 89 of the Trusts Act, once it was shown that the plaintiff was aware of the existence of a fiduciary relationship between defendants 1 and 2 and the 3rd defendant, plaintiff would be under the same disability as the party who occupied the position of confidence; and consequently the 3rd defendant could not be held liable to the plaintiff under the undertaking. 58 M. 454=69 M. L.J. 104.

(14) **HEAVY INTEREST** is not by itself sufficient to bring a contract under S. 16. 101 I.C. 759=1927 A. 538; 100 I.C. 679=1927 A. 315; 1927 A. 44; 1928 O. 330=5 O.W. N. 435; 164 I.C. 325=1936 A.L.J. 919=1936 A. 611. Nor mere need of money by borrower. 31 C.W.N. 693=1927 P.C. 84 (P.C.); 123 I.C. 175; but *see also* 102 I.C. 707=1927 L. 536; 1930 P.C. 139; 1936 A.W. R. 84. The mere fact that the rate of interest charged was high, although the security was good, is not sufficient by itself to raise a presumption of undue influence. Where there is no great pressure upon the mortgagors at the time of executing the mortgage-deed, there is no reason to infer that the mortgagees would be in a position to dominate the will of the mortgagors. [3 P. 279 (P.C.), Ref.] 130 I.C. 817=1931 N. 91; 134 I.C. 489=32 P.L.R. 378. 25 per cent. per annum compound is *prima facie* an excessive rate of interest in a mortgage transaction. Where the agreement to pay interest at such a high rate was the result of the lender being in a position to dominate the will of the borrower and it is also clear that he used that position to exact unconscionable terms for the loan, the contractual rate of interest is liable to reduction by the Court and a rate of 12 per cent. per annum simple is fair. 153 I.C. 695=1934 A. 938.

(15) **SISTERS AND BROTHERS-IN-LAW.**—The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception to the general rule. The plaintiff was married to the eldest sister and it appeared from the circumstances that she was in a position to influence her younger sisters, who had lost, not only their father but also their mother, before they executed a promissory note in favour of the husband of the eldest sister, for a certain sum in consideration of certain services rendered by him to them. At the time of the execution both of them were *sui juris*, but the youngest had attained majority only a month or two before. The plaintiff was their agent managing their estate and stood to them in a position of active confidence. The plain-

tiff after getting a draft of the note prepared by a lawyer dictated it to the second sister, making all the executants jointly and severally liable. *Held*, that the plaintiff was in a position to dominate the will of each of the sisters and whether the case came within the purview of S. 111, Evidence Act, or S. 16, Contract Act, the onus in either case was upon him to prove the good faith of the transaction, and if he failed to discharge it, the claim on the basis of the promissory note should be dismissed as against them.

*Held, further*, that the above failure did not involve the dismissal of his alternative claim to recover remuneration for services rendered by him to them. 41 C.W.N. 677=1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.).

(16) **BROTHERS.**—Where a younger brother just come of age enters into a transaction of a mortgage at the instance and for the benefit of his elder brothers who till recently were his guardians and under whose influence he was living, and the effect of the transaction is to make him and his property liable as security for a heavy debt for which he was not in law liable at all, it is not necessary for him, to sustain his plea of undue influence, to prove by direct evidence that his elder brothers exercised undue influence. The exercise of undue influence may in the circumstances be fairly presumed, in view of the relationship of the parties and the nature of the transaction. 1940 Mad. 285=1939 M.W.N. 976. *See also* 1930 O. 34.

**INDEPENDENT ADVICE GIVEN AFTER TRANSACTION—VALUE OF.**—Where it is incumbent upon a party to a transaction to prove that the other contracting party had independent advice, such advice to be of any value must have been given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances with a different position presented to the minds both of the adviser and his client. 151 I.C. 981=1934 P.C. 210 (P.C.).

**SECS. 16 AND 19.**—Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. 65 I.C. 380=8 O.L.J. 681; 56 M.L.J. 349 (P.C.).

**ILLUSTRATIVE CASES.**—Blindness by itself, unaccompanied by other circumstances, will not lead to a presumption of undue influence. 11 I.C. 775=4 Bur.L.T. 157. But *see* 147 P.L.R. 1913=20 I.C. 8; 58 I.C. 13=24 C.W.N. 769=16 N.L.R. 94 (P.C.); *see also* 66 I.C. 642=8 O.L.J. 358. Where one of the parties to an agreement is under a criminal liability for which he is being prosecuted, it cannot be said from that that there was any undue influence or coercion. 1943 A.L.W. 329.

**ILLITERACY.**—If the contents of a written contract are not fully explained to or under-

stood by a party who is an illiterate man, it is not binding on him. Reading audibly is not sufficient. 39 I.C. 177=21 C.W.N. 979. *See also* 18 C. 575; 83 I.C. 239=1925 N. 211 (Ignorant agriculturist).

**FEAR OF PUNISHMENT.**—Fear of punishment in a criminal case by itself does not constitute undue influence and the money cannot be refunded unless the circumstances disclose pressure or undue influence. 46 I.C. 424; 28 I.C. 434 (42 C. 286, Rel. on). The term "fraud" has a very wide meaning. 33 I.C. 396=18 Bom.L.R. 134.

**THREAT OF PROSECUTION.**—Undue influence may exist where a promise is extracted by a threat to prosecute certain person unless the promise is given. It is not necessary that there should be any direct threat. It may be enough if the undertaking is given owing to a desire to prevent a prosecution, and that desire is known to those to whom the undertaking is given. Undue influence usually arises in contracts made between relatives or persons in a fiduciary position. But even as between strangers between whom there exists no fiduciary relation certain forms of coercion, oppression, or compulsion may amount to undue influence invalidating a contract. Where the instrument of coercion is the doing or threatening of wilfully illegal act of any description, it retains the name of coercion in the Indian statute. But even though the instrument of coercion is not thus in itself illegal as in the case of a threat of prosecution, it may amount to undue influence and the enforcement of a contract so procured may nevertheless be held, in appropriate cases, to be contrary to public policy. 78 C.L.J. 129=1945 Cal. 218.

**HARD TERMS.**—[*See also* Notes under S. 74, *infra*.] Court's power to give relief from hard terms as to interest and compound interest when money-lender is not shown to have taken undue advantage of his position. 101 P.R. 1918=23 C.W.N. 130=48 I.C. 933 (P.C.); 29 O.C. 253=96 I.C. 413=1926 O. 408. *See also* 1925 P. 326. It is difficult for a Court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident. 23 C.W.N. 130 (P.C.). In a case of a mortgage bond the Court should not infer undue influence from the mere fact that the rate of interest stipulated for is heavy and there is a provision in the bond for capitalizing the interest in arrears. 47 I.C. 11; 10 I.C. 249; 54 I.C. 785; 54 I.C. 558. In the case of an agreement reduced to writing, a Court cannot, in the absence of fraud or undue influence, refuse to enforce its terms however unreasonable they may be. Under such circumstances, the Court has no discretion. 15 I.C. 377=1912 M.W.N. 416; *see also* 10 I.C. 249; 54 I.C. 985. [See now the Usurious Loans Act, 1918.] The fact that the borrower failed to realise what

the rate of compound interest would work out in a few years would not entitle him to relief from a Court of justice on the ground of hardship. 54 I.C. 558. There is nothing inherently wrong or oppressive in an agreement to pay compound interest. 4 L. 76=72 I.C. 765; 1923 L. 634; 56 I.C. 74; 130 P.L.R. 1912=16 I.C. 119; 55 I.A. 85=1928 P.C. 64=54 M.L.J. 427 (P.C.). Inequitable and unconscionable conditions such as one providing for oppressive rate of interest, should not be enforced against the mortgagor, or his successor in title. 128 P. L.R. 1911=11 I.C. 519. *See also* 73 P. L.R. 1914=22 I.C. 528. Where a contract provides for a high rate of interest, Courts cannot interfere to cut down the same unless there is satisfactory evidence of the exercise of undue influence. 22 I.C. 769=36 M. 533. Neither prior indebtedness nor a high rate of interest would by itself be sufficient to prove undue influence by the mortgagee on the mortgagor. 77 I.C. 383=1924 O. 118 (2). It is not a universal proposition of law that wherever there is a security for the debt a rate of interest over ten per cent. per annum is penal. 74 I.C. 346=1923 O. 139. In cases where there is no proof of undue influence a Court has no power to reduce the contract rate of interest merely on the ground that it is very high. 69 I.C. 657=1923 O. 8. [Special powers have now been conferred on Courts by the Usurious Loans Act, 1918, to give relief in cases of very excessive rates of interest, apart from fraud or undue influence.] The Court disallowed costs on the ground that the interest decreed was high. 69 I.C. 657=1923 O. 8 (1). The rate of interest, however exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentation such as are mentioned in the Contract Act. 2 P. 488=4 Pat.L.T. 707=74 I.C. 695. *See also* 2 P.L.J. 212=39 I.C. 352; 95 I.C. 1019=1926 O. 273. (See now the Usurious Loans Act, 1918.) A high rate of interest cannot always be regarded objectionable as penalty within S. 74. But when the contract provides a special condition for a change in the rate or mode of calculation of interest as a punishment for some default, that special condition is a penalty. 39 I.C. 352=2 P.L.J. 212. But 2 per cent. compound interest was held unconscionable. 1925 A. 31.

**LONG INDEBTEDNESS.**—The mere fact that one of the parties to a contract was antecedently indebted to the other is not by itself sufficient proof of undue influence. 68 I. C. 597=1922 N. 212. But *see* 11 I.C. 198 & 213 P.L.R. 1911; 48 P.L.R. 1914=22 I.C. 406; 20 I.C. 47=20 C.L.J. 424. *See also* 83 I.C. 1019=27 O.C. 374=1924 O. 423; 89 I.C. 348=1925 O. 535.

**SMALL INDEBTEDNESS OF SHORT DURATION** cannot raise any inference of undue influence. 123 I.C. 417=1930 L. 65.

**FALSE INDUCEMENT.**—*See* 1929 O. 44.

**MENTAL DISTRESS.**—It is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale. 72 I.C. 1032=1924 L. 334. As to mental distress, *see also* 22 A. 224; 28 B. 639; 10 A. 535; 11 B. 566; 13 M. 214.

**OLD AGE.**—Mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. 104 I.C. 527=1927 C. 889; nor the fact that an old man did not make provision in his settlement for his wife's maintenance. 1927 M. 255=52 M. L. J. 20. When people who are nursing an elderly invalid get a transfer of practically the whole of his remaining property in their favour to the complete exclusion of his heir, the transaction being made without the knowledge of his heir, it is for them to prove the *bona fides* of the transfer. 1933 R. 90. *See also* 1942 A.L.W. 666.

**UNCONSCIONABLE BARGAIN—BURDEN OF PROOF.**—Where an ignorant, illiterate and poor young man, on whom a right to the inheritance of his deceased relation had devolved, executes a sale-deed in favour of persons offering their help to recover the inheritance for him as volunteers and making the bargain with him which is entirely on their side, and wholly unconscionable, the conclusion is that the vendees were in a position to dominate the will of the vendor and exercised undue influence. 1 Luck. 144=95 I.C. 995; 1935 R. 174; 1935 P.C. 146=69 M.L.J. 335 (P.C.); 158 I.C. 973=18 N. L.J. 67; 1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.); 1938 Lah. 333; 1938 Nag. 470=1 L.R. (1938) Nag. 535; 1940 Mad. 285. Once this is established, sub-section (3) of this section will apply and the burden of proving that the contract was not induced by undue influence lies upon the person who was in a position to dominate the will of the other person. (*Ibid.*) 38 M.L.J. 349=43 M. 546=47 I.A. 1 (P.C.); 104 I.C. 527=1927 C. 889; 100 I.C. 679=1927 A. 315; 1927 A. 44. *See also* 11 O.C. 295. If such person does not discharge the *onus*, the sale must be set aside subject to payment of compensation to the vendee. 1 Luck. 144=13 O.L.J. 42=1927 O. 92; 35 M.L.J. 614=48 I.C. 1=21 Bom.L.R. 558 (P.C.). *See also* 65 I.C. 380=8 O.L.J. 681; 83 I.C. 239&1925 N. 211; 90 I.C. 463=29 C.W.N. 1029; 1927 A. 44. Question of undue influence depends on circumstances. 85 I.C. 169=1925 L. 196. When the contract is *prima facie* unconscionable, the party seeking to enforce it must prove that the contract was not induced by undue influence. 2 Pat.L.T. 663=41 I.C. 337; 1 Pat.L.J. 604=38 I.C. 235. The Courts have ample power under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interests in itself raises a presumption of undue influence

which it requires very little evidence to substantiate. Where there is no security, no rate of interest can be considered excessive. 42 C. 690=19 C.W.N. 809. *See also* 45 I.C. 778=8 A.L.J. 407. There can be no standard rate on personal loans. 42 C. 690. Where the parties are reasonably on terms of equality a Judge cannot do better than adopt what they themselves have agreed upon. The dicta of English Judges under the English Money Lenders Act can safely be accepted in India since the Indians lean more in favour of the debtors. 42 C. 690. Extortionate and inequitable agreement is not enforceable. 56 I.C. 272=1 L. 124. Compound interest at 24 per cent. with half-yearly rests may be enforced in the absence of undue influence. 50 M. 614=1927 M. 620=52 M.L.J. 612. The actual value of the land in dispute at the time of agreement determines if it is extortionate and inequitable. 56 I.C. 272=1 L. 124. A Court of justice is not a blind and humble instrument of the creditor to plunder the debtor. 25 I.C. 719=149 P.L.R. 1914. A creditor who got securities at a very high rate of interest (30 per cent.) from an expectant heir, who was a very inefficient clerk in a Court, is guilty of undue influence. 25 I.C. 719. Champertous bargains, not having been held in the country contrary to public policy, stand on the same footing as any other contract. 65 I.C. 129=24 O.C. 313. Apart from the Usurious Loans Act, the mere fact that a bargain is unconscionable in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference. 48 I.C. 177=5 O.L.J. 579; 22 I.C. 132=16 O.C. 267.

**URGENCY AND INADEQUACY OF CONSIDERATION.**—Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within S. 16. 29 C.L.J. 488=49 I.C. 794=23 C.W.N. 609; 29 O.C. 253=96 I.C. 413=1926 O. 408. *See also* 26 M.L.J. 315=1 L. W. 276; 1922 O. 268; 42 C. 652=21 C.L.J. 79; 18 I.C. 965=17 C.L.J. 221. The mere fact of the existence of an urgent necessity on the part of the borrower is not sufficient to raise the presumption that undue influence was exercised. Nor does the existence of urgent need accompanied by a high rate of interest establish such a presumption. In ordinary circumstances, the more pressing the necessity, the higher the rate of interest is likely to be, for the borrowers have no time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. 66 I.C. 687=8 O.L.J. 418 (34 C. 150; 8 O.C. 193, Rel.); 9 O.L.J. 439=69 I.C. 667; 48 I.C. 32=5 O.L.J. 572; 26 I.C. 26=1 O.L.J. 518; 69 I.C. 697=1 P. 263. Where the creditors are in a position to take advantage of the embarrassment of their debtors the bargain is unconscionable. 42 C. 652=21 C.L.J. 79. The mere fact that one party is in a position to

dominate the will of another is not enough to avoid a contract between them in the absence of proof that the transaction is also unconscionable. 18 I.C. 965=17 C.L.J. 221. A transaction may be unconscionable in many ways and a Court should see in each case whether according to its sense of justice it is really so. 18 I.C. 965. Excess of interest and charges may, if unexplained, of itself be evidence of a harsh and unconscionable bargain. 18 I.C. 965. Inadequate consideration may lead to inference of fraud or undue influence. 96 I.C. 468=1926 P. 539. But the inadequacy of consideration must be apparent and must not be left to be spelled out by dexterous arguments as to value. 96 I.C. 468=1926 P. 539. The mere fact that properties had to be parted with for an unduly low price owing to pressure of necessity will not indicate undue influence. 26 M.L.J. 315=23 I.C. 72=1 L.W. 276. See also 47 L.W. 714=1938 Mad. 426=(1938) 1 M.L.J. 676; 1938 Nag. 391; 1938 Nag. 470=I.L.R. 1938 Nag. 535. Where the bargain is fair and reasonable the plea of undue influence collapses. 24 I.C. 67=7 Bur.L.T. 90; 1938 Nag. 391; 1938 Nag. 400.

**PARDANASHIN WOMEN AND YOUNG PERSONS.**—Where a deed of gift by a pardanashin lady is impeached on the ground of undue influence, the questions that arise are (1) was the transaction a righteous transaction? (2) was it an improvident act? (3) was it a matter requiring advice? (4) did the intention of making the act originate with the donor? 65 I.C. 380=8 O. L.J. 681. If a family settlement or the award of a panchayat is impeached by a pardanashin lady on the ground that her consent was obtained by fraud, practised by her kinsmen, whose interest conflicted with hers and who, therefore, misled her, and the woman is shown to be illiterate and lacking in business capacity, the Court has to consider not whether she knew what she was doing, had done or proposed to do, but how her intention to act was produced. Fraud cannot be condoned unless there is full knowledge of the facts and the rights arising therefrom and the parties are at arm's length. 35 M.L.J. 362=20 C.W.N. 957=14 A.L.J. 1236 (P.C.). See also 35 I.C. 395; 23 I.C. 401=18 C.W.N. 133. A pardanashin lady, in the true sense of that term, is a lady living in seclusion, that is the *zenana*, and having no communication with any male strangers except from behind a screen. But a lady with a certain amount of education, who subscribes to newspapers, manages her affairs and even appears in Courts is not a pardanashin lady. 1930 L. 985. See also 60 C.L.J. 25=1935 C. 234. There is no reason why a rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not apply to the case of a poor woman who is equally

ignorant and illiterate and is not pardanashin, simply because she does not belong to that class. If that view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with the poor women. The object of the rule of law is to protect the weak and helpless and it should not be restricted to a particular class of the community. Consequently, even in a case of woman who is outside the regular pardanashin class, it is for those who deal with her to establish that she had the capacity of understanding that she entered into the transaction voluntarily and with full knowledge and import of what the transaction meant. 1930 C. 591=51 C.L.J. 465. The principles to be applied in testing the validity of documents executed by a pardanashin lady are not merely deductions from the law as to undue influence which finds a place in S. 16; they are founded upon the wider basis of equity and good conscience which have always been pillars of the administration of justice in India. 58 I.A. 450=11 P. 227=62 M.L.J. 60 (P.C.). The disposition made must be substantially understood and must really be the mental act, as the execution is the physical act, of the person who makes it. It is for the party setting up the deed of a pardanashin lady to satisfy the Court that it has been not only explained to, but understood by, her. If the explanation has been partial or erroneous, or has not been given at all, the question will then arise, as it arises, where there has been no independent legal advice, whether if proper information had been given, it would have affected the mind of the executant in completing the deed. And in order to ascertain whether the deed was the free and intelligent act of the executant, the Court must consider the whole history of the parties. 58 I.A. 450 (P.C.). Where the history of the parties disclosed that the respondent, in whose favour the pardanashin lady had executed a deed of mortgage, had purchased a speculative half of the lady's estate, launched, managed and financed the litigation on her behalf, supported the lady through ten years of poverty and anxiety, had the mortgages prepared and executed at his house and that the only man to whom the lady could turn for advice was in the service of the respondent, *held*, that the respondent was clearly the dominating personality, and that the burden of proof was on him to show that the lady understood the nature of the deeds executed by her. 58 I.A. 450=1931 P.C. 303=62 M.L.J. 60 (P.C.). It is for the person claiming the benefit from the disposition of property by the pardanashin lady to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act: if she is illiterate it must have been read over to her. If the terms are intricate they must have been



adequately explained, and her degree of intelligence will be a material factor, but independent legal advice is not in itself essential. 33 C.W.N. 633=1931 P.C. 100=61 M.L.J. 94 (P.C.). See also 11 P. 50=1932 F. 105. The donee, a priest, worked on the religious feelings of a lady when she was in mental distress and illness. The lady was not rich but made a substantial gift to the priest. *Held*, the transaction should be set aside. 39 C. 933=16 C.W.N. 649. When a deed is executed by a pardanashin lady or a boy of tender years, mere reading over is not sufficient. The language should be thoroughly explained especially when it is vague and ambiguous. 38 I.C. 454=3 O.L.J. 746; 10 O.L.J. 86=74 I.C. 547. See also 29 C. 749 (P.C.); 24 C. 664; 31 B. 165; 13 I.A. 215; 39 I.A. 156; 18 I.A. 545; 3 C. 324; 28 C. 546; 16 Bom.L.R. 147=36 A. 81 (P.C.); 4 Bom.L.R. 146; 7 C. 245; 5 B. 453; 11 B. 636; 33 C. 773. The principles of law applicable to a pardanashin woman will not be extended to a person said to be old and not in robust health. 74 I.C. 517=1923 O. 254. A knowledge of letters and figures and a capacity of dealing at first hand to some extent with her tenants will not convert a pardanashin lady into a woman of the world so as to rebut the presumption. The burden of proving *bona fides* lies on the party affirming it. 35 I.C. 395. See also 10 Mys.L.J. 217. A pardanashin lady sued for a declaration that a darpatri lease of a jalkar executed by her in favour of her deceased husband's cousin was invalid, and inoperative, having been executed under undue influence. It was found that the lady who lived with her father and brother understood the transaction and knew its full nature and effect, that the lessee, though a relation of her husband, was not in a position to dominate her will, that his relationship was not such as to suggest that they were not on equal terms, that she was intelligent that she had her father, brother and intelligent neighbours to advise her, that the transaction was not unconscionable or unfair and that the lessee had not taken an undue advantage of the position of the lady, and further that the plaintiff was in distress and in urgent need of money. *Held*, that the transaction was valid and that there was nothing from which undue influence could be inferred. 60 C.L.J. 25=1935 C. 234.

**PRINCIPAL AND AGENT.**—In a case where an agent is the object of the bounty of his principal if the agent can show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. 10 O.L.J. 86=74 I.C. 517. See also 1923 L. 634; 20 I.C. 812=195 P.W.R. 1913; 50 M. 786=1927 M. 852=53 M.L.J. 606.

**POSITION OF PARTIES.**—The fact that one party to a contract stands in the relation of a debtor to the other is not by itself sufficient to prove undue influence. 68 I.C. 597

=1922 N. 219; 42 A. 230=18 A.L.J. 100; 102 I.C. 707=1927 L. 536. See also 132 I.C. 452=1931 N. 63. A creditor can ask his debtor to execute documents in a particular form and where a creditor writes to his debtor's servant to get his master's signature to such a form, no inference that undue influence was used can arise. 42 A. 230=18 A.L.J. 100. A karinda who is a servant of very minor status cannot be presumed without very distinct evidence to be in a position to dominate the will of his employer. 48 I.C. 17=5 O.L.J. 579. When a Buddhist lady made a gift to her nephew who was also acting as her agent, *held*, that the relationship was not such a fiduciary one as would lead the Court to infer undue influence. 46 I.C. 738. See also 130 I.C. 119=1931 O. 34 (case of undue influence exercised by a brother over his weak-minded brother). Undue influence might proceed from a third person. 23 I.C. 401=18 C.W.N. 1133. There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law during the donor's last illness. 26 I.C. 39=8 Bur.L.T. 75; 68 I.C. 372=4 Pat. L.T. 17 (33 C. 733, Foll.). As to presumption in cases of dealing with pardanashin woman, see 39 I.A. 156; 29 C. 749; 13 I.A. 215; 31 B. 165; 36 A. 81; 18 I.A. 545; 33 C. 773; 23 A. 137.

**TRANSACTIONS IN FAVOUR OF THIRD PARTIES—WHEN CAN BE AVOIDED—CONDITIONS.**—Under S. 16 of the Contract Act, a transaction would be voidable against a third party if it is the result of undue influence and that party took the benefit either as a volunteer or with the knowledge of the exercise of undue influence by a person who was in a position to dominate, the will of the executant, as the third party's knowledge of the fiduciary relationship between the parties to a contract and the exercise of undue influence puts that party under the same liability as the other party who occupied the position of confidence. 39 Bom.L.R. 1233=1938 Bom. 97.

**PLEADINGS—WHO CAN PLEAD UNDEE INFLUENCE.**—Plea of undue influence can be raised only by executant of document or his representative in estate, but not by a third party claiming adversely to such executant. 1931 S. 78. A man of mature age and of some intelligence and activity managing his affairs previous to a transaction, cannot resort to the plea of undue influence. 42 A. 422=24 C.W.N. 529=47 I.A. 116 (P.C.). See also 26 I.C. 67=7 Bur.L.T. 90 (petition writer). A speculator who purchases the equity of redemption on the chance of getting redemption on easy terms cannot be allowed to set up the plea, as his vendor might have done, that the bargain was brought about by the exercise of undue influence. 305 P.L.R. 1913=20 I.C. 812. See also 1923 L. 634. Nor does contest by aggrieved party disentitle other



17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

defendants to any relief. 84 I.C. 124=1925 C. 94.

PROOF.—A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor. 44 I.C. 483=7 L.W. 339; 1 Luck. 144=1927 O. 92; 102 I.C. 707=1927 L. 536; 1927 A. 44. See also 112 I.C. 602; 56 M.L.J. 349 (P.C.). To establish a case of undue influence it is not sufficient to raise an atmosphere of suspicion, but there must be clear and definite evidence of the case propounded. (9 Luck. 178 (P.C.), Rel. on.) 40 P.L.R. 146=1938 Lah. 383. Undue influence is not a matter always capable of direct proof, and must depend in its very nature on the circumstances in which the transaction had its origin. 44 I.C. 483=7 L.W. 339. To establish undue influence it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction. 52 I.C. 335; 42 C.W.N. 14. See also 40 P.L.R. 146; 39 Bom.L.R. 1233=1938 Bom. 97.

BURDEN OF PROOF.—See 1930 P.C. 139=59 M.L.J. 14; 56 M.L.J. 349; 1929 P.C. 3=33 C.W.N. 205 (P.C.). As to burden of proof in case of transactions with pardanashin ladies, see 58 I.A. 450=11 P. 227=62 M.L.J. 60=1931 P.C. 303 (P.C.); 58 I.A. 148=54 M. 440=61 M.L.J. 91=1931 P.C. 109. A document executed under undue influence is not void but only voidable and the onus is in the first instance on the person who raises that plea. Before the onus can shift on the other party to prove that the contract was not induced by undue influence, the person raising the plea of undue influence has to prove not only that the other party was in a position to dominate his will, but that the transaction appeared on the face of it or on the evidence adduced unconscionable. 1931 S. 78. See also 36 C.W.N. 994=1932 P.C. 202=63 M.L.J. 54 (P.C.); 171 I.C. 605=1937 O.W.N. 1123. Where any person deals with one who has just attained majority and is inexperienced, the burden of proving that the contract is made in good faith and for adequate consideration lies on the person who takes the benefit of the contract. (20 B. 367; 43 M. 739, Ref.) 132 I.C. 452=1931 N. 63. See also 1931 M.W.N. 215; 1937 Cal. 492. It is not every fiduciary relationship which can be deemed sufficient to lead to the inference that the person standing in such relation to another is in a position to dominate his will. Where a manager to a Nawab in very embarrassing circumstances and who is faced with a costly and expensive litigation before him, looks not only after the litigation but also finds the money for it as well as for the house-

hold expenses of the Nawab, it would not be improper to infer that the manager was a person standing in a fiduciary relationship to the Nawab and in a position to dominate his will. Where a perpetual and heritable lease of nearly a fourth share of the Nawab's taluka is granted in favour of such a manager and the terms of it are such as to place the lessee in the position of an owner of the share leased and there is no satisfactory proof of the passing of the consideration as recited in the lease deed, the transaction would amount to an unconscionable one within the meaning of S. 16. It would be for the party claiming under the transaction to prove absence of undue influence in the matter of the execution of the lease and if he fails to prove that, the transaction becomes a voidable one under S. 19. 1946 O.A. (C.C.) 12=1946 A.W.R. (C.C.) 12=1946 O.W.N. 1.

LACHES AND LIMITATION.—In the case of gift deed executed under undue influence, the fact that the party seeking to avoid it has been guilty of delay and laches will not be a bar to the grant of the equitable relief of avoidance of the deed. The plea of laches and delay cannot apply to the case of a gift as opposed to a contract. In any case the delay can only begin from the time when the plaintiff discovers the true nature of the deed. He has a period of three years in such a case under Art. 91 of the Limitation Act. So long therefore as the suit is not beyond three years, relief should not be denied to him on the ground of delay and laches. 39 Bom.L.R. 1233=1938 Bom. 97.

SEC. 17.—To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them. 45 A. 624=21 A.L.J. 571=1924 A. 17. Mere silence is not fraud unless there is a duty to speak or unless it is equivalent to speech. 60 C. 262=1933 C. 366. See also 133 I.C. 372=1931 M. 603; 53 A. 374=1931 A.L.J. 153=1931 A. 154. The principle applies even in cases of transactions with pardanashin ladies. 60 C.L.J. 25=1935 C. 234. Equal means of knowledge is immaterial where there is an express representation or anything calculated to deceive or to lull suspicion upon a particular point. 133 I.C. 372=1931 M. 603 (2). It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and tangible proof. It is by its very nature secret in its movements. It is therefore sufficient if the evidence given is such as may lead to the inference that fraud must have been committed. In the generality of cases circum-

- (1) the suggestion as a fact, of that which is not true by one who does not believe it to be true ;
- (2) the active concealment of a fact by one having knowledge or belief of the fact ;
- (3) a promise made without any intention of performing it ;
- (4) any other act fitted to deceive ;
- (5) any such act or omission as the law specially declares to be fraudulent.

*Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

*Illustrations.*

- (a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.
- (b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.
- (c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech.
- (d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

stantial evidence is the only resource in dealing with questions of fraud. If this is not done the ends of justice would be constantly, if not invariably, defeated. 132 I.C. 51=1931 O. 333. The principal difference between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a mis-statement of fact which misleads the promisor. 53 A. 374=1931 A. L.J. 153=1931 A. 154. See also 3 B. 242. If a contract is obtained by fraud or cheating, it is voidable at the instance of the person defrauded or cheated. But where a performance has been obtained by fraud or cheating, the contract cannot be avoided. 23 Bom.L.R. 1144=46 B. 489. In order to avoid a contract fraud must be in the making of the contract and not in its performance. 15 Bom.L.R. 92=37 B. 158; and the fraud must be committed by a party to the contract or his agent or with his connivance 28 B. 639. A party cannot set up his own fraud to avoid the contract. 15 W.R. 273; 31 B. 405. Mere failure of a minor entering into a contract to reveal his age would not amount to fraud, see 168 I.C. 730=1937 Lah. 598=39 P.L.R. 508. A plea of fraud is not sustainable where there is no misleading on any question of fact or law. 20 I.C. 47=20 C.L.J. 424; 31 P.R. 1918=45 I. C. 101. Fraud in contract of service—Concealment of contract forbidding service elsewhere. 66 I.C. 441. Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently if he seeks to take advantage of that error, and cannot be allowed to enforce it. Where, therefore, the plaintiff agreed to accept service under the defendant company on a monthly salary of Rs. 500 and the agreement was drawn up for a salary of Rs. 600 owing to a mistake on the part of the latter and did not express

the intention of the parties and the plaintiff, fully realising the mistake, deliberately sought to take advantage of it, his conduct was fraudulent and the Court would not enforce the contract as drawn up. 61 C. 548=38 C.W.N. 908=1934 C. 778. In a proposal for insurance the utmost degree of good faith is required. Where the insured in reply to the questions of the insurance company during the course of inquiry into his proposal withholds facts and deliberately gives false replies, such withholding of material information is wilful and in the nature of fraud and the company is entitled to avoid the contract. I.L.R. (1939) Kar. 611=184 I.C. 575=1939 Sind 254. Where a person orders and obtains possession of goods with the deliberate intention of not paying for them, he commits fraud. He must then be considered to be the agent of the vendor and his possession as that of the vendor. If vendee tries to dispose of the goods before payment by transfer of the invoices to a third party's name, the third party gets no title to the goods. 14 P.L. R. 1917=39 I.C. 169. Seller selling property already sold by him to a third person is liable for fraud, and the buyer can recover back the price, in spite of agreement that seller could not be responsible for defect of title. 25 A.L.J. 708=1927 A. 693. Such conduct on the part of seller would amount to active concealment of a material fact 1927 A. 693. Mere failure to fulfil a promise is not fraud unless from the outset the promisee did not intend to fulfil it. 42 I.C. 113 (L.B.). The making of promises without the intention of keeping them is fraud under the section, though under the English rule such a thing is not fraud. 33 I.C. 396=18 Bom.L.R. 134. A plaintiff who relies upon fraud must both plead and prove it, and must give the particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. 10 I.C. 922=4 Bur.L.T. 18.

"Misrepresentation," defined.

18. "Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

19. When consent to an agreement is caused by coercion, \* \* \*

Voidability of agreements without free consent.

fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

#### LEG. REF.

<sup>1</sup> The words "undue influence" were repealed by S. 3 of Act VI of 1899.

That a party misreads a document (the acceptance memo.) and believed it to be something different from what it was, would not vitiate the contract. 1923 S. 25. If a man who cannot read has a written contract read over to him and the contract written differs from that pretended to be read, the signature of the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document, as his mind did not accompany the signature. 56 B. 180=34 Bom.L.R. 26=1932 B. 151. A Court should not declare a decree a nullity on the ground of fraud unless it can define in clear terms the fraudulent acts by which the decree was obtained. But it will not take fraud in the narrow sense of S. 17. 25 I.C. 789=8 S.L.R. 3. On this section see also 1925 C. 555=79 I.C. 330.

SECS. 17 AND 19.—Building contract—Decision of owner's agent regarding rates and measurements to be final—Latter passing bill for payment—Mortgage executed by owner for balance due on bill—When can be avoided. 1940 Lah. 505. As to building contracts, see also 1940 N.L.J. 486; 71 C.L.J. 309=1940 Cal. 494.

Sec. 18.—As to what amounts to misrepresentation, see 4 C.W.N. 369; 29 Bom.L.R. 1535; 27 A.L.J. 1122=1929 A. 837; 30 N.L.R. 196=1934 N. 29. Fraud and misrepresentation distinguished. See 3 B. 242; 53 A. 374=1931 A. 154. Misrepresentation as to part may make the whole contract voidable. 17 C. 296 (P.C.). Silence will in equity, in some cases, be equivalent to misrepresentation. 24 I.C. 193=42 C. 28. Failure to make such inquiries as an ordinary prudent man would make may, under certain circumstances, be evidence that the person to whom misrepresentation was made was not actually deceived. 16 S.L.R. 112=1923 Sind 5 (F.B.).

Sec. 18 (2).—There is no misrepresentation, if there are means of discovering truth with ordinary diligence. 112 P.L.R. 1916=36 I.C. 34; 46 I.C. 21=42 P.R. 1918; 38 I.C. 500; 140 I.C. 209. As to misrepresentation by agent, see 6 B. 309; 14 B. 241.

Document signed by blind man—Contents of documents misrepresented—Rights of *bona fide* purchaser for value. See 1925 P. 140=80 I.C. 67.

SEC. 18 (3).—When the area (or any other similar particular) is set down as part of the description of the property sold, it must have been regarded as material by the parties. Where it is found to be inaccurate, the Court gives effect to the rule of proportionate compensation. Where the terms of the contract are self-contradictory, the contract will not be enforced. But if it appears that one of the two contradictory parts is true and the other part is false and the part that is true describes the subject of sale with sufficient legal certainty, the true part is adopted and the false rejected. Where the plaintiff sold to the defendant a parcel of land specifically described with reference to its boundaries and survey number, its measurement being also stated as three acres and four gunthas, and subsequently it was found that the land conveyed in fact measures four acres and four gunthas, in a suit by plaintiff to get back the excess of the land, *held*, that the parties intended to convey, and take a conveyance of, the actual plot of land, that the measurement was not the governing portion of the description and the plaintiff was not entitled to relief. 137 I.C. 583=34 Bom.L.R. 212=1932 B. 449.

SEC. 19.—Under S. 19 the right is given to a party, who has entered into a contract under fraud or misrepresentation, to avoid the contract or to insist on the contract being performed. S. 19 does not entitle a party to insist on an entirely different contract being performed. 25 N.L.R. 187=1929 N. 254 (F.B.). Where a party to a contract treats it as avoidable at his option and exercises his option, he cannot go back afterwards and seek to enforce the contract. When he not only states clearly that he treats the document incorporating the agreement in question as void but also proceeds on that footing to make his demands on the other party, though the latter does not admit that the former could do so, and the former party does not at any time give up the attitude taken by him, he cannot afterwards be permitted to enforce the agreement as a

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

*Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

*Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

*Illustrations.*

(a) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

subsisting contract. I.L.R. (1943) Kar. 49 =A.I.R. 1943 Sind 197. The right to avoid a transfer or a conveyance executed under undue influence or fraud is not a mere personal right but can be exercised by the heirs or legal representatives of the person unduly influenced or defrauded unless the person has indicated his election to stand by the transaction. 43 B. 173=20 Bom.L.R. 911. Though 'undue influence' and 'fraud' are separately dealt with in the Contract Act 'undue influence' is a kind of 'fraud' in equity and invites the same relief as fraud. 33 I.C. 576=18 Bom.L.R. 27. "Fraud" and "misrepresentation" distinction between. See 1931 A. 154=53 A. 374; 3 B. 242. Silence when amounts to fraud—Burden of proving that silence amounts to fraud under particular circumstances. See 53 A. 374; 60 C. 262=1933 C. 366; 60 C.L.J. 25. In the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence. The words "fraudulent within the meaning of S. 17" as used in S. 19 (Exception) apply exclusively to "silence" and not to misrepresentation. Where a mortgage suit had abated and the mortgagee took a fresh mortgage in consideration of the barred debt without disclosing that the suit had abated, held, that the non-disclosure did not amount to fraud. 53 A. 374=1931 A.L.J. 153=1931 A. 154. See also Notes under S. 17, *supra*. The exception to S. 19 does not apply to a contract which contains within itself a defeasance clause. If the conditions demanded by that clause have been fulfilled, the contract can be avoided unless the right to avoid has been waived. I.L.R. (1942) 1 Cal. 100=46 C.W.N. 759=A.I.R. 1942 Cal. 412. A misrepresentation should in fact materially induce the contract in order to give a right of avoidance. 55 I.C. 817=31 C. L.J. 158; 29 Bom.L.R. 1535. See also

I.L.R. (1939) 1 Cal. 389=43 C.W.N. 347 =1939 Cal. 473. The Legislature in inserting the Exception to S. 19 of the Act did not intend to depart from the English law, under which it is accepted that where a vendor has deliberately made a false statement with the object of concealing the true position with regard to the property, the vendee is not put upon inquiry. Where a vendor sells property which he has previously leased out to a third party, and not only fails to disclose the lease but also makes a false and fraudulent representation that the vendee can take immediate possession, he cannot, in a suit by the vendee to set aside the conveyance, plead the Exception to S. 19, and contend that since the lease was a registered lease, the vendee could with ordinary diligence discover the lease by a search in the registration office. 51 L.W. 249=1940 Mad. 560=(1940) 1 M.L.J. 314. If a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. 34 I.C. 956=23 C.L.J. 122. See also 43 B. 173; 36 B. 37; 28 B. 639. The section does not apply where the object of the agreement was illegal to the knowledge of both parties at the time it was made and both parties are *in pari delicto*. 9 I.C. 161=13 C.W.N. 408. A person is not liable on an acknowledgment, where the money has been paid and his signature to the acknowledgment had been obtained by intimidation. 59 I.C. 751=24 P.W.R. 1921. *Misrepresentation inducing consent to marry* cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. Such consent cannot be given by a child of nine years of age and consequently a person who, though 54 years old, is found by the Court to be very feeble-minded and to have the mentality of a child of nine years of age is incapable of giving his consent. 1933 A. 122=55 A. 185. A contract voidable on the

(c) *A* fraudulently informs *B* that *A*'s estate is free from incumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*. *B* dies; *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

<sup>1</sup>[19-A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

#### Illustrations.

(a) *A*'s son has forged *B*'s name to a promissory note. *B*, under threat of prosecuting *A*'s son obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond, the Court may set the bond aside.

(b) *A*, a money-lender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just.]

#### LEG. REF.

<sup>1</sup> S. 19-A was inserted by S. 3 of Act VI of 1899.

ground of fraud or misrepresentation can be ratified by the person at whose option it is voidable. 46 I.C. 21=42 P.R. 1918; 38 I.C. 500=43 P.W.R. 1917; 28 B. 639. See also 1938 Rang. 264. As to what is ordinary diligence, see 4 C. 801. As to effect of laches on right of avoidance of contract, see 4 C.W.N. 369.

SECS. 19 AND 19-A: RIGHT OF SUIT.—A right to have a contract set aside on the ground of fraud or undue influence does not cease on the death of the contracting party who was deceived, but passes on to his representatives. 51 B. 133=29 Bom.L. R. 115=1927 B. 384.

RELIEF OPEN TO AGGRIEVED PARTY.—Under S. 19 the party whose consent is obtained by fraud or misrepresentation may insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true. But it must be proved that the consent of the party who claims to avoid the contract is caused by fraud or misrepresentation and that he is actually deceived. Further, even if the party is so deceived it should be shown that he did not have the means of discovering the truth with ordinary diligence. Where the consent to an agreement is caused by misrepresentation the promisee can either avoid the contract or ask for specific performance but he cannot sue for damages. 140 I.C. 209=1932 N. 148.

SECS. 19 AND 20.—Decree for possession with costs—Offer by judgment-debtor not to file appeal if plaintiff gave up costs—Appeal time barred at time of offer—Agreement is void or voidable. 1939 Lah. 511=I.L.R. (1940) Lah. 392=42 P.L.R. 769.

G.C.M.—215

SECS. 19 AND 23.—The Court is not prevented from enforcing a contract *inter partes*, which is in itself in no way illegal or fraudulent *qua* those parties merely because a third person may have a right to refuse to give effect to that contract. 18 I.C. 5=58 P.R. 1913. Dishonest concealment of identity of contracting party—Agent secretly procuring a running contract with his principal—Contract voidable. 43 M.L.J. 444=69 I.C. 927=45 M. 1005.

ILLUSTRATION (b) is not exhaustive of the class of cases which could come under the explanation. 13 L.W. 525=62 I.C. 764=1921 M.W.N. 340. A finding on the question whether a misrepresentation induced the consent of the party who relied on it is one of fact and the High Court will not interfere with it in second appeal, though the finding may not be quite satisfactory. 62 I.C. 764. Where one of the parties to a contract says: "I am well known to the National Bank in your city". It is not a statement of fact but only his own opinion, as to the state of his credit though it may be false. Such a statement is not one of fact and even if false does not avoid the contract under S. 19. 29 I.C. 575.

RESCINDED CONTRACT.—A rescinded contract becomes a void contract and the person who has received any advantage under it, is bound to restore it to the other party. 27 I.C. 130.

Sec. 19-A.—Under S. 19-A of the Contract Act when consent to an agreement is caused by undue influence the contract is voidable at the option of the party whose consent was so caused. When the party so consenting has no opportunity to cancel the contract after removal of the undue influence, it is open to his representatives after his death to raise the defence of undue influence in an action to enforce the contract.

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

*Explanation.*—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

*Illustrations.*

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Absence of consideration, though it itself cannot affect the title of the promisee, goes to show that the contract was the result of undue influence. 59 C.L.J. 387=1934 C. 762. Where a person is induced to execute a deed under the belief that he is signing some other instrument of a different nature, the transaction is void and not only voidable. 44 P.L.R. J. & K. 23. A contract induced by undue influence is voidable under S. 19-A of the Contract Act not only at the option of the party induced by such undue influence but also by his representatives, unless the party, at the date of his death, has lost such right by acquiescence or otherwise. Further, such representatives may set up undue influence by way of defence to an action based on the contract by the other party. 1936 A.L.J. 1215=1936 A. 672. When a contract is procured by undue influence it is only a voidable one and consequently this only gives the person under undue influence a right of choice or election. Such a right, once exercised, is exhausted. So, if by notice expressly given or implied by conduct, the promisor deems to affirm, he can never afterwards claim to avoid; similarly if he has once elected to affirm, he can never afterwards be allowed to affirm in his own interests. There is no *locus penitentiae* in either case. 46 C.W.N. 947=1943 Cal. 162. Undue influence must be pleaded with precision and unless a case is made out in the pleadings, the Court will not investigate it. 2 Pat.L.T. 111=5 Pat. L.J. 744=60 I.C. 282. Power of Court to grant relief on certain terms. See 31 B. 348; see also 84 I.C. 124=1925 C. 94; 47 A. 932=88 I.C. 1013=1925 A. 783.

Sec. 20: SCOPE.—1933 R. 79. Reason of the rule. 28 B. 420. Application of principle of *caveat emptor*. 40 B. 638=34 I.C. 515=18 Bom.L.R. 201. Relief can be granted if there is mistake as to existing facts, not on account of mistaken expectations, which are not realized. 40 B. 638. See also 5 I.A. 61; 4 B. 473; 3 B. 154. If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is void. 16 Pat. 159=18 Pat.L.T. 95=1937

Pat. 65 (S.B.). Mistakes as to collateral circumstances do not avoid a contract. 30 M. 284; 35 C. 955=33 C. 713; nor mistake as to immaterial terms. 100 I.C. 730=1927 O. 198. Ignorance of particular rights, however inexcusable, is on the same footing as ignorance of the general law. Where money is paid voluntarily with full knowledge of all the facts, it cannot be recovered on the ground that the money was paid under a mistake of law. 39 C.W.N. 174. See also 16 P. 424=1937 O. 254. Where a lease of land is given for the purpose of manufacturing bricks and cultivation and the land is found unfit for manufacturing bricks of good quality, the lease is not void under S. 20 as the tenancy was to be both for manufacture of bricks and cultivation. 1930 L. 772. S. 20 deals with the question of common mistake; the general principle of frustration may govern such cases. 70 I.C. 379=26 C.W.N. 573; 50 C. 615=27 C.W.N. 659; 40 B. 638=18 Bom.L.R. 201. See also 3 R. 477. In order to entitle a party to relief under this section, it must be proved that the mistake was common to both parties, and one of fact, and that the common mistake was with respect to a fact essential to the agreement in question. 33 C.W.N. 626=1929 C. 547. See also 61 C. 548=1934 C. 738. Unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification and would, therefore, if proved, not entitle the party alleging it to a decree or order for rectification or cancellation of the instrument. 1931 M. 785=61 M.L.J. 437. Even mutual mistake was not relieved against at common law save where the contract had not attached but equity relieved against mutual mistake, subject to equitable defences. 1931 M. 785=61 M.L.J. 437. Terms understood by parties in different sense—Contract is void. 95 I.C. 614=1926 N. 435. Compromise under mistake of fact—Setting aside. See 51 I.C. 955=29 C.L.J. 526; 4 C. 687. Compromise under mutual mistake as to terms which are not material will not be set aside. 100 I.C. 730=1927 O. 198. See also 1939 Lah. 511. Settlement of doubtful rights, whether of law or fact, even under a mistake of fact



21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India, has the same effect as a mistake of fact.

<sup>1</sup>[After the establishment of the Federation of India this section applies in relation to Central Acts made for a Federated State as it applies to laws in force in British India.]

*Illustration.*

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

\* \* \* \* \*

LEG. REF.

<sup>1</sup>This paragraph was inserted by A.O., 1937.

<sup>2</sup>The second *Illustration* to S. 21 was repealed by S. 3 and Sch. II of Act XXIV of 1917.

will be upheld. 11 O.W.N. 1176=1934 O. 442; 60 C.L.J. 477. As to case of decree obtained by mistake of parties, see 1937 A. L.J. 1095=1937 All. 731.

**ARBITRATION.**—A contract appointing arbitrators is a contract *uberrima fide* and unless there is complete confidence between the tribunal and the parties, it would be wrong to bind a party to his contract, when there is a probability that injustice would result from doing so. Where therefore both arbitrators have already adopted strong views in the case and this was unknown to the party who was made to join in the reference the effect and nature of which was also not explained to him, it would be manifestly unjust to bind a party to reference by his contract to appear before a tribunal from which he is scarcely likely to receive impartial justice. 1933 S. 347. See also 41 L.W. 130=1935 M. 356.

**ONEROUS LIABILITY SUBSEQUENTLY CAST BY STATUTE.**—Vendors who had agreed to supply a certain number of tins of matches at a particular rate refused to give delivery to vendee under the contract unless in addition to the contract price the vendee paid the sum equal to the proposed excise duty imposed on such goods by the Tariff Act which was published in the Gazette and which had come into force subsequently: *Held*, that the vendors were not entitled to refuse delivery as no excise duty had been imposed when they refused to give delivery and that S. 20, Contract Act, had no application to the case. 11 R. 201=1933 R. 79. Mistake as ground for setting aside consent decree, see 10 P.L.T. 164. Mutual mistake—Effect of. 25 C.L.J. 459=21 C.W.N. 404. A mistaken assumption which has reference to the motive which induced the execution of a document is not a mistake as to rights which would justify a Court in passing a decree for its cancellation. 32 M.L.J. 439=40 I.C. 205. Where both parties to a reference to arbitration are under a mistake of

fact as to something which is not essential to the agreement, the agreement of reference is not void and cannot be set aside. 47 I.C. 783=12 S.L.R. 41. But see 57 I.C. 481=7 O.L.J. 312. Pleadings. 9 B. 351. As to restitution of benefit where both parties acted honestly and there was a *bona fide* mutual mistake of fact, see 1930 A.L.J. 65=1929 A. 803. On this section, see also 1930 R. 12.

**BURDEN OF PROOF.**—Is on the party alleging mistake. 61 C. 548=152 I.C. 117=1934 C. 778.

**MISTAKE OF LAW.**—A mistake as to the law in force does not make a contract voidable. A man cannot go back upon what he has deliberately done merely because he alleges that he acted under a misapprehension of the law. A subsequent mortgagee took a mortgage in his favour knowing of a previous but unregistered mortgage in favour of another mortgagee. This transaction was done under the impression that even if the prior mortgagee was also to obtain registration of his deed, yet the deed in favour of the subsequent mortgagee would take precedence as it was first registered. *Held*, that S. 21 applied to the case, and that the subsequent mortgage must be postponed till the period fixed in the prior mortgage has expired or the mortgage otherwise came to an end. 1933 Lah. 836.

**SS. 20 AND 21—SCOPE—MONEY PAID UNDER MISTAKE—LAW AS TO—ENGLISH LAW—APPLICATION OF.**—The Indian Contract Act, though it deals with the effect of mistakes of fact and law upon a contract, has no express provision relating to the effect of payment made under such mistakes. The law relating to such matters is the same in India as in England. Money paid under a mistake of law cannot be recovered in an action for money had and received and neither can moneys so paid be set off against money due from the person who made the payments unless there is a special equity. 22 Pat. 220=A.I.B. 1943 Pat. 327=210 I.C. 426.

**SEC. 21.—Applicability of section—Payment of surcharge to railway—Pure error of law—Suit to recover money paid—Maintainability.** 1928 M.W.N. 585, Where a consumer of electricity pays the bill to the



Contract caused by mistake of one party as to matter of fact

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

What considerations and objects are lawful, and what not

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law ; or  
is of such a nature that, if permitted, it would defeat the provisions of any law ; or

is fraudulent ; or  
involves or implies injury to the person or property of another ; or  
the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Electricity Supply Co., under a mistake that the company had made rules after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in British India. This is a mistake of fact and is covered by S. 72. Besides this, if the payment is made under protest after being warned that supply would be disconnected if the payment is not made, this is sufficient to constitute coercion in the general sense of the word and the consumer would be entitled to refund under S. 72. 181 I.C. 345=1939 Pesh. 8.

SEC. 22.—A contract entered into under a mistake of fact is only voidable and is binding until it is avoided. 10 I.C. 343; 58 I.C. 591=14 S.L.R. 22; 21 Bom.L.R. 986=44 B. 631. *See also* 16 B. 561; 3 R. 477. Mistake due to negligence of a party, if good ground for re-opening decree passed. *See* 33 C.W.N. 739=1929 C. 670. Contract cannot be avoided on the ground of its becoming more onerous than was originally supposed. *See* 86 I.C. 364=1925 Sind 80.

BURDEN OF PROOF.—When a written contract has been signed by the parties, the party alleging that it has been erroneously recorded and that he signed it under a mistake; must establish that fact beyond all doubt. 61 C. 548=38 C.W.N. 908=1934 C. 778.

REFUND OF MONEY PAID.—Where a contract is a result of a mistake on either side, there is no contract at all between the parties and the party who has advanced money thereunder is entitled to get refund of same. 41 L.W. 476=1935 M. 287.

SEC. 23. MEANING OF WORDS.—The words "consideration" and "object" of an agreement do not mean the same thing. 33 C. 702. Burden of proof. *See* 107 I.C. 903.

UNLAWFUL OBJECT.—A promissory note executed by a minor under the Court of Wards though void, is no unlawful consideration for a bond executed by his son after his death and after the estate had ceased to be under the Court of Wards. 21 A.L.J. 446; 75 I.C. 428=1923 A. 590. An agree-

ment by a Parsi husband with his wife that they should live separately is lawful and a reference to arbitration on the question as to the amount of maintenance to be paid to the wife is quite legal. 45 C. 318=22 Bom.L.R. 1293 (23 B. 279, Foll.). Agreement between expectant heirs to divide property after the succession opened is legal and enforceable. 14 Pat.L.T. 27=1933 P. 165. Debt contracted by the father for trading purposes—Liability of sons. 17 Bom.L.R. 955=40 C. 126. Suit to recover money on a hundi drawn to cover betting losses. 27 C.W.N. 442=1923 C. 445. Where a pleader is appointed by Court in a suit as Commissioner the work done by the Commissioner is no work done for the party but for the Court. 27 C.W.N. 430=1923 C. 436. Consequently where a Commissioner who had been appointed at the instance of a party to a suit took a bond from that party for a certain sum of money and subsequently sued upon it, *held*, that the consideration for the bond was illegal and that it represented an improper advantage obtained by an officer of Court by abuse of his position as such. Consequently the bond was unenforceable. 27 C.W.N. 430. Alienation of service inam lands unlawful. 45 M. 620=42 M.L.J. 477=1922 M. 197 (F.B.). Where a mortgage of a tenancy holding is unlawful, the consideration paid at the time of its execution must be held to be also unlawful. Where, therefore, at the time of redeeming that mortgage, the mortgagor, instead of paying the mortgage-money in cash, executes a simple money bond for that amount there is no valid consideration either for that bond or for the bond executed by him in renewal of it. Accordingly, a suit to recover the amount due on the bond is not maintainable. 12 Luck. 679=1937 Oudh 150. S. 23, covers cases in which the consideration or object of an agreement is forbidden by law, at the time when the agreement is entered into or is of such a nature that, if permitted it would defeat the provisions of any existing statute. The section

*Illustrations.*

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house. and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B*, 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child and *B* promises to pay *A*, 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A*, on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter and would so defeat the object of the law.

(j) *A*, who is *B*'s mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(k) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

could not possibly be interpreted to render void an agreement which was perfectly lawful when it was entered into. A pronote in respect of arrears of rent the recovery of which was later on prohibited by U.P. Act XVIII of 1939 is not void. 1943 A.L.W. 87. When a transaction has been entered into for unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of a *particeps criminalis* to relieve him from the legal effect of the transaction. 44 M. 329 = 39 M.L.J. 525 = 59 I.C. 1003. But a suit can be maintained if the illegal object was not carried out. 31 P.L.R. 987. A hundi passed for an illegal consideration is unenforceable. 40 M. 285 = 34 I.C. 401 = 31 M.L.J. 264. A contract which is void because it is forbidden by law cannot become valid even if the parties act according to the contract. 119 I.C. 505 = 1929 A. 394. An agreement between two priests by which certain disciples were specifically allotted to each of them with the stipulation that that arrangement would be binding on them and their heirs and that if one of them would perform any religious service in the family allotted to the other priest, he would be liable to pay compensation, is invalid being opposed to public policy. Consequently a suit for damages for breach of that agreement is not maintainable. 42 C.W.N. 1038.

**ILLEGALITY DISCLOSED IN EVIDENCE.**—If the illegality of a transaction is brought to the notice of the Court, the Court should not assist the person who invokes its aid even

though the defendant has not pleaded the illegality and does not wish to raise the objection. This is based on grounds of public policy. 145 I.C. 599 = 1933 M. 187. See also 53 I.C. 773 = 24 C.W.N. 306.

**COLLATERAL CONTRACT.**—An agreement by a Government tenant with plaintiff to the effect that if the plaintiff helped the former in bringing the land under cultivation the former would give to the plaintiff one-half of whatever rights he might acquire in the land is not opposed to public policy. 3 L. 92 = 64 I.C. 18 = 1922 L. 287. The sale of a share in a chance in the Turf Club sweep is not a wager and is not opposed to public policy. 25 I.C. 355 = 258 P.L.R. 1914. No suit lies for recovering money lent and used for an illegal object as bribe. 24 I.C. 692 = 185 P.L.R. 1914 (8 C. 24, Foll.). Where the defendant borrows moneys from the plaintiff with the clear intention of utilising the money for the purpose of gambling but there is nothing to indicate that the plaintiff was privy to this intention, there is nothing to preclude the plaintiff from recovering the amount from the defendant by suit. 131 I.C. 546 = 1931 A. 458 (1). See also 29 I.C. 573; 100 I.C. 345. **Collateral contract**—Right of agent to recover gambling debt paid for principal if opposed to public policy. 13 I.C. 319 = 79 P.L.R. 1912. A bond for payment of a loan was taken by the creditor in the name of his concubine's mother. The debtor cannot plead that the consideration for the bond is tainted with immorality and that the bond therefore is unenforceable. 56 I.C. 616. The concu-

bine's mother or her assignee can sue as benamidar and it cannot be treated as involving the enforcement of an immoral contract. 56 I.C. 616. A contract, which is *ultra vires* is not necessarily illegal. A Bank lent money on mortgage to the defendant. The memorandum of association of the Bank prohibited the Bank from lending on mortgage. *Held*, that the Bank could sue to enforce the contract. 1930 M. 512—59 M.L.J. 28. Where a person applied to the municipal committee for sanction to build so as to encroach upon a street and the Municipality having sanctioned the same on condition of his paying certain rent he agreed to the same, *held*, that the contract was not illegal and that the Municipality was entitled to recover the rent reserved. 32 P.L.R. 607=1931 L. 634. If an agreement is void but not illegal, plaintiff can recover from a third party money which the latter has received on his behalf under the void agreement. 51 I.C. 530=12 Bnr.L. T. 9.

**PARTIES TO ILLEGAL ACTS.**—Where the assistance of equity was not being asked to carry out an illegal agreement, defendants could recover on their counter-claim. 44 R. 631=21 Bom.L.R. 986; 1923 M.W.N. 335=1923 B. 626. *See also* 1925 L. 65. If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him. 72 I.C. 653. *See also* 1933 M. 187. A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. 51 I.C. 280=4 Pat.L.J. 542. *See also* 1935 C. 748; 157 I.C. 1096=1935 A.W.R. 200=1935 A.L.J. 339=1935 A. 256. Where the illegal portion of an agreement has been wholly carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve if he is not able to show that he has been less to blame than the other. 20 C.W.N. 760=1 Pat.L.J. 48=33 I.C. 711; 44 M. 329=39 M.L.J. 525. A partnership is *prima facie* legal unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy, and so while it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and the facts constituting illegality were established. 122 I.C. 342=1930 M. 361. *See also* 1931 A. 83=53 A. 316.

**ILLUSTRATIVE CASES. ACTS DEFEATING STATUTE.**—No man can exclude himself from the protection of Courts by a contract entered into with another. 42 B. 330=35

M.L.J. 262=45 I.A. 61 (P.C.); 1930 S. 175. *See also* 1 A. 267. A sale-deed which tends to defeat the provisions of the Tenancy Act or other Act is void and unenforceable. *See also* 145 I.C. 163=1933 L. 291; 39 A. 647=15 A.L.J. 656; 32 M.L.J. 383=21 C.W.N. 616=44 I.A. 54=39 A. 173 (P.C.); 117 I.C. 298=1929 M. 68; 11 L. 8=31 Punj.L.R. 397; 1936 R.D. 384; 165 J.C. 537=1936 R.D. 235=1936 O.W.N. 1115=1937 O. 150. An agreement in an absolute sale deed to pay annual rent to vendor is void under S. 11, T.P. Act. 171 I.C. 504=1937 O.W.N. 1138. A contract by which land is sought to be tied down at a fixed rent is void as it offends against S. 35 of the Oudh Rent Act. 16 R.D. 235. There is nothing contrary to law in an agreement between a permanent lessee and his lessor that there should be no enhancement of rent. It cannot be said to be illegal. There is no prohibition against such a condition as non-enhancement of rent and it can be pleaded in bar of a suit for enhancement. 1943 R.D. 512=1943 A.W.R. (Rev.) 278. Contract though unenforceable will not vitiate a transfer merely because the contract is unenforceable. 38 A. 232=14 A.L.J. 270; 27 I.C. 508=13 A.L.J. 6. As to the effect of invalidity of terms of contract intended to defeat provisions of an Act of the legislature, *see* 25 I.C. 508=13 A.L.J. 6; 35 A. 19=10 A.L.J. 416; 16 I.C. 42; 24 Bom. L.R. 449=1922 B. 84. Public servant—Salary below attachable limit—Agreement between public servant and execution creditor for deducting portion from salary void and not enforceable. *See* I.L.R. (1941) Bom. 415=43 Bom.L.R. 758=1941 Bom. 389. Acts prohibited by statute—Release of certificate debtor under Bengal Public Demands Recovery Act—Security bond therefor—Consideration is lawful. *See* I.L.R. (1937) 2 Cal. 698. A contract to prepare by printing and to supply copies of a picture produced in England is not unlawful or against policy. 44 B. 720=22 Bom.L.R. 808. Act defeating statute—Public policy—Speculation in gold against Government Notification. 44 B. 6=21 Bom.L.R. 788. Loan for gambling is not one forbidden by law unless it be proved that the gambling was in a public place. 100 I.C. 345=1927 N. 155. *See also* 131 I.C. 546=1931 A. 458. Dicta of English Judges on public policy, how far to be considered by Judges in India. 44 B. 6. Public policy should not be interpreted under S. 23 as comprehending all the political policies of the Government of India. 44 B. 6. Government Servants Conduct Rules are rules of conduct and not a statutory prohibition. Hence a disregard of these does not taint Government servants' transactions with immorality or illegality. 40 R. 126=17 Bom.L.R. 955; 33 Bom.L.R. 250=1931 B. 269. Agreement to share pro-

fits from the forest license though not allowed by the terms of licence, is not void. 40 B. 64=17 Bom.L.R. 701. An option by purchaser to resell the property to the vendor on certain terms and conditions is valid. The purchaser is bound to fulfil if the conditions are complied with strictly. 35 I.C. 631. Hatchitta executed by insolvent debtor to plaintiff—Suit upon—Consideration—Illegality—Transferability. 14 I.C. 519=16 C.L.J. 162. *See also* 1936 L. 831 (act intended to defeat provisions of insolvency law). A transfer for consideration made by a person with the intention of defeating or delaying his creditors is merely voidable and not void *ab initio* and as such does not fall within the ambit of S. 23. 1936 N. 268. *See also* 1938 Rang.L.R. 19=1938 Rang. 11. In cases of a composition, where all creditors have joined in on equal terms and a secret preference is given to certain creditors to induce their agreement to the composition, the contract whereby such a preference is given is void under S. 23 as being a contract based on fraud. The essence of the offence against S. 23 is that there is a secret agreement by some creditors that they are to be preferred, so that there is a fraud upon the other creditors, who, ignorant of this secret agreement, have signed the deed of composition in the belief that all are to lose equally and none is to be preferred. I.L.R. (1939) Kar. 147=1939 Sind 33. As to reservation of a portion of property to insolvent debtor by agreement between purchasers and insolvent, *see* (1937) 2 M.L.J. 508. Act defeating statute—One of several judgment-debtors getting assignment of decree is not against law. 44 M. 1=39 M.L.J. 692=60 I.C. 127. Fraudulent perpetual lease by widow to defeat reversioners—If can confer ordinary tenancy rights at the least. *See* 1941 A.W.R. (Rev.) 858. A promise to abstain from raising the plea of limitation in a suit is void as it defeats the provisions of Law of Limitation. 40 M. 701=35 I.C. 575=31 M.L.J. 231. The sale of palanquin bearing service inam is not opposed to public policy. 13 I.C. 190=(1911) 2 M.W.N. 588. Benami purchase by police officer while in service is not void as being opposed to public policy. 52 I.C. 153=16 N.L.R. 25. Where land which is not transferable under a special statute is transferred in contravention thereof a suit by the vendor for damages for breach of covenant for title is maintainable. 54 I.C. 669; 47 I.C. 32=14 N.L.R. 125. A purchase made benami by a Government servant in contravention of executive orders and rules governing the conduct of public servants is void on the ground of public policy and the real purchaser does not get a title under the purchase. 47 I.C. 694; 1930 A. 732. *See also* 19 Mys.L.J. 262. A pro-note payable to "so and so order or bearer" contra-

venes the provisions of S. 24 of the Paper Currency Acts and is therefore void. It is a contract forbidden by law and nothing can be recovered on the document. 24 I. C. 721=(1914) 11 U.B.R. 13.

**ACTS PROHIBITED BY STATUTE.**—Where a transaction consists of two separate considerations for two several objects consisting of legal and illegal parts in which the lawful is separable from unlawful, it is always possible to give effect to the lawful and reject unlawful; in fact that is what the Courts are bound to do unless the whole transaction is prohibited by statute or unless it involves serious moral turpitude or is otherwise against public policy. 177 I.C. 6=1938 Nag. 335 (F.B.). A transfer of property to Kanungo is not against public policy. 14 A.L.J. 969=36 I.C. 319=39 A. 58. Assignment of mortgage in the name of a patwari's mother is not against public policy, though the patwari cannot engage in trade or money-lending according to rules framed by Revenue Board. 14 A.L.J. 962=39 A. 51. A patwari acquiring land in his own circle is against public policy and illegal. 1927 L. 18=7 L. 463. A promissory note executed in the name of patwari who is prohibited by the patwari rules from carrying on money-lending business is not void under S. 23 of the Contract Act when the patwari is a mere benamidar for his wife who advanced the money and he did no more than lend his name to the transaction for her accommodation. I.L.R. (1944) Nag. 645=1944 N.L.J. 448=A.I.R. 1944 Nag. 325. It is an established principle that the Court will not lend its aid to enforce a contract entered into with a view to carry into effect anything which is prohibited by law. *Prima facie*, there is nothing illegal about trying to avoid, or successfully avoiding having one's property taken under the superintendence of the Court of Wards so long as the device adopted is not illegal in itself. There is nothing in the adoption of such a device which would make it invalid in law. The purpose is not an unlawful one. 196 I.C. 787=1941 Oudh 529. Where in a compromise, one of the parties agrees not to claim exproprietary rights on a transfer by him, the agreement is neither forbidden by, nor defeats the provisions of S. 7-A (5) of the Oudh Rent Act and hence is neither unlawful nor would it defeat the provisions of any law. 1941 O.W.N. 1138=17 Luck. 249=1942 Oudh 1. Agreement not to apply for restoration of possession under S. 35, U. P. Encumbered Estates Act—Legality. *See* 1940 O.W.N. 1246. As to mortgage of occupancy holding forbidden by the Tenancy Act, *see* 157 I.C. 1096=1935 A.L.J. 339=1935 A. 256. A police officer who was forbidden from purchasing land under S. 33, Police Act, purchased land in the name of his mother.

After his death she sold a portion of it to her daughter. The son of the deceased officer sued to have the sale set aside alleging that his father was the true owner of the property. *Held*, that the contract under which the plaintiff's father obtained the property was void, that no claim could be made on the basis of such illegal agreement and that as the father had no title, the son was not entitled. 35 Bom.L.R. 404=1933 Bom. 262. Where money is advanced by a creditor for the purpose of defraying the expenses already incurred in celebrating a marriage of an infant in violation of the Child Marriage Restraint Act, the consideration is not rendered illegal under S. 23 of the Contract Act. 65 C.L.J. 557=41 C.W.N. 1176. *See also* (1940) 2 M.L.J. 353. An agreement for the payment of a monthly sum by the defendant to the plaintiff (the permanent Karnam) in consideration of the plaintiff recommending the defendant to the office of Karnam gumastha during the minority of the plaintiff's heir is opposed to public policy and unenforceable. 1933 M. 768=65 M.L.J. 532. The fact that a contract was made in breach of the Government Servants Conduct Rules, would not invalidate the contract. Those rules appear *prima facie* rules of conduct and would not render such a contract invalid but only render the person who commits a breach of the rules liable to departmental action. 1943 A.L.W. 537. An agreement to do an act which is prohibited by the Rules framed under the Motor Vehicles Act is illegal and void, though the parties did not know of the prohibition. 91 I.C. 1029=1926 N. 259. *See also* I.L.R. (1940) Kar. 347 (Omission in contract with corporation to comply with statutory requirements). Agreements which have been held to be void under this section include a sublease of an excise contract, a transfer of a share in an excise contract, a transfer of occupancy rights declared by statute to be non-transferable and a transfer by a disqualified proprietor and a transfer in contravention of S. 8 of the Punjab Tenants Act. 3 P.R. 1915 (Rev.)=31 I.C. 400. So also a contract for the possessory mortgage of occupancy holdings is void. 1931 A. 461. Municipal Council has no power to farm out the right to collect slaughtering fees. A lease of such a right is void. 36 M. 113=21 M.L.J. 790=11 I.C. 669. Agreement in contravention of S. 257-A, old C. P. Code, is not opposed to public policy. 21 M.L.J. 709=9 I.C. 875=35 M. 75. Pledar advancing loan to a person not his client is not opposed to public policy. 39 I.C. 135=20 O.C. 67. *See also* 1930 S. 175=123 I.C. 299. There is no law or regulation laying down that an agreement between any two persons living in the Santhal parganas to pay compound interest on the amount borrowed is unlawful within the

meaning of S. 23, Contract Act. All that the law provides is that compound interest will not be decreed by any Court. 1930 P. 442=10 P. 63. When the contract is void because prohibited by statute the Court has power to work out the equities and place the parties upon terms. No question of limitation arises in connexion with the Court's powers to place the parties upon terms if the suit is otherwise good. 177 I.C. 6=1938 Nag. 335 (F.B.). When a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory because of the maxim *ex turpi causa non oritur actio*; in fact the test of illegality is the applicability of maxim. But there are several exceptions to this rule, one of which is where the contract is made illegal by statute with the object of protecting a particular class of persons, in which case restitution can be ordered. The refusal to direct restitution is not founded on any section of the Contract Act but is because of the matters like public policy, *ex turpi causa, in pari delicto* and the like. 177 I.C. 6=1938 Nag. 335 (F.B.).

SLAVERY BOND, or any other bond approaching this is void as forbidden by laws. 103 I.C. 96=1927 M. 818. *See also* 106 I.C. 803=1928 N. 89 (2); 1929 M. 267.

AGREEMENT TO ADOPT OR NOT TO ADOPT.—Where a Hindu widow having authority from her husband to adopt agrees in consideration of a pecuniary advantage to herself, not to adopt, the agreement is void as being opposed to public policy. The authority is given not for her but for her husband's benefit. 49 I.C. 929=1919 M.W. N. 52. Compromise in a suit providing that the plaintiff should adopt the son of one of the defendants and giving the plaintiff certain rights on condition of his so adopting was held to be a *bona fide* family settlement and not opposed to public policy. 1926 M. 1093=51 M.L.J. 366.

AGREEMENT TO PREVENT BIDDING.—An agreement by a person promising to pay money to another if the latter would not compete for the purchase of certain property with the former is legal. 10 I.C. 627; 10 M.L.T. 338. Partnership in respect of.—Legality.—Tender by one partner on behalf of partnership.—Licence in name of such partner only.—Suit for dissolution of partnership.—Maintainability. 1933 Mad. 295=(1944) 1 M.L.J. 97.

*Quaere*: Whether, when a partnership is entered into before the auction of toddy shops and one of the partners is deputed to bid for and obtain a license in his own name on behalf of the partnership, the partnership would be a lawful one? (1944) 1 M.L.J. 97, there was nothing in the Madras Abkari Act or in the rules thereunder with regard to the sale of Abkari privileges to prevent a firm

from holding a license. I.L.R. (1944) Mad. 697=57 L.W. 93=1944 M.W.N. 81=A.I.R. 1944 Mad. 295=(1944) 1 M.L.J. 97. An agreement to abstain from bidding at an excise auction is not void under S. 23 as being against public policy. 44 I.C. 223. (18 B. 342; 16 C. 194; 6 O.L.J. 111, Rel.) Agreement between two or more persons not to bid against one another at a public auction is not unlawful or against public policy. 56 I.C. 963=12 Bur.L.T. 241; 44 I.O. 223; 46 I.C. 755; 32 P.L.R. 879; 10 O.W. N. 1. But see 28 I.C. 40=8 S.L.R. 247, *contra*. An agreement between intending bidders at an auction to form a knock out ring and share the profits resulting therefrom is opposed to public policy and is unenforceable. I. L. R. (1943) Lah. 837=45 P.L.R. 119=A.I.R. 1943 Lah. 100. There is no warrant for holding that a combination of persons not to bid against one another at a public sale or auction of Government tolls offends against public policy. The law will always encourage freedom to contract. "Public policy" is that principle under which freedom of contract or private dealing is restricted by law for the good of the community. It is a variable thing and must fluctuate with the circumstances of the time. But it is still an untrustworthy ground for legal decision and it must be resorted to within the prescribed limits. A partnership formed solely with a view to taking toll contracts at a public auction is in itself not illegal; such partners who agree to take tolls for the benefit of their firm would naturally agree not to bid against one another. The fact that in certain cases such a combination might result in possible loss to public revenue, would not make the act, which is perfectly legitimate, opposed to public policy so as to render it void and illegal. 42 Bom.L.R. 750=1940 Bom. 369=I.L.R. (1941) Bom. 71.

**BENAMI TRANSACTION.**—Plaintiff, to whom a railway company had refused to grant any contracts, entered into an agreement with the defendant that the defendant should put himself forward as the applicant for the contracts, and when the same was secured he would serve the plaintiff, the real contractor. The plaintiff sued for declaration that he was the real person who held the contract. *Held*, that the object of the agreement was to commit fraud on the railway company and therefore was void. 1930 A. 732. See also 1944 Nag. 325=1944 N.L.J. 448.

**BRIBE FOR PERJURY.**—See 1 L.W. 300=23 I.C. 540=1914 M.W.N. 322; 10 I.O. 801=4 Bur.L.T. 95. See also 146 I.C. 240=1933 R. 199.

**BRIBE TO PUBLIC OFFICERS.**—A Court will not assist a party who has entered into a contract involving moral turpitude. 43 O. 115=19 O.W.N. 919=29 I.C. 625. Money

paid as bribe is not legally recoverable. 1931 R. 83. See also 146 I.C. 240=1933 R. 199. S. 23 is not concerned with motive. It is confined to the object of the transaction and not to the reasons or motives which prompted it. The law does not prevent even the most degraded of men from having their own friends and from receiving gifts from them whatever the motive of the donors may be, provided the object is not to induce or encourage the commission of an illegal or an immoral act. B, a Hindu, borrowed a certain amount from A in order to bribe a certain officer. After the bribing was done and completed B obtained a loan from C in order to pay off A and executed a mortgage in favour of C. *Held*, that the purpose of the mortgage loan was not to effect an illegal purpose. Such illegal purpose as had been effected had been effected. The mortgage loan was at worst a loan designed to enable the borrower to pay back a lender who could not have sued the borrower in a Court of law successfully and therefore it was no more contrary to public policy than would be a loan to a borrower to enable that borrower to make a gift. I.L.R. (1940) Nag. 573 and 618=1940 Nag. 305.

**CHAMPERTY AND MAINTENANCE.**—An agreement to finance a litigation and to share the fruits thereof ought to be carefully watched and when found to be extortionate and unconscionable or made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper object so as to be contrary to public policy, effect ought not to be given to it. 43 I.C. 74. See also 1934 L. 1017; 14 R. 392=1936 R. 491; 15 Lah.L.T. 26; 1938 Lah. 23. Champerty is *per se* not illegal. But a champertous agreement if extortionate and unconscionable, should however be held to be contrary to public policy and cannot be enforced. 1933 R. 418 (2); 48 M. 230=1924 P.C. 162 (P.C.); 1925 O. 71; 39 I.C. 229; 131 I.C. 401=1931 P.C. 100=61 M. L.J. 94 (P.C.); 14 R. 392=1936 R. 491; 15 Lah.L.T. 26; 166 I.C. 194=1937 O. 82=39 P.L.R.J. & K. 33; 42 Bom.L.R. 165. An agreement to transfer property for financing a suit is valid provided that the agreement is fair and equitable and not extortionate or unconscionable or for an improper purpose. 33 A. 626=8 A.L.J. 652; 16 S.L.R. 278=1923 S. 50; 70 I.C. 904; 93 I.C. 959; 39 P.L.R. (J. & K.) 88. Champerty is not void in India unless the transaction is not a *bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spell or litigation disturbing the peace of families and carried on from an improper and corrupt motive. 59 I.O. 10; 1 R. 565=77 I.C. 872



=1924 R. 48. Champertous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. The fairness of the agreement must be considered independently of unproved suggestions that it may have been improperly obtained. In applying the principle that "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being *per se* opposed to public policy" it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money he may well be allowed some chance of exceptional advantage. 61 I.A. 50=I.L.R. (1940) Lah. 1=51 L.W. 86=44 C.W.N. 345=1940 P.C. 19=(1940) 1 M.L.J. 278 (P.C.). There is no law in India prohibiting champertous agreements and such an agreement cannot be attacked on the ground that it is against public policy. 121 I.C. 295=1930 L. 392. The English Law of Champerty is not in force in India. 1 L. 124=56 I.C. 272. *See also* 1923 N. 214; 55 I.C. 635; 1 R. 565=2 Bur.L.J. 177; 1928 M.W.N. 5. Where a person contracts with the real claimant of an estate to litigate on his behalf for its recovery and agrees to share a portion of the net assets realised by him out of the estate, such agreement is not void as opposed to public policy; yet when it is extortionate, it should not be enforced in its entirety but the amount which he spent in litigation *plus* a reasonable amount for the trouble which he has taken should be awarded; where the agreement gave half the share in the net assets realised, the Court allowed the amount spent in litigation together with 12 per cent. interest on it. 1934 R. 346. A transfer of a right of a reversioner as illegal and opposed to public policy as stimulating gambling in litigation. 41 I.C. 347=135 P.L.R. 1917. There is nothing illegal in a plaintiff agreeing to sell the suit property to a third person if the suit prove successful. 98 P.L.R. 1913=18 I.C. 485. Champerty—Agreement to finance litigation—Suit for moneys advanced is maintainable. 47 I.C.

563. An agreement to obtain for a nominal sum the right to carry on a litigation with a very poor chance of success, is champertous and cannot be given effect to on principles of equity and good conscience. 63 I.C. 356; 61 I.C. 884. Purchase of interest in the property for the purpose of litigation for its realisation is unlawful. 55 I.C. 635. Champerty—Test of. *See* 52 C.L.J. 492=1931 C. 144; 61 M.L.J. 94=1931 P.C. 100 (P.C.).

BURDEN OF PROOF.—A party being unable to pay the Court-fees and other expenses for certain suits which he had to institute, the defendant undertook to raise the requisite amount by subscriptions on the understanding that in case the suits succeeded half the decretal amount should be paid to the subscribers. Plaintiff was one of the subscribers and paid amounts. The parties having fallen out, plaintiff sued the defendant for return of the amount of subscriptions paid by him. *Held*, that the burden of proving that the litigation proposed was a just one and that the agreement to finance it was just and equitable was on the plaintiff; that the terms of the agreement in question were on the face of them inconsistent with a proper motive, *i.e.*, an intention to help a litigant unable to finance himself in the pursuit of a proper claim; and that the claim was one for the recovery of a gambling debt, and being opposed to public policy, must fail. 151 I.C. 969=1934 A. 1023. *See also* (1941) 1 M.L.J. 807.

CHEATING.—Certain persons were being tried for an offence. The accused representing that he could influence the Court in their favour received money from those persons. The accused was prosecuted for cheating. It was urged for the defence that the money having been paid for an illegal purpose a prosecution for cheating in regard to that money could not be maintained. *Held*, that the plea was untenable. 146 I.C. 240=1933 R. 199. *See also* 1931 R. 83. Compromise of suit dealing with property of minors, not parties to suit. *See* 61 C.L.J. 88.

Agreement interfering with service vital to public and involving deceit of Secretary of State. An agreement by which a person on failing to obtain a postal contract from the Secretary of State is to be the real owner of the lorries plying and receive the profits of the contract obtained by another, is entirely contrary to public policy and is void. Such an agreement is likely to lead to a condition of affairs which will seriously interfere with the proper maintenance of a service vital and necessary to the public. Further it involves deceit of the Secretary of State in respect of a matter in which the public as a whole are vitally interested. I.L.R. (1943) Nag. 565=1943 N.L.J. 345=A.I.R. 1943 Nag. 260.



**COPYRIGHT—ASSIGNMENT OF—VALIDITY OF TERMS.**—See 39 O.W.N. 224.

**EVIDENCE.**—An agreement by the parties to a suit, even apart from the Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit, is perfectly valid. There is nothing in the Contract Act which offends against such an agreement. It is only a waiver of the right to produce any other evidence. 1933 A.L.J. 1127=1933 A. 861 (F.B.).

**EXCISE CONTRACT.**—An agreement to sub-lease salt pan in contravention of terms of licence is not specifically enforceable. 24 Bom.L.R. 111=46 B. 651=1922 B. 73. Contract infringing Abkari laws is void. 18 S.L.R. 16=87 I.C. 353=1925 S. 55. See also 58 M. 727=1935 M. 440=68 M.L.J. 570 (F.B.); 69 M.L.J. 490; 1937 Nag. 250; 1941 Mad. 64=(1940) 2 M.L.J. 694. Abkari sale—Bidder entering into partnership with another after sale and before grant of licence in respect of running of business of sale of toddy not legal. 53 L.W. 530=(1940) 2 M.L.J. 694. See also 22 Pat. 334; (1944) 1 M.L.J. 97=1944 Mad. 295. A contract to sublet or assign a licence is one to evade the excise rules and is void and illegal. 9 I.C. 115=15 O.W.N. 169; 29 I.C. 480; 37 B. 390=19 I.C. 442=15 Bom.L.R. 227 (31 C. 798, Foll.); 8 L. 310=100 I.C. 846=1927 L. 333. The supply of intoxicating liquor on credit is forbidden under the Bombay Abkari Act and Rules thereunder; hence a contract for the supply of liquor on credit is illegal or void coming within the mischief of S. 23 of the Contract Act. The Abkari Act has a dual purpose. Its primary object might be fiscal or administrative, but it also has a social purpose. The prevention of the sale of intoxicating liquor on credit has a social or moral purpose, and any contract made in contravention of such a prohibition is clearly a contract which would defeat the provisions of the law within the meaning of S. 23, Contract Act. It makes no difference that the prohibition is contained in a statutory rule and not in the statute itself. I.L.R. (1943) Kar. 350=A.I.R. 1943 Sind 219. A lease to a person not licensed under the Madras Abkari Act for tanning toddy is not illegal and can be enforced. 61 I.C. 537=14 L.W. 226. The taking of a partner by an Abkari licensee is in effect a sale to him of a portion of the business and making him an agent for the sale of liquor contrary to the terms of the licence and the partnership is consequently illegal. 43 M. 141=38 M.L.J. 123; 68 M. L.J. 570=1935 M. 440=58 M. 727 (F.B.). But see 8 L. 310=100 I.C. 846=1927 L. 333, holding that though the state may refuse to recognise such partnership, the parties cannot wriggle out of it. An agreement subletting the right to vend *ganja* is illegal and unenforceable, where one of the conditions of an Abkari licence prohibits vending,

transferring or subletting of the licence. 34 I.C. 927. A promissory note given in consideration of the transfer of a right to sell toddy prohibited under S. 22 of the Madras Abkari Act is unenforceable as being for an illegal consideration. 27 I.C. 919=1915 M.W.N. 25. The provisions of the Abkari and Opium Acts are not merely intended to guard the Government revenue, but they are based on public policy. No suit will lie to enforce rights that are inconsistent with the spirit of the Acts. 35 M. 582=21 M.L.J. 425. An agreement of partnership to start a business for the sale of drugs the lease for which was obtained in the plaintiff's name is not illegal. 25 I.C. 146=17 O.C. 193.

**TOLLS COLLECTION—LEASE OF—SUB-LET-TING.**—A term in a Government *kabuliyat* dealing with the assignment by the lessee of tolls was to the effect that the "contractor, his heirs, executors, administrators and assigns shall not sub-let, assign, transfer or mortgage the whole or any portion of the rights or property the subject of these presents without the written permission of the said Collector, previously obtained." It was also provided that for breach of the conditions, the Collector could impose a fine. *Ud'd*, that subletting or assignment was not absolutely prohibited and is not opposed to any provisions of law and since redress was provided by the imposition of a penalty under the *kabuliyat*, the clause against sub-letting or assignment except in a particular manner would not render an assignment void. I.L.R. (1941) Bom. 71=42 Bom.L.R. 750=1940 Bom. 369.

**EXECUTION SALE.**—An agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy. Where however the transaction is entered into fraudulently in order to deprive a rival decree-holder of the fruits of his decree it is void because of S. 23. Fraud inferred on facts of the case. 8 Luck. 233=1933 O. 124. An agreement providing that one of the parties should assist the other in carrying on a litigation commenced by the other and help him to evade or delay the execution of a decree passed against him is contrary to public policy. 145 I.C. 756=1933 A.L.J. 85=1933 A. 303.

**EXPECTANT HEIRS.**—Where an agreement entered into between expectant heirs in 1868 provided for the division of the property after the succession opened. *Held*, that the agreement was not hit at by S. 6, T.P. Act or S. 23, Contract Act and was enforceable. 14 Pat.L.T. 27=1933 P. 165. See also 39 Bom.L.R. 1233=1938 Bom. 97. A charge created by a Mahomedan on the uncertain and undefined share of property of one of his heirs defeats the provisions of Mahomedan law and hence it is illegal and invalid and cannot be enforced. 1933 A. 934.

**FRAUDULENT LEASE BY MORTGAGOR.**—The owner of 58 bighas of lands hypothecated the holding. It appeared that 47 bighas were cultivable and 11 bighas uncultivable waste land. The mortgagor subsequently gave a lease of the cultivable lands to another at a certain rate. The effect of the lease was that during the period of the lease the property was not only absolutely valueless to the owner but also involved a net liability of a few rupees the amount by which the land revenue exceeded the rent payable.

*Held*, that the lease was a fraudulent transfer as it deprived the mortgagee of his security and the Court could order the ejectment of the lessee as a trespasser. 18 R. D. 367=15 I.R. 445 (Rev.). *See also* 1941 A.W.R. (Rev.). 858.

**FRAUDULENT TRANSFER.**—Where a debtor transfers property to one creditor with a view to give a fraudulent preference to that creditor over others, there is nothing illegal though in the event of bankruptcy supervening, the transaction would be invalid as against the assignee in bankruptcy. When the object of the transaction is to defeat the equality of distribution among all the creditors, required by the bankruptcy law, it can be avoided in the event of a bankruptcy, but as between the parties to the transaction, they are bound by it. 1944 Mad. 403=(1944) 1 M.L.J. 371.

**FORFEITURE.**—Mortgage executed by accused in favour of surety for amount forfeited by latter not opposed to public policy. 1938 Lah. 732.

**GOVERNMENT—CONTRACT WITH.**—Where Government open a telegraph office at a particular place at the request of certain persons in that place, a contract with them for meeting the deficit in its working expense is a contract relating to a matter of amenity, which a modern State generally provides for, for advancing the material welfare of its subjects, but which it is not bound to do as a part of its fundamental constitutional obligations. There can, therefore, be no objection to such a contract on the ground of public policy. I.L.R. (1938) 1 Cal. 463=43 C.W.N. 116=1938 Cal. 151.

**INDEMNIFYING SURETY.**—Where a bail bond is forfeited owing to the failure of the accused to appeal, the surety cannot sue a third person who had agreed to indemnify the surety for recovery of the amount forfeited, as such a contract is illegal. 56 I.C. 539=24 C.W.N. 368; 28 I.C. 560=19 C.W.N. 329; 65 I.C. 137; 1930 C. 546; 32 P.L.R. 739.

**JURISDICTION OF COURT, OUSTING OF, BY AGREEMENT.**—The jurisdiction of any Court is conferred by statute and it can only be taken away by statute. The parties can by mutual consent no more take away the jurisdiction vested by law in any Court than they can confer on it when it is not so vested by law. By a private agreement the parties

cannot divest the Court of its inherent jurisdiction to try disputes arising out of the agreement. It would be against public policy if the parties by private agreement can oust the jurisdiction of the Courts. 1935 N. 48=157 I.C. 315. Where two Courts have jurisdiction to try a case, an agreement between the parties that it should be tried in one place rather than another is not opposed public policy. 20 N.L.J. 247=1937 Nag. 334.

**MASTER AND SERVANT.**—Agreement between parties that master may impose fine—Fine imposed—Suit claiming refund of fine is not barred. *See* 6 Pat.L.T. 762=87 I.C. 739.

**MARRIAGE CONTRACT.**—An ante-nuptial agreement whereby a suitable maintenance is provided for the wife in case the husband ill-treated or behaved improperly towards her, or capriciously turned her out, is not opposed to S. 23 and is enforceable. 19 A. L.J. 675=43 A. 650=63 I.C. 889. Receiving of consideration by those who arrange marriages in India when the money received is intended to benefit those persons and not for the expenses of the ceremony or for the benefit of the bride or bridegroom, is against public policy and falls within the mischief struck at by S. 23 of the Contract Act. I. L.R. (1914) Nag. 535=1944 N.L.J. 124=A.I.R. 1944 Nag. 159. An agreement for separation and the payment of periodical maintenance to the wife is not contrary to public policy. 27 N.L.R. 281 (28 C. 751, Dist.) A contract that parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money if and when the marriage is celebrated is not void *ab initio* as being opposed to public policy. 51 I.C. 856. *See also* 5 P. 646=1926 P. 582; (1945) 1 M.L.J. 145 (Promissory note by Hindu to future bridegroom in consideration of marriage). Section 23 is not a bar for recovery of money paid in consideration of a marriage where there has been a breach. Where the defendant admitted execution of the promissory note in favour of the plaintiff but pleaded that it was executed for money due to the plaintiff and his sister in consideration of the latter's son marrying his daughter and it appeared that the agreement fell through, *held*, that the promissory note was all the same enforceable. 8 Mys.L.J. 247. *See also* 157 I.C. 736=1935 Pesh. 121. The Court would clearly not enforce a contract or a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But the Court should not refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India, when that object was actually performed in a place or Native State where it was perfectly legal. When a decree has been passed against a person requiring him to pay a sum of money towards his share of the expenses of the

marriage of his sister, which was performed in a Native State in order to evade the provisions of the Child Marriage Restraint Act, execution of the decree cannot be refused on the ground of public policy on the ground that the marriage if performed in British India would be opposed to the Child Marriage Restraint Act. 1940 Mad. 901=(1940) 2 M.L.J. 353. See also 41 C.W.N. 1176=65 C.L.J. 557. An agreement between a Mahomedan husband and his wife, providing for a certain maintenance to the wife in the event of a future separation between them, is void as being opposed to public policy. 37 B. 280=17 I. C. 946=14 Bom.L.R. 1178. See also 1939 Lah. 165. It is as much the policy of the Mahomedan Law as of the English Law that people who are married should live together and not apart. (*Ibid.*) Advancing money to compensate husband willing to divorce his wife—If legal. See 1925 N. 111. An agreement at time of marriage executed by husband providing that in case of strained relations between him and his wife, the wife would be entitled to her customary maintenance is not void under any provision of law. 184 I.C. 105=41 P.L.R. 711=1939 Lah. 165. See also 39 Bom. L.R. 458=1937 Bom. 358 (agreement between Hindu husband and wife to live separately and provision for wife's maintenance charged over specified property). A contract by a Hindu to maintain as wife a woman, who is not his lawfully wedded wife, is opposed to public policy and consequently unlawful. 16 I.C. 133=14 Bom. L.R. 547. Where a suit for maintenance by a wife against her husband is compromised and the parties agree to live together and in case of future disagreement between them, the husband agrees to pay a certain rate of maintenance to the wife, if, after living together for some time, the parties fall out and the wife begins to live separately owing to disagreement, she is entitled to enforce execution of the compromise decree. It cannot be said that the agreement or compromise is void as being opposed to public policy on the ground merely that it contains a provision for future separation. The agreement being one in furtherance of the husband and wife living together and for the purpose of effecting reconciliation between parties then living apart, it is valid and enforceable and not void. Nor can the plea that the compromise is opposed to public policy be raised in execution proceedings. The case is not one of inherent want of jurisdiction but one where the question of jurisdiction is to be decided by the Court itself. The decision, though wrong, is one which the Court is competent to give and will operate as *res judicata*. The Court recording the compromise having power to decide whether it was lawful, its decision is binding and competent and the executing Court cannot go

behind it. 57 L.W. 485=1944 M.W.N. 573=(1944) 2 M.L.J. 210. See also 56 L. W. 536=(1943) 2 M.L.J. 359. An agreement whereby guardian, natural or appointed, consents to give his ward in marriage for his own pecuniary benefit is void under S. 23 and the fact that no injury resulted thereby to the ward is irrelevant. 9 I.C. 652=13 C.W.N. 447. Marriage contract—Money paid under—Suit for recovery—Contract not performed. See 106 I.C. 803=1928 N. 89 (2); 53 I.C. 406=113 P.R. 1919; 16 I.C. 1004=10 A.L.J. 169. A breach of betrothal agreement gives rise to a claim for damages. 27 I.C. 1008=27 P.L.R. 1915. A contract of betrothal made in regard to a girl not born at the time of the contract is null and void and cannot form a basis for damages. 125 I.C. 369=1930 L. 561. An agreement, by which the father binds himself to place his daughter at the disposal of another to be given away in marriage by him to anyone whom he likes is invalid and cannot be recognized by the Courts of law. 125 I.C. 369=1930 L. 561. An agreement for the purchase of a bride for the son of a person who had given his daughter in exchange for finding a wife for that person is void being against public policy. 125 I.C. 369=1930 L. 561. A contract by A to give his daughter in marriage to D's son and in case of breach to pay a certain sum as damages is unenforceable. 37 M. 393=24 M.L.J. 310=18 I.C. 515. An ante-nuptial agreement by a Mahomedan husband not to contract a second marriage is not illegal or invalid or immoral or opposed to public policy or in restraint of marriage. 10 L.B.R. 194=59 I.C. 804=13 Bur.L.T. 89. An agreement to pay a sum of money for persuading a woman to marry the person paying the sum is opposed to public policy and unenforceable. 50 I.C. 551=(1918) 3 U.B.R. 119. Contract of betrothal in marriage between parents of Hindu bride and bridegroom is valid—it is not marriage brokerage contract. See 1937 M.W.N. 1274. The plaintiff was anxious to have his son married. The defendants offered to procure a Jat girl for the boy, provided the plaintiff paid them Rs. 2,000. The plaintiff agreed and the defendants produced a girl who they represented was Jat. The plaintiff paid Rs. 2,000 in cash to the defendants and a date was fixed for the marriage. Before the ceremony, the girl informed the plaintiff that she was not a Jat but was a sweeper by caste and that the defendants had falsely stated that she was a Jat. On this the contemplated marriage did not come off. *Held*, that the agreement having remained unfulfilled the plaintiff was entitled to a refund of the money, even though the original agreement was void under S. 23. 1938 L. 849 (2). Public policy—Husband's promise to pay money for wife's personal ex-

penses is valid. 1929 L. 660=11 L. 85.

**MONOPOLY, GRANT OF.**—A contract by a District Board granting a person a monopoly of lorry traffic on a particular road to the exclusion of all other members of the public is opposed to public policy and is therefore void. (28 M. 520, Foll.) 35 P.L.B. 511=1934 L. 474. *See also* 19 Mys.L.J. 262. A contract or licence under which the licensee is entitled exclusively to collect the hides of all dead animals within a particular area of the Zamindari or raj of the grantor of the licence, and under which the chamars and owners of dead animals are bound to sell hides to the licensee and to none else, is one which purports to grant a monopoly and is unenforceable. 17 Pat. 255=1938 Pat. 473.

**PARTITION.**—*See* 39 C.W.N. 716.

**PARTNERSHIP.**—Where a person lends money to a partnership which is an illegal one or is forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, a suit by him to recover the amount so lent is not maintainable. 165 I.C. 765=1936 M. 603. *See also* 1937 B. 47.

**PERJURY.**—Where a litigant has agreed to give property to a certain person in consideration of latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for it is opposed to public policy and is therefore illegal. 187 I.C. 269=1940 Rang. 73.

**RESTRAINT OF TRADE.**—(*See also* Notes under S. 27). An agreement to form a combination of ginning factories to fix rates and to divide the profits in a certain manner is not either in restraint of trade or opposed to public policy. 10 A.L.J. 117=16 I.C. 631=34 A. 587. A combination amongst the traders of a locality to do business only amongst their members, to pay part of their profits to a common fund, and levying of certain penalty for the breach of the conditions is not actionable *per se* merely because it brings profits to them and indirectly hurts a rival in trade. 53 A. 316=1931 A.L.J. 84. The action of the Government restricting, by the issue of licences, admission of brokers into a market allowed to be held on Government land is neither illegal nor opposed to public policy. 18 C.W.N. 1194=24 I.C. 387=19 C.L.J. 313. A person purchasing goods for himself cannot claim commission the claim being opposed to public policy. 50 I.C. 975=16 P.W.B. 1919.

**STIFLING PROSECUTION.**—In order to render a transaction illegal on the ground that the object of the transaction was to stifle a criminal prosecution, it must be proved to the satisfaction of the Court that it was entered into or brought about in pursuance of an agreement to stifle a criminal prosecution. The mere possibility or a talk of criminal prosecution at some stage or another will not make the transaction illegal.

The mere fact that the plaintiff did not prosecute the defendant as at one time he threatened to do will not warrant the Court in inferring an agreement to abstain from prosecuting, when there is very little basis for finding that the plaintiff could ever have thought seriously that the defendant had committed any criminal offence at all. If the fact of the actual commission of an offence is beyond doubt and the plaintiff knows of it, his abstaining from prosecuting would afford some foundation for the argument that the non-prosecution must have been the result of an agreement not to prosecute. Further a distinction must be made in the case of a transaction where there is a pre-existing civil liability, for that is not the case where the plaintiff wishes to gain some money not already due to him, as a result of an arrangement entered into on the threat of criminal proceedings. When what the plaintiff does is only by way of taking steps to secure payment of a portion of the money undoubtedly due to him from the defendant, the transaction cannot be rendered illegal, merely because there is a threat or talk of criminal prosecution. The circumstance that the defendant becomes the obligor under the contract to the plaintiff in respect of a pre-existing liability of another person will not detract from the validity of the contract, it is only a factor to be borne in mind in drawing the inference of fact as to whether the contract was entered into in pursuance of an agreement to stifle a prosecution. It is not a principle of law that wherever a third person undertakes the liability of another in circumstances in which there has at one time been a talk or threat of criminal prosecution, the third person's promise is either without consideration or vitiated by illegality. (1937) 1 M. L.J. 414=44 L.W. 572=1937 M. 223. *See also* 155 I.C. 341=1935 O.W.N. 553; 19 Pat. 715=1940 Pat. 683; 6 Cut.L.T. 70; 1939 Pat. 291; 19 Pat. 424=1940 Pat. 573; 1941 Pat. 349; 193 I.C. 187; 41 P.L.B. 144=1939 Lah. 187; 1937 O.W.N. 1123; 1941 O.W.N. 391=1941 Oudh 593; 1941 Pat. 349; 54 L.W. 571=(1941) 2 M.L.J. 827; 1942 Mad. 662=(1942) 2 M.L.J. 191=I. L.R. (1943) Mad. 183; 1943 A.L.W. 329. An agreement which consists of a promise to do some act directed towards the stifling of criminal proceedings in respect of a non-compoundable offence is against public policy and is therefore void and unenforceable in a Court of law. If the agreement is the outcome of an understanding that the promisee (complainant) should not object to the withdrawal of the prosecution in respect of a non-compoundable offence is against public policy. The fact that it is not within the power of the complainant to withdraw the prosecution or complaint himself makes no difference. To avoid an agreement as being against policy, it is not enough that the

motive which impelled the party undertaking the liability under the agreement was that a pending criminal case should be withdrawn. The test is whether it was an express or implied term of the bargain between the parties that a non-compoundable criminal case should not be proceeded with. 46 Bom.L.R. 745=1945 Bom. 82=I.L.R. (1945) Bom. 208. A contract whereby a proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence is an agreement to stifle prosecution falling under S. 23 of the Contract Act. Proof that there has actually been a crime committed is obviously unnecessary. But it is of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. Such agreements are from their very nature seldom set out on paper; like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances. An agreement whereby a wife executes a mortgage bond of her property in discharge of debt due by her husband as part of the consideration for a promise by the husband's creditor to withdraw criminal proceedings against her husband is illegal and falls under S. 23 of the Contract Act, as there is an infringement of public policy. The fact that there was a debt really due by the husband is irrelevant when the agreement to abandon the prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or liability. Indeed if there were not a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a crime. 46 C.W.N. 1=1941 P.C. 93= (1941) 2 M.L.J. 726 (P.C.). See also 19 Pat. 424=1940 P.W.N. 878=1940 Pat. 573; I.L.R. (1943) Kar. 49=1943 Sind 197. It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the Judges, and put it in the hands of private individuals. The test to be applied in all such cases is whether it was an express or implied term of the bargain between the parties that a non-compoundable criminal case should not be proceeded with. If the consideration for a bond in contract is the withdrawal of a criminal prosecution, obviously it is hit by S. 23. But the fact that prosecution was actually withdrawn as a result of the execution of the bond by the accused in favour of the prosecution does

not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A distinction has always been drawn between the motive to a transaction and its object or consideration and it is not enough that the motive which impelled the party who executed the bond was that the criminal case against him might be dropped. To bring a case within the purview of S. 23, it is necessary to show that the object or consideration of the agreement is unlawful. When there is a just and bona fide debt owing by the accused, against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction. There, as between the debtor and the creditor, there is no trading on felony, which public policy condemns and the law attempts at preventing. The creditor gets just what he was entitled to, and there is no advantage or emolument coming to him for withdrawing the prosecution against his debtor. When security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case, and as such the security is not enforceable in law. The position is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced in law. 43 C.W.N. 147=1938 Cal. 840. Per Pal, J.—Embezzlement is a crime as also a tort and so far as the tortious liability involved in it is concerned, the remedy of the injured is an action for unliquidated damages. Embezzlement may also create a relation within the confines of what may be said to be *quasi contract*. When embezzlement takes place, the injured party may waive the tort and seek his remedy in an action based on *quasi contract* for "money had and received." No party is bound to sue in tort, when by converting the action into one of *quasi contract* he does not prejudice the tort-feasor. If the tort-feasor agrees to give the injured party a promissory note and a collateral security for the amounts embezzled by him and the consideration for the agreement is the undertaking given by the latter not to sue the former in damages or for money had and received, the agreement is valid and is for a perfectly valid consideration. If, however, the consideration for the agreement is the undertaking given by the latter not to prosecute the former criminally, the agreement is void as the consideration is illegal, the

offence being non-compoundable and its composition being opposed to public policy. An undertaking not to prosecute cannot however be inferred from the mere fact that the injured party held out threats of prosecution. Where there is a debt actually due, the mere use of such threats, though followed by an abstaining from prosecution, will not vitiate the transaction. 78 C.L.J. 129=1945 Cal. 218. An act may involve a person in a civil as well as a criminal liability for a non-compoundable offence, the liability depending on proof. The mere fact that an agreement may be made with regard to the civil liability while a possibility of prosecution criminally is existing will not render the agreement void, but if that agreement is made and part of the consideration for it on the side of the aggrieved party is an agreement not to prosecute criminally, then the agreement is void. If the agreement as to the civil liability changes the nature or the extent of the original civil liability, for example if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security; this will be a strong indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. The additional advantage so conferred by the agreement cannot be enforced in law, though it would be open to a party to fall back upon the original civil liability and enforce it. In considering the question as to whether the consideration of the agreement is the withdrawal of the criminal proceedings, the Court is not confined to the terms of the agreement. It is open to a party to give evidence from which the inference necessarily arises that part of the consideration is unlawful. I.L.R. (1940) 1 Cal. 372=44 C.W.N. 304=1940 Cal. 337. See also 39 P.L.R. 536=1937 Lah. 686. It is only in the cases of certain serious offences against the State that no composition is allowed and it is only in such cases that a compromise to withdraw the case is an illegal consideration. But, where there is a criminal case in respect of an offence which is compoundable with the permission of Court, a compromise during the pendency of the case to refer the dispute to arbitration and incidentally to withdraw the prosecution is perfectly lawful. 182 I.C. 490=1939 Lah. 98. Where there is an existing debt or an obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid. It need not be the sole bargain. Hence where a promissory note is executed

pending a criminal prosecution and it is proved that the withdrawal of such prosecution forms part of the consideration for the promissory note, the promissory note is unenforceable. 1936 M. 656=I.L.R. 1937 M. 471=(1937) 1 M.L.J. 489. See also 40 P.L.R. (J. & K.) 11; 19 Pat. 424=1940 Pat. 573. An agreement, the consideration of which is the dropping of a prosecution for a non-compoundable offence, falls under S. 23, Contract Act, being opposed to public policy, and cannot be enforced in a Court of law. But in order to determine it, the object of the agreement or the consideration is to be considered. If the consideration for it is something separate and the motive for the agreement is the hope that the prosecution will be dropped, S. 23 will not apply. Where the agreement is in effect an admission of pre-existing liability, and the consideration for it has nothing to do with the criminal prosecution, the fact that the prosecution was an incentive for accelerating the settlement does not make the consideration for the agreement unlawful within the meaning of S. 23. 151 I.C. 1025=1934 Pesh. 105. See also 43 C.W.N. 147=1938 Cal. 840. An agreement to withdraw an application for sanction to prosecute under S. 195, Cr.P. Code, is opposed to public policy. 46 I.C. 424. See 2 O.W.N. 791; 90 I.C. 463=29 C.W.N. 1029; 29 C.W.N. 855=89 I.C. 200=42 C.L.J. 90; 1925 O. 120. An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and is illegal. 25 I.C. 409=17 O.C. 213. See also 150 I.C. 734=1934 S. 71; 53 Cal. 51=1926 C. 59. But where the offence involves harm to an injured party, he can settle or compromise his private damage though the offence is of a public nature. 25 I.C. 409. Where a criminal complaint is shown to be false and the complainant's act amounts to coercion, a compromise entered into under these circumstances is not enforceable as there is no good consideration for the same. 187 I.C. 790=33 P.L.R. 630. Where the consideration for a bond is the withdrawal of a non-compoundable case, the bond is unenforceable. See 150 I.C. 734=1934 S. 71; 57 B. 678=35 Bom.L.R. 850=1933 B. 413. See also 53 A. 130=1930 A.L.J. 1592; 1937 A.L.J. 333=1937 A. 370. But where no part of the consideration for the bond was the price for the withdrawal of the criminal prosecution the contract is not opposed to public policy. 35 C.W.N. 28. So also where there was a pre-existing civil liability based upon an adjustment of accounts between the parties and the withdrawal was merely the motive and not the consideration for the bond the transaction is not hit at by this section. 35 C.W.N. 26. See also 49 A. 540=1927 A. 318; 74 I.C. 843; 1 O.L.J. 553=25 I.C. 409; 17 O.C. 213; 10



I.C. 555=8 N.L.R. 97; 46 I.C. 424; 26 I.C. 181=37 M. 385; 92 I.C. 503=1926 A. 270; 7 R. 800=121 I.C. 803=1930 R. 140; 53 A. 130=1930 A.L.J. 1592; 112 I.O. 459. A contract arising out of the composition of a compoundable offence is not against public policy. 62 I.C. 70. *See also* 4 Luck. 669=7 O.W.N. 575=1930 O. 196; 58 L.W. 605=(1945) 2 M.L.J. 468; 211 I.O. 162. A promissory note executed by the defendant in consideration of the plaintiff withdrawing a complaint of a compoundable offence is valid. 4 A.W.R. 964=1934 A. 1068. *See also* 1941 Rang.L.R. 816=1941 Rang. 231; 1943 Mad. 173=(1941) 2 M.L.J. 827. A bond otherwise supported by good consideration, but under which a criminal prosecution is also withdrawn is good in law and legally enforceable. 28 Punj.L.R. 388=1927 L. 530. In a suit for the recovery of money alleged to be due under a mortgage bond, *held*, that as the plaintiff was a party to a conspiracy for stifling prosecution he was not entitled to any relief. 56 O.L.J. 413. If it is an implied term of the reference to the arbitration of a civil dispute or an *ekrarnama* that the criminal complaint already filed would not be further proceeded with then the consideration of the reference or the *ekrarnama* as the case may be is unlawful and the award or the *ekrarnama* is invalid quite irrespective of the fact whether any prosecution in law had been started or not. 123 I.C. 187=1930 P.C. 100=59 M.L.J. 32 (P.C.). *See also* 117 I.C. 74=1929 L. 564. Reference by all partners of their dispute to arbitration, while a criminal complaint under sec. 406, Penal Code is pending against one of the partners and the prosecution is consequently dropped, the agreement to refer is not against public policy and is therefore enforceable. 101 I.C. 786=1927 L. 465. Agreement not to prosecute for non-compoundable offence is not enforceable. 41 I.C. 812=2 P.L.J. 630. A contract founded on the illegal consideration of compounding a non-compoundable offence is wholly void. 1 P.L.J. 48=33 I.C. 711=20 O.W.N. 760. A person standing bail for an accused in criminal case and forfeiting the bail bond on account of the laches of the accused is not entitled to recover from him the amount so paid on any express or implied contract, such an agreement being illegal as opposed to public policy. 1930 C. 596=57 C. 1093. Where a person in a position of trust embezzles sums of money belonging to his master, he exposes himself to the risk of a criminal prosecution, but he also remains under a civil liability to his master. The amount embezzled is a debt which he is responsible to pay, and if the man to whom such a civil debt is due, takes security for that amount from his debtor, even though the debt arises out of a criminal offence, the agreement to pay the amount is

enforceable in law and is not obnoxious to the provisions of S. 23. 1930 A.L.J. 1297=1930 A. 826 (1). As to the case of sureties, *see* 1937 Lah. 686=39 P.L.R. 536; 1938 Cal. 840; 1940 Cal. 337; (1942) 2 M.L.J. 191.

**INFLUENCING COURSE OF LITIGATION.**—Agreement to perform puja for a consideration in order to help a person in obtaining success in a pending litigation is opposed to public policy and is unenforceable, as intended to exercise unauthorized influence on the proper course of litigation. 49 A. 705=25 A.L.J. 518=1927 A. 406. But *see* 53 Mad. 29=57 M.L.J. 154; 1935 Nag. 119. An agreement providing that one of the parties should assist the other in carrying on a litigation commenced by the other and help him to evade or delay the execution of a decree passed against him is contrary to public policy. 1933 A.L.J. 85=1933 A. 303.

**ousting JURISDICTION OF COURT**, by agreement of parties, not valid. 1935 N. 48. *See also* 1 A. 267; 42 B. 380=45 I.A. 61 (P.C.).

Contract subject to rules and bye-laws of East India Cotton Association—Rules and bye-laws providing for reference of disputes to arbitration—Clause in contract providing for institution of suits in regard to matters arising out of transactions in particular Court only—No bar to reference to arbitration. 44 Bom.L.R. 485=1942 Bom. 239.

**PROSTITUTION—PAST CO-HABITATION.**—Where the past co-habitation is the consideration for a transfer of property, transfer, how far valid. 22 Bom.L.R. 762=57 I.C. 472=44 B. 542; 25 Bom.L.R. 252=1924 B. 135. *See also* 23 A.L.J. 376=47 A. 619=1935 A. 437; 23 A.L.J. 201=1925 A. 358; 35 Bom.L.R. 345=1933 B. 209. Past co-habitation is a good consideration. (13 M.L.J. 7, Appr.; 25 Bom.L.R. 252; 44 B. 542 and 1925 M.W.N. 828, Diss. from.) 59 M.L.J. 596; I.L.R. (1940) A. 371=1940 All. 385. The weight of authority in the Madras High Court is in favour of the view that past illicit co-habitation may validly support a promise to pay a sum of money. Such a consideration is not regarded as immoral though future illicit co-habitation will not support a promise, because it is immoral consideration. A promissory note executed in favour of a woman by a man in consideration of past illicit intercourse is not therefore void and unenforceable. 56 L.W. 24=A.I.R. 1943 Mad. 253=(1943) 1 M.L.J. 56. *See also* 23 Mys.L.J. 283. Agreement to pay maintenance to mistress not illegal or immoral. 12 O.L.J. 510=89 I.C. 573=1925 O. 536. An agreement by a person to pay to his past mistress a sum of money every month for her maintenance so long as she remained unmarried and unmarried, there being nothing in the agreement with reference to future asso-



ciation cannot be regarded as void as being immoral or opposed to public policy. An agreement to become a mistress, which is doubtless void as being immoral should not be confused with an agreement to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with her protector. Past consideration under the Indian Law is good consideration and the fact that the woman has rendered service in the past whether immoral or otherwise and has suffered an injury of a kind and continues to suffer from that injury forms a perfectly good consideration for the contract to compensate her. 17 Pat. 308=19 Pat.L.T. 893=1938 Pat. 502. Where the consideration for a bond was future adulterous co-habitation, the agreement is void under S. 23. 45 M.L.J. 551=76 I.C. 306=1924 M. 15; 153 I.C. 323=1935 Oudh 71. Money lent for assisting the borrower to visit brothels and bring in prostitutes cannot be legally recovered. 39 I.C. 767. Where it is no part of the contract between the lender and the borrower that the money lent should be utilised for immoral purposes and the lender has no control over the application of the money, he is not prevented from recovering the money. 69 I.C. 939=43 M.L.J. 695=45 M. 778. If the object of a transfer of property is immoral, for example, where the transfer is for future co-habitation and as a reward for past co-habitation, the transfer is void and the transferor retains the title in himself and would ordinarily be entitled to recover the property on the ground that the title has not passed from him. But the principle of equity enunciated in *Ayerst v. Jenkins*, L.R. 16 Eq. 275, would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. 35 Bom.L.R. 345=1933 B. 209.

**RELIGIOUS PURPOSES.**—An agreement between the *panda* and *pariwal* of a temple to participate in the offerings made by pilgrims is not contrary to public policy. 70 I.C. 124=45 A. 79=1923 A. 56; 24 I.C. 86. Sale of a share in the offerings made to a shrine and to a participant therein is not opposed to public policy. 34 P.L.R. 254=141 I.C. 427=1933 L. 223. Agreement to perform *pūja* for obtaining success in litigation being intended to exercise unauthorized influence on Court is opposed to public policy and unenforceable. 49 A. 705=25 A.L.J. 518=1927 A. 406. But *see* 53 Mad. 29=57 M.L.J. 154. Contract to propitiate deity to avert malign influence is valid in law. 31 N.L.B. 229=1935 N. 119. An agreement to pay bribe to procure the adoption of a boy is one against public policy, and cannot be enforced. 26 I.C. 779=27 M.L.J. 416=1 L.W. 926. **Religious purposes**—Agreement by a *Gayawal* to

pay part of his earnings from certain ceremonies to an *Acharya*—Validity of the agreement. 1 Pat.L.J. 539=38 I.C. 116. Agreement between two temples restricting and regulating each others' rights to take out procession is void. 24 L.W. 58=24 A.L.J. 801=1926 P.C. 64 (P.C.). The doctrine of public policy will not be extended beyond the classes of cases already covered by it and the Courts cannot invest new hands of public policy. The appointment of an officer, *Mutwalli* or *Manager* or *Superintendent*, by whatever name he may be called, for a term of three years and subject to dismissal on three months' notice is quite within the competence of the Committee appointed under S. 7, of the Religious Endowments Act, 1863, and such an agreement is not opposed to public policy, merely on the ground that the terms of appointment are not in accord with the position and powers of *mutwalli*, properly so called, and appointed under the general *Mahomedan* law. 61 C. 80=38 O.W.N. 214=1934 O. 328. Suicide is not an offence in India and is not against public policy by reason of its being a crime. Hence a policy of life insurance which covers such a risk is not on that ground opposed to public policy. 20 Luck. 194=1945 O.W.N. 8=A.I.R. 1945 Oudh 152.

**PARTIAL ILLEGALITY.**—It is settled that if one of the several distinct promises is illegal it will not prevent the rest from being enforced. 10 I.C. 465. In an illegal contract even though a part of the consideration may be legal yet if the legal part cannot be severed from the illegal, the whole contract is vitiated. 20 O.W.N. 760=1 Pat. L.J. 48=33 I.C. 711; 3 Pat.L.T. 386=67 I.C. 49; 15 I.C. 836. Where the law has imposed a personal disability of an absolute character, as in the case of a minor or a person of unsound mind, every contract made by him is void. Where the disability is partial, as in the case of a judgment-debtor to whom *Sec. 3*, C.P. Code, applies, an alienation made by him is invalid; but any agreement to pay money recoverable from his person and other property, moveable or immovable, is unaffected by the partial disability imposed by para. 11. Such agreement is enforceable in law and is as valid as any other contract. The executant admitted in a deed that a sum of Rs. 20,000 had been advanced to him and he undertook to repay it on demand. This covenant was quite distinct and separate from the other part of the agreement under which the debtor gave security for the payment of the amount due from him. The debtor was incompetent to mortgage the property by virtue of *Sec. 3* para. 11, C.P. Code. *Held*, that the creditor was entitled to enforce his remedy under the first part of the agreement. 144 I.C. 373=1933 A.L.J.

1522=1933 A. 468.

SEC. 23, ILL. (j).—Plaintiff, agent of a lady for selling her lands and occupying a fiduciary position, entered into an agreement with the defendants that the lands should be sold cheaply to the defendants at the then market price, and should not be sold to strangers even if better prices were offered by such strangers. The plaintiff was to be paid a commission of five per cent. on the sale price for trouble he was taking for the defendants. The sale having been completed, the plaintiff sued the defendants for his commission. *Held*, that the consideration for the agreement or the object of the agreement between the plaintiff and the defendants was fraudulent and also immoral, and that contract was unenforceable. 1936 M. 541=70 M.L.J. 724.

AGREEMENT BY AGENT EXCEEDING HIS POWERS.—Where a statute prescribes no penalties an agreement in breach of a condition imposed under powers given by it does not fall under sec. 23, Contract Act and where a condition is imposed under statute purely for administrative purposes an agreement in violation thereof is not void. Hence where a Cantonment Board agrees to confer on a person 'old grant' rights in land in the Cantonment area, there is nothing unlawful about it, but only a doubt as to whether the Board had the power to do so. It is really a case of an agent exceeding his authority and the principal not repudiating his action. Even if there is ground for considering whether S. 23 is applicable on the view that the agent's powers were circumscribed by law and that he acted *ultra vires*, the section would not be applicable because the consideration or object of the agreement is neither forbidden by any statute nor is of such a nature that, if permitted, it would defeat the provisions of any statute. 1942 A.W.R. (C.C.) 353=1942 O.W.N. 699.

MISCELLANEOUS.—A withdrawal of a suit by the landlord for rent against the tenant is a lawful consideration for a note executed by the tenant to the landlord. 25 I.C. 89=12 A.L.J. 331. An adjustment of an attached decree by an attaching decree-holder which involves serious injury to the rights of original decree-holder is hit by S. 23. 41 O.W.N. 880=1937 Cal. 468. An agreement by a sub-overseer in the service of a Nawab contrary to the conditions of his service is illegal and opposed to public policy. 11 I.C. 2. Agreement by agent exceeding his powers. 1943 Oudh 99. A clause in a Fire Insurance contract limiting liability of a company to claims made within one year is valid and binding. 11 Rang. 475=149 I.C. 15=1934 Rang. 15. A clause in an insurance policy cutting down limitation period for bringing suit for rejection of claim is enforceable. 27 O.W.N. 955=1924 C. 186. If the illegality of a transac-

tion is brought to the notice of a Court, the Court will not assist the person invoking its aid, even though the defendant has not pleaded the illegality and does not wish to raise objection. 24 C.W.N. 306=53 I.C. 773=30 O.L.J. 241. *See also* 145 I.C. 599=1933 M. 187. The form of risk note exonerating Railway Company from liability except for loss of complete package is not contrary to public policy. 40 I.C. 626=21 C.W.N. 815. As to agreements opposed to public policy, *see* 43 Bom.L.R. 758; (1940) 2 M.L.J. 353. (1941) 1 M.L.J. 807. Agreement to pay remuneration for settlement of civil dispute is valid in law. 14 I.C. 31=16 C.W.N. 480. A contract to pay brokerage is neither immoral nor opposed to public policy. 60 I.C. 727; 1931 P. 22. A bargain to have a caveat discharged is not contrary to public policy. 1931 C. 587=58 C. 699. Bargaining about public office is against public policy. 1931 A.L.J. 397. Whether judgment-debtors' objection to transfer of decree can be enforced. *See* 18 L.W. 453=76 I.C. 845=1924 M. 189. Contract opposed to law or public policy is legal according to French Law, but not according to law in British India. 45 M.L.J. 59=18 L.W. 314=1923 M. 708. An agreement to pay a vakil's clerk for special attention to his case is void being opposed to public policy. 41 M. 471=33 M.L.J. 724=42 I.C. 911 (F.B.). An illegal business may be prohibited lawfully and such prohibition gives no right of action. 39 M. 781=31 I.C. 324=29 M.L.J. 280. Transaction in yarn at place where no licence is issued—Contract for sale of yarn at such place is not—Enforceability—Contravention of Madras Yarn Control Order. 57 L.W. 195=(1944) 1 M.L.J. 256=1944 Mad. 387. Right to do scavenging work exclusively in houses of others cannot be recognised—Contract of assignment for consideration not valid. 51 L.W. 662=1940 Mad. 558. Maha Brahmans' offerings—Validity of agreement as to right to reside from agreement. 42 I.C. 794=20 O.C. 265. Purchase of house by a Buddhist monk, the same being forbidden by Buddhist Law—Transaction is void and suit by monk for ejectment is not maintainable. 5 R. 626. Suit by a Mahomedan—Agreement with a Hindu to remunerate him for offering prayers to God Subramanya for his success in the suit is valid—Validity. 57 M.L.J. 154=53 M. 29.

SECS. 23 AND 27.—The plaintiff and the defendant, who were both owners of motor buses made tenders to the postal authorities, to secure the license for carrying mails, entered into an agreement by which the plaintiff was to withdraw from the tender, and the defendant who wished to secure the license himself was to secure it and to pay the plaintiff a sum of Rs. 15 per month for a certain period and Rs. 20 in a certain contingency; the defendant secured the license, the plaintiff having withdrawn his tender under

*Void Agreements.*

Agreements void, if considerations and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

the agreement, but failed to pay the amounts agreed upon to the plaintiff. The plaintiff therefore sued, to enforce the agreements but the defendant pleaded that it was opposed to public policy and was also in restraint of trade. *Held*, that the agreement was not opposed to public policy, that it was impossible to treat the obtaining of the license from the Government as in the nature of a trade or calling and that the agreement was not invalid either under S. 23 or under S. 27. 59 L.W. 136=1946 M.W.N. 119=(1946) 1 M.L.J. 187.

SEC. 24: DISTINCT COVENANTS—SEVERABILITY OF.—If a contract contains distinct covenants some of which are legal and others illegal, the Court can enforce the legal ones; but if the covenants are not severable the whole contract is void for illegality; also if there is one promise made upon several considerations some of which are legal and others illegal. Again if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce that will not of itself prevent the rest from being enforced. The test will be whether a distinct consideration which is wholly lawful can be found for the promise called in question. 144 I.C. 373=1933 A.L.J. 1522=1933 A. 468. *See also* 57 B. 278=143 I.C. 331=35 Bom. L.R. 163=1933 B. 132; 167 I.O. 707=1937 B. 47. If there is one entire consideration for two several contracts and one of these contracts is for the performance of an illegal act the whole is void. Thus where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void. And if a contract or promise be founded upon a legal and an illegal consideration and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of part vitiates the whole. 1939 Rang.L.R. 711=1940 Rang. 45. S. 24 does not apply to transfers under T.P. Act. *See* 158 I.C. 267=1935 O.W.N. 1045=1935 O. 501. Section has no application to promises which are offered in the alternative. In such a case the rule applicable is contained in S. 58. 1931 A. 589 (2)=1931 A.L.J. 295. S. 24 has not been made applicable to transfers of immovable property and the language of S. 15, Tenancy Act, does not justify the inference that a relinquishment under S. 15 is forbidden by law. 1934 A.L.J. 1193=1934 A. 346. Where a usufructuary mortgage of an occupancy holding is void, a personal covenant to that effect is also void and unenforceable. 20 A.L.J. 318=44 A. 486=67 I.C. 792. *See also* 27 A.L.J. 479=116 I.C. 17, *contra*. *See also* 13 O.L.J. 449=

1926 Oudh 270; 5 Bur.L.J. 86=1926 R. 186. Where the deeds are mortgages of occupancy land which is forbidden by the Tenancy Act they come under S. 23 as agreements where the consideration or object was forbidden by law. The deeds cannot be enforced in any manner, even as simple money bonds and therefore the plaintiff cannot sue for the promises of payment of principal and interest in the bond, nor can he rely on the covenant in the bonds that if possession is not given, then the plaintiff should receive back the money. But the plaintiff has a right under S. 65 to the return of any money which he has been able to prove that he has advanced to the defendant under these void bonds. 1935 A.L.J. 339=1935 A. 256. *See also* 39 Bom. L.R. 1124. Where the mortgage consideration constitutes an independent transaction of loan, the mortgagee would be entitled to the return of the money. 3 O.W.N. 217=93 I.C. 310=1926 O. 270. For a case where it was held that the entire agreement was invalid and that it was not permissible for the Court to split the consideration, *see* 34 Bom. L.R. 404. Section does not apply to an out-and-out transfer. 85 I.C. 459=1925 A. 474. S. 24 does not apply to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. 39 A. 539=39 I.C. 785=15 A.L.J. 544. S. 24 has not been made applicable to transfer of immovable property. There is therefore no justification for stating broadly that even if the transfer of several items of properties can be split up and separated, the whole transaction is void because one part of it may be vitiated. Of course where the object of the consideration of the transfer is unlawful, as that word is defined in S. 23, the transfer is not effective. 1930 A.L.J. 45=122 I.C. 872=1930 A. 1 (F.B.). Contract may be invalidated either by the illegality of the object of the consideration itself or by the incapacity of the promisor to enter into such contract. In cases of inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But in cases of contract only partly beyond the competence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. 1930 A.L.J. 45=52 A. 338=1930 A. 1 (F.B.). For a case where the legal part of an agreement was upheld, *see* 15 B.L.R. App. 5; 1931 N. 6; 33 Bom.L.R. 260. *See also* 1933 L. 291. In a contract where one of

*Illustration.*

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

Agreement without consideration void, unless—it is in writing and registered.

25. An agreement made without consideration is void unless—

several considerations is unlawful the whole agreement is void. 20 O.C. 155=39 I.C. 540=4 O.L.J. 380; 18 I.C. 9; 35 A. 558=21 I.C. 878=11 A.L.J. 854; 39 A. 539=39 I.C. 785=15 A.L.J. 544; 86 I.C. 515=1925 N. 302; 47 A. 780=23 A.L.J. 521=1925 A. 543. Where there was one single consideration for two objects, namely, the lease of the right of a Municipality to collect tolls and taxes, and the part that was legal, that is, the one relating to the collection of tolls could not be severed from the illegal, *held*, that the whole contract was void. 35 Bom.L.R. 163=1933 B. 132. Where a woman agrees to serve both as a house-keeper as also by living in adultery, suit cannot be maintained even for services rendered as house-keeper. 27 A. 266. Promise by two persons—One executant forging signature of the other—Plaintiff consenting—No intention to cheat—Plaintiff can succeed against real executant. 21 L.W. 532=87 I.C. 48=1925 M. 920. If the various promises of the two parties are quite interdependent the fact that one large part of the contract is void must vitiate the whole. 70 I.C. 881. *See also* 145 I.C. 163=1933 L. 291. Contracts in violation of the personal laws of parties (as) the Hindu or Muhammedan laws are also void. 28 M. 413. Covenant opposed to law is illegal. 1924 A. 80=45 A. 621=21 A.L.J. 430.

Sec. 25.—To bring a case within this section it is necessary to show that there was an express promise to pay. A mere acknowledgment of liability even if it implies a promise would not be sufficient for purposes of the section. 131 I.C. 867=1931 A. 375; 1932 A. 279; 1930 A.L.J. 552=1930 A. 467; 141 I.C. 617; 1932 M. 219; 1933 A. 175=144 I.C. 1005=1933 A. L.J. 170; 12 Mys.L.J. 504; 18 L. 234; 1935 A.M.L.J. 14; 159 I.C. 447=1935 N. 221; 178 I.C. 259=1938 Lah. 264; *see also* 38 P.L.R. 85 (Son signing acknowledgment for father's debt is good consideration). The word "debt" in sec. 25 is used in its ordinary meaning of a sum payable in respect of a loan recoverable by action. 40 M. 31=82 M.L.J. 422=39 I.C. 220 (F.B.); 13 L. 448. Acknowledgment can form basis of suit. 1925 N. 9. An unconditional acknowledgment imports a promise to pay and can form the basis of a suit but an acknowledgment of time-barred debts which does not contain distinct promise to pay does not fulfil the requirements of sec. 25 (3) of the Contract Act and a suit is not maintainable thereon. 141 I.C. 617=1933 L. 200; 141 I.C. 425=1933 L. 47. *See also* 1934 L. 835. Mere implied promise to pay is not sufficient for the purposes of sec. 25. More than three years from the last item of account the balance was struck

and signed by the debtor. The entry however contained no words which could amount to a promise to pay. On a suit being brought on the basis of such entry, *held*, that the entry did not fulfil the requirements of sec. 25. 175 I.C. 446=1938 Lah. 155. *See also* 40 Bom.L.R. 1010=1938 Bom. 460. A promise to pay the amount which might be found due by the arbitrator on taking the accounts is not a promise to pay a "debt" within sec. 25 of the Act. 1925 N. 9. An account stated in the form of an acknowledgment of a debt amounts to a promise and implies the existence of a debt, but it may be rebutted by showing that there is no debt at all. But in the case of a "real account stated", with entries on both sides in which the parties agree that the items on one side may be set-off against those on the other side, and that the balance only should be paid, there is a promise for good consideration to pay the balance arising from the fact that items on the smaller side are set-off against those on the larger side and decreed to be paid in that way. 38 C.W.N. 813=1934 P.C. 144=67 M.L.J. 103 (P.C.). An agreement in respect of a barred debt is valid under sec. 25 although the promisor did not at the time of the agreement know that it was barred. 25 I.C. 36. *See also* 53 A. 963=1932 A.L.J. 77. Adequacy of consideration is not a matter to be taken into consideration in deciding whether an agreement is valid. 45 A. 590=21 A.L.J. 446=1923 A. 590. An agreement to take less than what is really due and also to give time for payment is not valid unless supported by consideration. 6 R. 191. The forbearance to enforce in a Court of law a claim *bona fide* believed to exist and to be enforceable, would be a good consideration for a contract. 44 A. 422=20 A.L.J. 285=1922 A. 260; 26 N.L.R. 320. 118 I.C. 646=1922 L. 689. Promise to defend a suit would be a good consideration. 99 I.C. 752. Simply acknowledging indebtedness without any promise to pay is not an agreement under sec. 25. 17 I.C. 722=14 Bom.L.R. 1020. But *see* 1929 L. 59. There is a difference between acknowledgment sufficient for Limitation Act, sec. 19 and Contract Act, sec. 25. In order to create a new contract as required by the latter the promise to pay must be expressed. 6 Pat. L.J. 121=60 I.C. 514=2 Pat.L.T. 303. *See also* 124 I.C. 243=1930 N. 236; 1930 P. 604; 10 Pat.L.T. 169; 1929 L. 541; 132 I.C. 420=1932 A. 38. As to difference between English and Indian Law, *see* 10 Pat. L.T. 169. A letter constituting an acknowledgment of liability cannot amount to a new contract within the meaning of sec. 25 (3) of the Contract Act unless it contains any definite promise to pay. 7 O.W.N. 420

(1) it is expressed in writing and registered under the law for the time being in force for the registration of <sup>1</sup>[documents], and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

or is a promise to compensate for something done, (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

or is a promise to pay a debt barred by limitation law.

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent, generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

#### LEG. REF.

<sup>1</sup> This word was substituted for the word "assurance" by sec. 2 and Sch. II of Act XII of 1891.

1930 O. 287. See also 1935 L. 984. Plead if authorised to admit liability under the section. 21 A.L.J. 713=75 I.C. 309=1924 A. 12. Agreement by a creditor with co-debtor not to sue him if he helps in realisation is not valid. 57 I.C. 844. In the absence of a contract by the promisee for rendering future services a promise to pay for services is without consideration and therefore void. 46 I.C. 282=23 C.W. N. 639. The promise of the vendee to defend a suit to be brought by a collateral of the vendors constitutes a legal consideration for the contract of sale. 2 L.L.J. 306. The withdrawal of proceedings under sec. 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties. 20 I.C. 817=20 P.B. 1914. A contract entered into by heirs of deceased to settle disputes and doubtful rights is valid and binds the minor members as adult members acted as *de facto* guardians for their benefit. 20 P. R. 1913=19 I.C. 411=185 P.L.R. 1913; 21 I.C. 768. Forbearance to litigate a legal claim is good consideration. 22 O.C. 163=6 O.L.J. 404=53 I.C. 104. Promissory note for barred debts is valid. 41 M.L.J. 567=45 M. 345=66 I.C. 155. A promise to pay something which the promisor is already under an obligation to pay is promise without consideration and cannot be enforced. Any separate promise made to pay the amount at any particular place must be supported by a consideration. 9 L. B.R. 75=39 I.C. 132. A composition with the debtor on the assurance of the joint debtor for payment of the balance amount is unenforceable. 15 I.C. 363=5 Bur.L.T. 81. What is natural love and affection to support a promise, see 4 C.W.N. 488; nearness of relation does not necessarily mean that. 4 C.W.N. 488. An agreement to pay maintenance to a wife entered into after the marriage is not supported by any consideration the marriage not being affected thereby. 11 I.C. 833=245 P.L.R. 1911. Promise to contribute money to charity out of one's own pocket not enforceable. 18 Pat.L.T. 288=1 937 Pat. 358.

SEC. 25, CL. (1): "PARTIES STANDING IN NEAR RELATION" must not be narrowed down to mean only near relatives. Wife's parents of a Mahomedan would come under the expression. 100 I.C. 350=4 O.W.N. 195=1927 O. 146. Where a person settles an annuity upon his alleged wife the settlement cannot be construed to be a contract for consideration of love and affection, but is a gift pure and simple, and no consideration is necessary. 36 C.W.N. 392=1932 P. C. 34=62 M.L.J. 292 (P.C.). The words 'near relation' used in sec. 25, Contract Act cannot be construed as the same thing as 'a near relative'. The words 'near relation' must be taken in their ordinary and natural sense and it would be a question of fact to be decided in each case as to whether a particular relationship would satisfy the statute or not. The law does not insist either on the relationship being a blood relationship or the relationship of love and affection being mentioned in the document in question. 1943 A.L.W. 78. Where an agreement not supported by consideration but in writing registered provided for payment of Rs. 100 every year as maintenance to the plaintiff who was the defendant's father-in-law's divided brother's wife, as it was impossible for her to maintain herself decently otherwise, and she sought to enforce the same: *Held*, that the parties could not be said to stand in a near relation to each other within the meaning of sec. 25 (1), and the agreement could not therefore be enforced. 56 L.W. 311=1943 M.W.N. 107=A.I.R. 1943 Mad. 591=(1943) 1 M. L.J. 422.

BENAMI TRANSACTION.—Purchaser under a sham transaction gets no interest in the property. 1928 M. 541=111 I.C. 690.

CL. (2).—An agreement by a person of full age to compensate a promisee for something voluntarily done for the promisor at the time when the promisor was a minor, falls within sec. 25 cl. (2) and is enforceable. But no interest can be recovered upon such an agreement. 2 L. 263=64 I.C. 121; 54 I.C. 436=20 P.L.R. 1920; 31 P. R. 1911=11 I.C. 321.

CL. (3).—Sec. 25 of the Contract Act only applies to contracts which are wholly without consideration and not to contracts which may be for inadequate consideration. The

In any of these cases, such an agreement is a contract.

*Explanation 1.*—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

*Explanation 2.*—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

*Illustrations.*

- (a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.
- (b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
- (c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.
- (d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.
- (e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
- (f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.
- (g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given

deed under Explan. (2) of sec. 25, inadequacy of consideration is not relevant unless it affects the question of free consent to contract. It is true that under sec. 25 (3), Contract Act an agreement to pay a time-barred debt is regarded as one without consideration but this sub-section only applies when a wholly gratuitous promise is made to pay a time-barred debt and not to those cases when a promise to pay a time-barred debt is made for some consideration though the consideration might be inadequate. When a new contract is made for a fresh consideration superseding the previous contract which had become barred by time but including it as a part consideration in the new contract, an action could be founded upon the new contract and it can be enforced in its terms without raising any question about the acknowledgment of a time-barred debt. An express promise to pay is not necessary in the case of an agreement to pay a time-barred debt and an implied promise would satisfy the requirements of sec. 25 (3). An express promise to pay interest on the debt acknowledged would reasonably include a promise for payment of principal also. 1942 A.W.R. (H. C.) 382=1942 A.L.J. 656=I.L.R. (1943) All. 171=(1943) All. 63. Though a barred debt may not be recoverable in a Court of law, yet, if by a fresh contract that debt is promised to be paid, then it would be a good consideration, and the contract would be valid under sec. 25 (3) of the Contract Act. It is not necessary for the creditor in order to get the benefit of sec. 25 (3), to show that the debtor knew when he promised to pay that the debt for the payment of which he was making a promise had become time-barred; nor is it necessary that the promise or contract itself must show that it was made for a past debt. There is nothing in the wording of sec. 25 (3) to this effect, although of course, the promise made in writing must be to pay a debt for which the creditor might have enforced payment but for the law of limitation. Sec. 25 (3) does not require

that in the writing itself the consideration should be described as past debt, when in fact it was such past debt and known to the debtor as such. The conditions necessary to make it a promise within sec. 25 (3) are that it should be in writing; be signed by the person to be charged therewith; and be a promise to pay wholly or in part a debt, of which the creditor might have enforced payment but for the law for the limitation of suits. The writing itself need not purport to pay such a debt, if in fact the writing was passed for the payment of such debt. 45 Bom.L.R. 837=A.I.R. 1943 Bom. 447. Unless a promise to pay is in writing it cannot fall within the purview of sec. 25 (3). The implied promise to pay which is contained in all acknowledgments does not attract the provisions of sec. 25 (3) because the promise to pay is not in writing. Consequently, the words "after making old accounts into consideration there remains to be paid a balance of Rs. 3,200" in an acknowledgment do not amount to a promise to pay within the meaning of sec. 25 (3). I.L.R. (1941) Nag. 141=1941 Nag. 100. See also 1937 Lah. 865. In order to keep alive a time-barred debt, the promise to pay must be expressed in unequivocal terms. 1939 Lah. 406. When a promise to pay falls under sec. 25 (3) it constitutes a valid agreement for the purpose of suing, whether there is a fresh consideration for the promise or not, and it is immaterial whether the debts covered thereby are within limitation or not. 40 P.L.R. 689=1938 Lah. 757. See also 1940 N.L.J. 607; 1939 A.M. L.J. 147. Sec. 25 (3) requires that the person reviewing time-barred debt must be either the person himself or his agent generally or specially authorised in that behalf. A *de facto* guardian of a minor is not generally or specially authorised to renew a time-barred debt and has therefore no power to renew a time-barred debt. 41 Bom.L.R. 896=1939 Bom. 464. See also (1940) 1 M.L.J. 682. Sec. 25 (3) makes a debt recoverable only when a certain form of ack-



nowledgement is made as regards a time-expired debt. It does not allow the institution of a subsequent suit, where a debt was held irrecoverable in an earlier suit owing to the minority of the debtor. 1940 A.M.L.J. 72. *See also* 1937 O.W.N. 1034. Sec. 25 (3) applies only to a case in which there is an express promise to pay and has no application to a case where an implied promise is inferred from a mere acknowledgment. 1931 A.L.J. 56; 1932 A.L.J. 279. In order to comply with the terms of sec. 25 (3) there must be an express promise to pay a time-barred debt. If there are two debts, one barred and the other not, the promise to pay the latter cannot be interpreted as a promise to pay the former. Nor can a promise to pay an imaginary debt be interpreted as a promise to pay a barred debt. Where in lieu of the time-barred remittances of money a mortgage is executed, a promise in writing in the mortgage-deed to repay the consideration money cannot be said to be a compliance with sec. 25 (3), when there was in fact no consideration for the mortgage and the transaction is found to be *benami*. 1941 Cal. 419. The mere mention of a debt in the schedule of creditors cannot amount to anything more than a mere acknowledgment. It cannot be held to contain in itself a promise to pay. 18 Lah. 562=39 P.L.R. 678=1937 Lah. 382. *See also* 1938 Bom. 460=40 Bom.L.R. 1010; 171 I.C. 96; 51 L.W. 520=1940 Mad. 678=(1940) 1 M.L.J. 682. But *see* 1939 A.M.L.J. 137. The promise referred to in sec. 25 (3) must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. There must be a distinct promise to pay. 51 L.W. 520=1940 Mad. 678=(1940) 1 M.L.J. 682. But *see* 1939 A.M.L.J. 137; 1939 Lah. 486. Where the debtor proposes in a letter to pay a time-barred debt by monthly instalments and remits some of the instalments as proposed, the acceptance of the instalments by the creditor constitutes acceptance of the proposal by conduct so as to convert the proposal into a promise within the meaning of sec. 25 (3). 1940 Rang.L.R. 377=1940 Rang. 159. Sec. 25 (3) of the Contract Act is based on an agreement, but when there is no agreement, the section will not apply. Hence an offer by the debtor before the Debt Conciliation Board, undertaking to pay a creditor seven annas in the rupee of the debt due to him, which the creditor does not accept, cannot be utilised to found a claim based on sec. 25 (3). 1945 M.W.N. 713=53 L.W. 618=(1945) 2 M.L.J. 405. Where a newly admitted partner along with the existing partners acknowledges that on a particular day a particular amount is due from the partnership to their creditor, there is sufficient consideration for the newly admitted partner's undertaking to pay the acknowledged debt. The acknowledgment thus creates a new contract as the admitted partner obtains the promise of a partnership as

the condition of his liability. 48 C.W.N. 36=A.I.R. 1943 P.C. 147=(1943) 2 M.L.J. 417 (P.C.). Where a claim is barred by statute nothing short of an express promise can provide a fresh period of limitation. 161 I.C. 703=1936 L. 164. But for a promise to pay a time-barred debt to be a good consideration, it is not necessary that the debtor must expressly state that he was renewing a barred debt. 1936 L. 1016. *See also* 1937 Lah. 642. It is not necessary that an agreement to pay a debt barred by the law of limitation should refer in terms to the barred debt. 1938 Rang.L.R. 6=1938 Rang. 134. Unless a promise to pay is in writing it cannot fall within the purview of sec. 25 (3). 174 I.C. 374=1938 Nag. 180. *See also* 18 Lah. 562=1937 Lah. 382; 1941 Nag. 100. Wherever there is a balance struck and interest has been fixed or agreed to be paid, the words have always been construed to mean a promise to pay within the meaning of sec. 25 (3). I.L.R. 1938 Lah. 193=1938 Lah. 234 (F.B.). But *see* 1938 Bom. 460=40 Bom.L.R. 1010. Where a balance is struck in the account book of a creditor and is followed by the words "*bagi chahi hain*" signed by the debtor, the document is an "agreement" and not a mere "acknowledgment", as it contains a promise to pay. 41 P.L.R. 194=1939 Lah. 486. But *see* 40 Bom.L.R. 4; (1940) 1 M.L.J. 682. Sec. 25, cl. (3) should be liberally construed. 129 I.C. 545=1931 A. 154. Construction of cl. (3). 57 C. 394=33 C.W.N. 965=1929 C. 444; 112 I.C. 740. Scope of cl. (3). *See* 27 A.L.J. 901=119 I.C. 109=1929 A. 586. An express promise to pay a portion of a debt is not sufficient and cannot provide a good cause of action in regard to the portion for which there is no express promise. If a person promises to pay a portion of a barred debt he can only be sued for that portion and not for the whole debt. 51 L.W. 520=1940 Mad. 678=(1940) 1 M.L.J. 682. The words "by the person to be charged therewith" in sec. 25 (3) are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. 51 L.W. 520=1940 Mad. 678=(1941) 1 M.L.J. 682. *See also* 40 Bom.L.R. 896. Sec. 25 (3) of the Contract Act requires that in the case of a time-barred debt there should be a promise in writing to pay the barred debt. An acknowledgment of the debt in a sale-deed is not sufficient for that purpose. 1930 L. 985. A contract entered into by a minor, being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. Sec. 25 has no application to the contract of this kind. 177 I.C. 388=1938 Lah. 159. *See also* 1937 O.W.N. 341=1937 Oudh 300. Where the debtor writes to the creditor ack-



nowledging his liability to pay a debt which is time-barred but the letter does not contain promise to pay the writing cannot form the basis of a suit as it does not amount to a new contract. 124 I.C. 245=1930 N. 236. An acknowledgment even when it is not made to any creditor may if unconditional amount to a promise. It is however highly necessary to examine the circumstances of each case to see whether there is anything in conflict with such an inference. Where the debtor makes an arrangement for the payment of a debt by somebody else it cannot be held that the debtor promised to pay the debt himself and a fresh contract cannot be inferred. 1932 M.W.N. 52=1932 M. 219. "Limitation" in sec. 25, cl. (3) means limitation of time as prescribed by the law of limitation. 129 I.C. 545=1932 A. 154. A judgment-debt comes under the meaning of sec. 25 (3). 50 C. 974=28 C.W.N. 322=79 I.C. 439. See also 4 C. 500; 3 A. 761; 26 A. 363; 14 B. 300. A promise in writing to pay a barred debt is valid even if the promisor is not aware that the debt is barred. 20 I.C. 809=18 C.L.J. 269; 21 I.C. 254=18 C.L.J. 329; 49 A. 496=25 A. L.J. 405=1927 A. 677. But where an acknowledgment is proved to have been made by inadvertence or mistake, it cannot be treated as implying a promise to pay even though it may be ostensibly unconditional. 1933 A.L.J. 170=1933 A. 175=144 I.C. 175. An unconditional acknowledgment imports a promise to pay and can form the basis of a suit but an acknowledgment of time-barred debts which does not contain distinct promise to pay does not fulfil the requirements of sec. 25 (3) of the Contract Act and a suit is not maintainable thereon. 141 I.C. 617=1933 L. 209. See also 34 P. L.R. 252. Oral promise not sufficient. 86 I.C. 942=1925 M. 1147. Where the debtor promised to pay by a share of the profits of a business, *held*, that the plaintiff could not recover in any other way. 14 I.C. 133=16 C.W.N. 636. The promise may be absolute or conditional. The whole of the promise whether free or clogged with a condition gives the cause of action. 16 C.W.N. 636. The new promise is the measure of the creditor's right. 14 I.C. 133=16 C.W. N. 636. See also 38 C.W.N. 253=1934 C. 178, *infra*. A promissory note executed in renewal of a former note which is barred by limitation is a promise in writing to pay a debt of which the creditor might have enforced payment but for the law of limitation within the meaning of sec. 25 (3) of Contract Act. The maker's knowledge or want of knowledge that the claim under the prior note has become barred has nothing to do with the matter and does not affect his liability, under the fresh note. To make the knowledge of the promisor a condition of his liability under sec. 25 (3) would be to read into the words of the statute something which is not there. 40 C.W.N. 130. See also 167 I.C. 919=1937 O.W.N. 341; 1935 A.L.J. 1256. Where the defendants executed a hand-note in satisfaction of a

decretal debt due from their father which was at that time barred, *held*, that the note contained a distinct promise to pay the amount in writing and signed by the defendants as contemplated by sec. 25 (3) of the Act; but that they were not personally liable because under the law, their liability was limited to the assets which had come to their hands and a promise to pay the debt personally would be without consideration. (51 A. 983, *Rel. on.*) 148 I.C. 1305=58 C. W.N. 253=1934 C. 178. A suit lies on a written promise to pay a barred debt under sec. 25 (3). 73 I.C. 652=1923 L. 481; 14 I.C. 123=16 C.W.N. 636; 20 I.C. 839=18 C.L.J. 269; 66 P.R. 1917=41 I.C. 915; 37 C.W.N. 326=1933 C. 659.

JOINT HINDU FAMILY AND MINORS.—Debt by manager—Promissory note by junior members, validity of. 41 M.L.J. 567=66 I.C. 155=45 M. 345. See also 6 Pat.L.J. 121=2 Pat.L.T. 203. A pro-note passed by a Hindu father or grandfather for a time-barred debt is enforceable against him and after his death against his sons or grandsons. 34 Bom.L.R. 1005. A promise to pay a barred debt by a manager of a Hindu family who is not the father of a junior member of a joint Hindu family, is not binding on such junior member. The question lies within the region of the Hindu Law and not of the Contract Act. Sec. 25 (3), Contract Act, does not apply to such a case. 1927 Nag. 327. Where the petitioner enters into a money bond not to raise personal loan but only to pay off his deceased father's time-barred debts, a decree on the bond can be passed only against the estate of the deceased in his hands, but no personal decree can be passed against the petitioner. 177 I.C. 388=1938 Lah. 159. Sec. 25 (3) applies to the case of a minor executing a promise in writing to pay a debt of his guardian. 65 I.C. 716=1922 N. 250. But *see*, 1934 Pesh. 123 (Minor on attaining majority is not legally capable of ratifying contracts entered into by him during his minority). Guardian of minor cannot make a valid promise to pay time-barred debt. 1928 C. 850=115 I.C. 263. A barred debt is a good consideration for a sale. 21 I.C. 69. In order that a valid contract may be constituted under sec. 25 (3), it is necessary that the statement should be in writing and should be signed by the person charged therewith or by the agent generally or specially authorized. 21 A.L.J. 713=75 I.C. 309=1924 A. 12; 61 P.R. 1893. Mortgage of partnership property by one partner—Binding character of mortgage disputed by the other partner—Compromise—Subsequent declaration of invalidity of mortgage as regards the disputing mortgagor's share—Effect of. 19 C.W.N. 193=28 M.L.J. 448=26 I.C. 924 (P.C.). A mortgage was executed by a person after attaining majority and part of the consideration for the mortgage was the payment by the mortgagee to a creditor of the mortgagor, who had advanced money during the mortgagor's infancy. In a suit by the son of the mortga-

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business is to that extent void.

gor challenging the mortgage, *held*, that payment by the mortgagees to the creditor was a valid consideration. [49 A. 137 and 1928 A. 440 (F.B.), Dist.] 147 I.C. 234=1933 A.L.J. 1399=1933 A. 659. Bond of Hindu son to pay father's time-barred debt—To what extent valid. *See* 51 A. 983.

Sec. 26.—An agreement to pay a woman certain annual allowance only “until” death or re-marriage or “during widowhood” is not illegal. 16 I.C. 13=10 A.L.J. 185. Though sec. 26 is general in its terms it is doubtful whether partial or indirect restraint on marriage is within its scope. A provision in a compromise between two widows whereby either of them would be divested of her share in her husband's property on her re-marrying is not void. 1942 A.L.J. 446=A.I.R. 1942 All. 351. A kabin-namah by which a Mahomedan husband authorizes his wife to divorce herself from him in the event of his marrying a second wife, is not void under sec. 26. A Mahomedan husband may delegate to his wife power to divorce on certain conditions. 31 I.C. 562=19 C.W.N. 1226. A custom to pay a bride price while marrying a major girl is immoral and in restraint of marriage and is therefore unenforceable. 58 I.C. 167=1 L. 574. An agreement for payment of money spent on the boy's education if he married another during the lifetime of his wife is void. 7 L.B.R. 304=24 I.C. 777. Sec. 26 is not restricted to the case of the first marriage only but also applies to a person already married. 7 L.B.R. 304=24 I.C. 777. Contract by husband to live with wife and not take another wife—Breach—Damages recoverable by suit. 15 I.C. 915=(1912) 1 U.B.R. 108. A condition in a *wakf* to the effect that if the widow of a sharer re-married, she would forfeit her right to the profits under the *wakf* is neither illegal nor improper. 9 O.W.N. 105=130 I.C. 292=1932 O. 108.

Sec. 27.—It is settled law that a bare agreement in restraint of competition cannot be upheld. Such an agreement can only be sustained when it is ancillary to some main transaction and is reasonably necessary in the interests of both parties in order to render that transaction effective and is consistent with the interests of the public. I. L.R. (1943) Kar. 49=A.I.R. 1943 Sind 197. Construction of terms of a document relating to sale of goodwill. *See* 47 M.L.J. 687=26 C.W.N. 345=48 C. 1030=48 I.A. 508 (P.C.). *See also* 39 I.C. 177. Sec. 27 contemplates not only a total but a partial restraint also. A contract requiring the defendants to sell hides only to the plaintiff and to nobody else is a partial restraint on the defendant's exercise of their trade and as such void under that section. 1937

O.W.N. 879=1937 Oudh 445. (*See also* 1942 Sind 114. Agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are not void under sec. 27, Contract Act, on the ground that they are in restraint of trade. Such agreements are enforceable. Whether a particular covenant in a particular agreement is unreasonably wide has to be decided by the nature of the agreement, the qualifications of the employee and the service he has to render, along with the place where the employee can get alternative service of the same nature. 43 Bom.L. R. 90. Where a person enters into a covenant to the effect that “he will not directly or indirectly engage in any other sardine business whatever in the Dominion of Canada,” it cannot be said that a shareholder in a company carrying on such business or being a partner therein is necessarily a breach of the covenant. The phrase “directly or indirectly” is not void for uncertainty. It is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. In cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him within bounds, which, having regard to the nature of the business, are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy. This principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company. The same result may well follow in a case where, instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold, and one or more of the directors or managers of the company, being interested in the sale, are willing in order to enable the transaction to go through, or to obtain a better price, to enter into restrictive covenants with the purchaser. Where there is a good will to be protected, a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life. The onus of establishing that such a covenant is injurious to the public in the sense that it is calculated to produce a pernicious monopoly is upon the party who attacks the covenant. When the Court is satisfied that the restraint is reasonable as between the parties, and that there are no reasonable grounds for holding that the restriction is

**Exception 1.**—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

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## LEG. REF.

<sup>1</sup> Exceptions 2 and 3 were repealed by sec. 73 and Sch. II of Act IX of 1932.

likely to produce a real monopoly, it is impossible to say that the public interest is affected. 196 I.C. 871=53 L.W. 266=1941 P.C. 75 (P.C.). See also I.L.R. (1943) Kar. 49. Where the two branches of the profession, viz., barristers and solicitors, are amalgamated in a place, an agreement by a barrister not to practise for a reasonable time is valid and its breach can be restrained by an injunction. 19 I.C. 822=17 C.W.N. 215 (P.C.). The right of free contract cannot be ignored by Courts of law without an express statutory prohibition. 34 I.C. 441. See also 130 I.C. 482=1931 A. 539. An agreement between the neighbouring land-owners that market for sale of cattle shall not be held on the same day on the lands of both is not void under sec. 27. 37 A. 212=27 I.C. 871=13 A.L.J. 281. Trade or calling—Securing of licence to carry Government mails—Tenders by rival motor owners—Withdrawal of tender by one in consideration of payment of fixed amount by other monthly—Agreement—If invalid as being in restraint of trade or calling. See (1946) 1 M.L.J. 187.

**CONTRACT IN RESTRAINT OF TRADE—TEST OF VALIDITY—ONUS.**—A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public. When a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. 150 I.C. 232=1934 P.C. 101=66 M.L.J. 510 (P.C.).

There is nothing in the wording of sec. 27 of the Contract Act to suggest that the principle stated therein does not apply when the restraint of trade or business is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to the section. I.L.R. (1942) Kar. 25=A.I.R. 1942 Sind 114.

**AGREEMENT BETWEEN TRADERS FOR MUTUAL BENEFIT.**—Two owners of factories entered into a partnership to avoid competition. It was mutually agreed that only one factory namely, that of the defendant should be worked at first and that after deducting its cost of making, the balance should be distributed between the parties in certain proportions. It was also provided that if there was a larger demand, the second factory should also be worked by mutual agreement. One of the parties having instituted a suit for ac-

count. *Held*, that the agreement satisfied the definition of partnership and *held*, that it was not void under sec. 27 of the Contract Act as being in restraint of trade. 146 I.C. 1030=1934 L. 110.

**PURCHASE OF PROTECTION AGAINST MERE COMPETITION—LEGALITY OF.**—Covenants restrictive of competition are sustained when they are ancillary to some main transaction, contract or arrangement and necessary to render it effective. But a bare covenant not to compete cannot be upheld. Where the agreement between the parties was, in substance, nothing more or less than a contract whereby in consideration of a sum of money the appellants undertook for a period of fifteen years not to engage in the business of brewing beer and to confine themselves solely to the business of brewing sake. *Held*, that the agreement was open to the objection that it constituted a purchase of protection "against mere competition"; further, the restrictions on manufacture not being confined to any particular place, the covenants could not be held to be reasonable. [(1919) A.C. 548, Ref.] 1934 P.C. 101=66 M.L.J. 510 (P.C.).

**EXCEPTION (1).**—Good will, what is—Restraint of trade, what amounts to. 39 I.C. 177=21 C.W.N. 979. A contract by a theatrical party with the plaintiff not to play anywhere else or in any other theatre in any town till the termination of the period in question, is void as being one in restraint of trade and no injunction can be issued against the company restraining performance in any other place. 14 I.C. 215=16 C.W.N. 531. Where one of two rival cooly-suppliers agreed not to supply coolies in consideration of the latter paying Rs. 50 monthly to the former, the agreement was void as being in restraint of trade. 21 I.C. 768=1914 M.W.N. 108; 70 I.C. 881=1 Bur.L.J. 72; 33 I.C. 238. Where a claim is found on tort, secs. 23 and 27 do not apply. A combination amongst the traders of a particular locality to do business only amongst their members to pay part of the profits to a common fund, etc., and levying of certain penalty for the breach of the conditions does not offend against the provisions of secs. 23 and 27 and is not actionable *per se* merely because it brings profits to them and indirectly hurts a rival in trade. 1931 A. 83=53 A. 316=1931 A.L.J. 84.

**CONTRACT OF PERSONAL SERVICE.**—Provision against service elsewhere valid. 64 I.C. 794=11 L.B.R. 26. The agreement of a plaintiff not to set up a business in consideration of which the defendant promised to pay a certain sum for life was held to be void, in restraint of trade. 33 I.C. 238=3 L.

28. Every agreement, by which any party thereto is restricted absolutely

Agreement in restraint of legal proceedings void.

from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may

thus enforce his rights, is void to that extent.

B.R. 389. *See also* I.L.R. (1943) Knr. 49.

Sec. 28.—Agreements ousting jurisdiction of Courts are not valid. 1 A. 267. *See also* 1935 Nag. 48. No man can exclude himself from the protection of Courts by a contract entered into with another. 42 B. 330=22 C. W.N. 601=35 M.L.J. 262=45 I.A. 61 (P. C.). *See also* 1935 N. 48. Compromise of doubtful rights arising out of a previous contract is valid. 94 I.C. 371=1926 S. 202. Sec. 28 of the Contract Act makes void only those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. It has no application when a party only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried. Accordingly, an agreement between the parties to a contract, where a suit can be tried within the territorial limits of several Courts to the effect that it will only be tried in one of the Courts having territorial jurisdiction and that the parties will be limited to have recourse to only one of the several competent Courts, is not within the mischief of the section and is valid and enforceable. I.L.R. (1945) Lah. 291=47 P.L.R. 378 (F.B.): 20 Luck. 105=1944 Oudh 275; 40 C.W.N. 58; 49 C.W.N. 123; (1943) 2 M.L.J. 375. An agreement that all payments and other transactions should be deemed to have been effected at a particular place, does not vest jurisdiction solely in the Court at that place. Its only effect is to introduce a sort of fiction as to the place of accrual of cause of action, and the ordinary law as to jurisdiction is thereupon to operate 49 C. W.N. 123. Where two Courts, A & B, have jurisdiction to try a suit, an agreement between the parties that any legal action resulting from their contract should be taken in Court A has the effect of preventing them absolutely from filing a suit in Court B, which they have a right to do, and it is, therefore, within the mischief of sec. 28 of the Contract Act. Even if the agreement is not void, it is putting the matter too high to say that it has taken away the jurisdiction from the Court B, although the fact that the parties willingly made the agreement may afford a good ground for transfer. 221 I.C. 633. Where in spite of the fact, that, under the ordinary provisions of law, a particular Court would have jurisdiction, the parties provide by their agreement that another Court to the exclusion of the former Court shall have jurisdiction to adjudicate upon the disputes arising under the agreement of the parties, such an agreement is illegal. But, if such an agreement specifies the place where the terms of the contract have to be carried out, in other words where, according to the facts stated in the agreement, the cause of action is deemed to arise, the agreement is

legal. 122 I.C. 488 (2)=1930 L. 611. *See also* 32 Bom.L.R. 43. But *see* 11 C. 282

Where in a contract entered into between two parties the cause of action partly arises in one place and partly in another, and the parties agree in terms of the contract that in case of any dispute arising out of the contract it shall be litigated only within the jurisdiction of one particular Court, and here the Courts in both places have jurisdiction, such an agreement is a valid one and enforceable under the law and the parties are bound by it. But this principle has no application when the particular Court has no pecuniary jurisdiction to entertain the suit. In such a case the agreement will in effect amount to divesting the only competent Court of its jurisdiction and vesting it in another which has no pecuniary jurisdiction, and it is, therefore, invalid. 49 C.W.N. 123. It is not unnatural that a big company which has agents all over the country should enter into agreements with its agents that disputes should be tried in a place where it has its head office, and if the agents agree that disputes should be tried by one out of two competent tribunals, they should be held to this agreement. Nor does sec. 28, Contract Act, prohibit an agreement which restricts a litigant to one Court out of two. 20 N.L.J. 247=1937 Nag. 334. A clause in a mercantile contract to the effect that all suits arising out of it should be filed only in the Courts in a specified place which is the place of business of one of the parties to the contract, is not illegal and does not offend against sec. 28. 56 L.W. 580=1943 M.W.N. 703=A.I.R. 1944 Mad. 47=(1943) 2 M.L.J. 375. The parties to a contract one of whom resided in Bombay and the other in Jalgaon agreed that if any dispute arose between them in respect of their contract, the same should be referred to the Bombay High Court or such Courts in the Town and Island of Bombay as had jurisdiction in the matter. The contract having been broken, a suit for damages was filed in the sub-Court at Jalgaon. The defendant pleaded that under the agreement the suit could only be tried in Bombay. Held, that the agreement was not void under sec. 28, Contract Act. 37 Bom.L.R. 157. Contract for purchasing and sending goods from one place to another—Clause treating all legal disputes as having arisen at one place only—Not an agreement in restraint of legal proceedings. 49 M.L.J. 189=90 I.C. 1019=1925 M. 1145. But *see* 221 I.C. 633. Clause cutting down period of limitation for suit is enforceable. 27 C.W.N. 955=1924 C. 186; 16 I.C. 1001=14 Bom.L.R. 741; 38 B. 344=15 Bom.L.R. 948; 11 R. 475=1934 R. 15. But *see* 11 I.C. 756; 32 I.C. 937. *See also* 91 I.C. 622=1926 R. 3; 138 I.C. 793=34 Bom.L.R. 634

**Exception 1.**—This section shall not render illegal a contract by which two

Saving of contract to refer to arbitration dispute that may arise.

or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

<sup>1</sup>[When such a contract has been made, a suit may be brought for its specific per-

Suits barred by such contracts.

formance, and if a suit, other than for such specific performance or for the recovery of the amount so awarded is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

**Exception 2.**—Nor shall this section render illegal any contract in writing,

Saving of contract to refer questions that have already arisen.

by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

#### LEG. REF.

<sup>1</sup> The second clause of Exception 1 to sec. 28 is repealed by Act I of 1877, throughout British India. The clause is, however, printed here in italics, because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply.

1932 B. 330; 1931 S. 124; 1931 A. 273. Agreement to refer to arbitration before going to Court may be given effect to by stay of proceedings in Civil Court. See 34 B. 13; see also 1937 A.L.J. 823=1937 All. 650; 120 I.C. 826; 156 I.C. 277=37 Bom.L.R. 157=1935 B. 198. (Agreement to select one of two competent tribunals for disposal of disputes is valid). But an agreement referring a criminal matter with a view to stifle prosecution. 37 C.W.N. 749=1933 C. 817. Where a dispute arose between a contractor and a Railway Company over rates charged by the former for the construction work done by him and the contractor's claim was disposed of by the Chief Engineer of the Railway, who was also the person whose decision on disputed claims was agreed to by the parties as final, the Court must be satisfied that the Engineer was conscious of the fact that he was called upon to exercise that power, and was exercising that power with the sense of responsibility and judicial independence required for the purpose. 1935 M. 356=41 L.W. 130. See also 1933 S. 347; 139 I.C. 362=1932 O. 265. An agreement with the Secretary of State by which the plaintiff undertook to abide by the decision of the Deputy Commissioner in all matters relating to the contract is valid; the Deputy Commissioner is not the agent of the Government and it cannot be regarded as a reference to a party to the contract. 139 I.C. 362=9 O.W.N. 563=1932 O. 265. An agreement that the parties to an arbitration will not raise any objections whatever to the award is opposed to the spirit of sec. 28. 117 P.B. 1916=34 I.C. 192; 32 Bom.L.R. 43. See also 6 M. 368. Agreement to be bound by award beyond the scope of the dis-

pute, whether on a private reference or one made through the Court in a pending suit would be void. 102 I.C. 183 (11 S.L.R. 43; 13 S.L.R. 75, Foll; 1925 P.C. 293, Rel. on). A barrister-at-law practising as an advocate in the High Court is not disentitled to sue his client for recovery of fees due. 1933 A.L.J. 451 (F.B.) (25 A. 509, overruled). 55 A. 570=143 I. C. 727=1933 A. 417. Agreement not to appeal, when valid. See 8 C. 455; 1 A. 267; 6 M. 368; 6 B. 528; 33 C. 1169; 1 C. 466. An agreement not to appeal against a decree is not void and is not prohibited by sec. 28. Where in a suit by the lessor for ejectment and recovery of rent and cess the lessor obtained a decree for the latter relief while ejectment of the lessee was refused and both the lessor and lessee subsequently drew up an agreement by which the lessee accepted the decree and paid the decretal amount. Held that as the parties had agreed to treat the decision as final it must also be held that they had agreed by implication that neither party should prefer an appeal. 1934 P. 644. Restraint on execution of decree is void. 44 M. 919=41 M.L.J. 316=69 I.O. 337 (F. B.). But see 7 A. 124. Clause in bill of lading providing suits for loss to be brought within one year valid. 34 Bom.L.R. 634=1932 B. 330. Also 133 I.C. 77=1931 S. 124. But see also 54 A. 573 (F.B.). So also condition in a maintenance deed restraining suit for more than one year's arrears at a time is valid. 36 C.W.N. 555=1932 C. 720. A condition in a Life Insurance Policy that no suit shall be brought on the policy after one year from the death of the assured, if void. See 11 I.C. 756=4 Bur.L.T. 173; 38 B. 344=21 I.C. 694=15 Bom.L.R. 948; 91 I.C. 622=1926 R. 3. But see also 14 Bom. L.R. 741; 38 B. 353; 3 R. 383. No one can contract himself out of the statute of limitation and consequently where the result of a compromise is that the limitation provided by law is extended it is open to the judgment-debtor to plead that the decree-holder's application was barred by limitation. 54 A. 573=1932 A. 273 (F.B.).

Agreements void for uncertainty.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

*Illustrations.*

(a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer, in cocoanut-oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar." There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) C agrees to sell to B "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager are void ; and no suit shall be brought for

EXCEPTION 1.—*See* 1929 S. 55; 1932 O. 285; 1937 A.L.J. 823=1937 All. 650. If either of the parties to a cause desires to substitute another mode for the trial of the suit than the one provided for in the Code, and if in pursuance of it an offer is made by one party and accepted by the other, with knowledge and consent of the Court, that is a binding contract between the parties, and they cannot be permitted to withdraw or renege from it unless it is alleged and proved that there has been fraud or collusion or non-performance of the act by which decision of the Court was agreed to be arrived at. 10 Mys.L.J. 269 (47 A. 456, Ref. to).

EXCEPTION 2.—An agreement that award will not be opposed or objected to is void being a contract not to enforce rights conferred by the Arbitration Act in respect of the contract to refer. 42 I.C. 706=11 S. L.R. 43.

SEC. 29.—A contract is not indefinite by reason of the omission to fix maximum limit of purchase, and the Court will reject the dishonest claim for damages on the alleged failure to comply with large and unreasonable orders. Where there is a continuing contract to supply goods as orders are received, the obligor can withdraw from the transaction before any particular order is received after giving notice to the other party. 34 I.C. 520=18 Bom.L.R. 217. *See also* 1937 M.W.N. 760. Terms for renewal of lease—Vague and uncertain—Inoperative in law. 33 I.C. 448=20 C.W.N. 948; 1 Pat.L.J. 238=34 I.C. 482. *See also* 25 N.L.R. 131 +1929 N. 194. A covenant of partnership giving one party the right of specifying the share of profits to be assigned to the other and affording no indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty. 31 I.C. 632=185 P.W.R. 1915. An instrument is not void if it is capable of being made certain. 305 P.L.R. 1913=20 I.C. 812. Letter to creditor holding oneself liable to sums to be advanced to another is not void for uncertainty simply because no limit is mentioned as to time or amount. 1937 M. W.N. 760. A contract to execute a deed (*khobala*) "containing the necessary stipula-

tions" is not void for uncertainty. 105 I.C. 527=1927 C. 839. Such a contract only means that the deed should contain the stipulations for sale implied by law and enumerated in the Transfer of Property Act. 1927 C. 839. An agreement to pay rent in cash without the rate being definitely fixed, is void for uncertainty. 55 I.C. 78=1920 M.W.N. 15. Agreement to pay something for collection of old debts without specifying amount—Whether enforceable. 31 I.C. 733=29 M.L.J. 749. Where a document is capable of two contrary interpretations or practically incapable of interpretation at all, it is void for uncertainty. 63 I.C. 43=4 N. L.J. 67. A personal covenant to convey land which is too vague and indefinite is inoperative. 1 Pat.L.J. 238=34 I.C. 482. The appellant's assignor and the respondents had dealings in mica in 1930, and in 1933 the respondent undertook under a document to pay to the appellant's purchaser after two years the sum of Rs. 12,600 with a certain interest "after deductions as would be agreed upon". The appellant became the assignee of the claim based on the document with its original cause of action in 1938 and he filed a suit in 1938 to enforce the claim. The parties were in dispute as regards the deductions. *Held*, that the expression "after deductions as would be agreed upon" rendered the document vague and the claim was therefore unenforceable by reason of sec. 29 of the Contract Act.

*Held, further*, that the acknowledgment contained in the document of 1933 extended the period of limitation only for three years from that date, and the suit to enforce the claim based on the original cause of action was barred. 57 L.W. 499=(1944) 2 M. L.J. 225=1945 Mad. 10=I.L.R. (1945) Mad. 521. For other illustrative cases, *see* 22 M. 96; 11 M. 206; 5 C. 175; 31 C. 667.

SEC. 30.—Section applies only to prevent a case based on contract. *See* 1928 M. 434 and cases referred to therein. "Wager" means what is indicated by the words "gaming and wagering" in English law. 29 C. 461 (P.O.). The essence of gaming and wagering consists in the agreement that one party is to win and the other party to lose



Agreements by way of wager void.

is made.

This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute,

Exception in favour of certain prizes for horse-racing.

made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294-A of the Indian Penal Code not affected.

recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294 of the Indian Penal Code apply.

upon a future event, which at the time of the agreement is of an uncertain nature, that is, that if the future event turns out one way the plaintiff is to win, and if it turns out the other way he is to lose. 1923 N. 291; 1922 P. 220. In order to constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences. The common intention of both parties at the time of entering into the contract must be not call for or give delivery from or to each other. But mere speculation is quite different from wager and there is no law against speculation as there is against gambling or wager. Speculative transactions have therefore to be carefully distinguished from agreements by way of wager. 39 Bom.L.R. 1083. The essence of a bet is that both parties agree that they will pay and receive respectively on the happening of an event in which they have no material interest. The transaction may be cloaked behind the forms of genuine commercial transactions; but to establish the bet it is necessary to prove that the documents are but a cloak and that neither party intended them to have any effective legal operation. Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value. 1942 A. L.J. 258=55 L.W. 332=A.I.R. 1942 P.C. 19 (P.C.). To make a contract a wagering contract, there must be, from the outset, a common intention of the parties to the contract to make and accept no delivery and to deal only in differences. A subsequent agreement to the effect that buyer has no longer right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering one. 26 N.L.R. 125=1930 N. 111. See also 60 C. 856=1933 C. 759; 27 A.L.J. 1140=1929 A. 890=51 A. 1027; 1929 B. 241; 1940 A.L.J. 48=1940 All. 182; (1940) 2 M.L.J. 997; 1929 A. 134=1929 A.L.J. 262; 7 B. 200; 188 I.C. 548=1932 L. 273; 39 Bom.L.R. 1083; 13 L. 766=1932 L. 356; 1934 L. 85.

Where according to the rules of an Association when jute is bought and sold under those rules, the buyer can insist on delivery, the transaction cannot be of a wagering nature. 1943 A.M.L.J. 18. See also 1944 A.L.W. 291 (Nazarana contracts, being in the nature of *Tejmandi* transactions are wagering contracts). See also 1936 L. 215. 'Mandi' contracts cannot be held to be wagers merely on their apparent nature and characteristic, without proof of the facts that the common intention of the contracting parties at the time of entering into the particular contract in question was to deal only in differences and in no circumstances to call for, or give, delivery. 1938 Lah. 825. Whether a contract is a wagering one depends upon the intention of the parties at the time when the contract is entered into. The mere fact that contracts are highly speculative is insufficient to render them void as wagering contracts. 124 I.C. 453. As to the meaning of the word, see also 9 B. 353; 7 Bom.L.R. 154; 94 I.C. 371=1926 S. 202; 51 A. 1027=1929 A. 890. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding express or implied, that the goods were not to be delivered, that would not convert a contract into a wager; nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction. 1933 Lah. 781. The distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions is frequently a narrow one and difficult of determination even after the examination of the parties concerned, the course of the business and the nature of the contracts. It certainly is not a question which can safely be left to the decision of a local Commissioner. 58 I.A. 173=1931 P.C. 136=61 M.L.J. 665 (P.C.).

**WAGERING CONTRACTS AND SPECULATION—DIFFERENCE BETWEEN.**—There is nothing illegal in speculating. It is a common place of the Stock Exchange. This method of



doing business is by no means confined to stocks and shares, but is of every day occurrence in almost all commodities. As far as the distinction between speculation and gaming is concerned, it makes but little difference whether the commodities are actually paid for, and held with a view of selling again at a profit, or whether the matter is arranged by a re-sale before the time for delivery. Such dealings are perfectly legitimate. Gaming and wagering contracts, on the other hand, are not real dealings at all; they may take the form of purchases and sales, but they are, in fact, mere bets on the market price of commodities at a future date. For a contract to be a gaming and wagering contract there must not only be no intention on the part of either party to deliver, or to take delivery of the commodities, but also no obligation on either to do so; there must be an agreement or understanding that all the buyer has to do is to receive from, or pay to, the seller the difference between the price of the bargain and the price at some future date. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature. Thus the difference between the two is to be found in seeing whether the transaction in question is a real transaction or whether it is merely a peg to hang a bet upon. Whether it is a real transaction depends upon whether in law the parties could be compelled to carry out the contract of sale. And it is often necessary to look behind the contracts for its proper understanding, but in so doing, one must always bear in mind the fact that there is nothing wrong in different contracts so long as the parties are not absolved in any event from delivering the commodity or paying if the other party calls for delivery or payment. 1937 Nag. 345. *See also* 58 I.A. 173=53 A. 190=61 M.L.J. 665 (P.C.); 1927 B. 125=29 Bom.L.R. 147; 1924 O. 186. There must be proof that the contract was entered into upon the terms that the performance of the contract should not be demanded, but that differences only should become payable. It is not enough that the parties contemplated that delivery would not be likely to be demanded. 47 C. I. J. 144=1928 F.C. 30=54 M.L.J. 130 (P.C.).

**FORWARD CONTRACTS**, for the purchase and sale of goods are recognised forms of commercial transaction. They may be perfectly legitimate and genuine transactions, though of a speculative character, or simply gambling or wagering contracts. To be a wagering contract there must be a bargain for differences. It would be still regarded a wagering contract even if a party thereto had an option under the contract to demand delivery. Where a contract on the face of it appears to be a contract for the sale of goods for a price, extrinsic evidence may establish that there was a common intention to wager, that is, the intention of both the parties to the contract was that the title to

the goods would not pass (i.e.) there is to be no delivery, but the intention was only to take differences according to the rise and fall of the market on the date of delivery, mentioned in the contract. If such an intention is established, the contract is a wagering one. If such an intention on the part of one of the contracting parties is established and the other party, though intending a trading transaction, is shown to have been aware of the other's intention at the time of the formation of the contract, it would be regarded as a wagering contract. The common intention to wager can be established by direct evidence or from surrounding circumstances. But when it is found that all or a substantial part of goods were actually taken delivery of, such a forward contract must necessarily be taken to represent a genuine commercial transaction, as the fact of delivery destroys the inference of a common intention to wager. 45 C.W.N. 478=1941 Cal. 341. Where the effect of the clauses in a series of 'Forward' contracts with a 'pacca arhati' is that the 'pucca arhati' was to be in a position to choose whether he delivered or not and was, if he so liked to be able to settle the matter by paying or receiving, as the case might be, a mere difference, and where in not one of such contracts is there any delivery except in one small instance, the contracts are based upon terms which are singularity appropriate to mere gambling transactions. The Court is entitled if not bound, to regard the course of dealing between the parties in such case as a reliable indication of what their real intentions were. Such a transaction is a wagering contract. I.L.R. (1942) All. 289=1942 A.L.J. 131=A.I.R. 1942 All. 170. As to forward contracts, *see also* 39 Bom. 1=16 Bom. L.R. 213. Wagering contract—Suit upon—Defendant admitting Liability Court can yet dismiss suit all the same. 30 P.L.R. 596=120 I.C. 429 (1). Speculation does not necessarily involve a contract by way of wager. To constitute such a contract, a common intention to wager is essential. 42 B. 373=34 M.L.J. 305=45 I.A. 29 (P.C.); 4 Bur.L.J. 131=1925 R. 284; 64 I.C. 809=34 C.L.J. 533. As to ascertaining intention of parties with reference to surrounding circumstances, and the admissibility of oral evidence, *see* 39 Bom.L.R. 1083=1938 Bom. 44. The transaction must wholly depend upon the risk in contemplation. 9 B. 358. If one of the parties has the event in his hands it is not wager. 9 Bom. 358. Betting transaction—Legality of. *See* 52 C. 677=1925 C. 1087. Joint betting at horse race by two persons—Receipt of winnings by one—Suit by other for recovery of share of winnings not barred as wager. 163 I.C. 251=43 L.W. 514=1936 M. 486=70 M.L.J. 433. When there is a perfectly lawful contest in a game of skill between two persons the prize for success in that contest should be recoverable if it is subscribed by outside persons but not recoverable if it was subscribed for by the competitors themselves. 133 I.O. 254=33 B.L.R. 260=1931 B. 264. Chit fund whether and when amounts to lottery. *See* conflict of law

ings in 48 M. 661=90 I.C. 420=1925 M. 870; 1925 M. 281=47 M.L.J. 876; 49 M. L.J. 791=92 I.C. 968=1926 M. 168; 50 M. 696=1927 M. 583=52 M.L.J. 687 (F.B.). Even in the case of wagering contracts, sec. 30 does not prevent a person who is employed as agent in connection with the same, from recovering sums due to him by his principal. 73 I.C. 477=45 A. 503=1923 A. 585; 51 I.C. 530; 38 I.C. 566. The question whether the contract between the parties is of a wagering nature is really a question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry on the contracts but agreed to abide by the prices at the due dates, when difference would be received. 25 Bom.L.R. 520=1923 B. 458; 36 A. 426=12 A.L.J. 817; 43 A. 585=19 A.L.J. 522; 21 A.L.J. 153=1923 A. 273. In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstances to find out the true intention of the parties. These surrounding circumstances could only be proved by evidence outside the written contract. Courts will have to look behind the form of the contract to the real intention of the parties, which may be gathered from the oral evidence and actual transactions between them. 161 I.C. 713=1936 L. 215. Common intention of both parties neither to give nor receive delivery but merely to pay or receive differences must be proved. Such common intention can be inferred from the surrounding circumstances. 37 B. 347=14 Bom.L.R. 807. See also 138 I.C. 542=1932 L. 273; 7 L. 442=94 I.C. 304=1926 L. 318; 23 L.W. 105=93 I.C. 169=1926 M. 326; I.L.R. (1940) 2 Cal. 385. If a wagering contract is entered into directly between two persons and no relationship of principal and agent existed between them, the fact that it is by way of wager would disentitle one to recover any losses in respect of the contract. But if the contracts were entered into by one not directly with another, but through that person's agency, then that person would be entitled to recover the losses on those contracts provided he proves that either he paid those losses to the persons with whom those contracts were entered into or incurred a pecuniary liability to make good those losses and that liability is still enforceable against him. 1940 A. 95=1939 A.L.J. 1073. See also 1932 Lah. 356; 1923 Lah. 408. A Court should scrutinize the evidence of the defendant when he accepts payments when the dealings are successful but pleads wagering contract when the transaction ends in loss. 64 I.C. 809=33 C.L.J. 538. Contract to pay difference when a wagering contract. 20 I.C. 832=15 Bom.L.R. 750; 38 B. 204=15 Bom.L.R. 716; 19 I.C. 29=15 B. 204=15 Bom.L.R. 716; 19 I.C. 29=15 Bom.L.R. 85; 37 B. 347=14 Bom.L.R. 807; 25 I.C. 747; 64 I.C. 809=33 C.L.J. 538; 37 B. 264=14 Bom.L.R. 617; 45 M.L.J. 716=76 I.C. 893=1924 M. 378. Oral evidence

if admissible to prove that transaction is wager. See 17 M. 480; 24 B. 227. Burden of proof, as to whether transaction is wager or not, see 9 B. 355; 23 A. 165; 24 Bom.L.R. 115=1922 B. 81. Defence of wager—Onus on defendant to prove that both parties agreed neither to ask for nor to give delivery—*Tejmandi* transactions. 65 I.C. 682=24 Bom.L.R. 60. *Tejmandi* contracts when void as a wager. 24 Bom.L.R. 812=1922 B. 408; 138 I.C. 241=1932 L. 356. The transactions known as *tejmandi*, *teji* and *mandi* explained and discussed. 65 I.C. 682=24 Bom.L.R. 60. See also 24 I.C. 441=7 Bur.L.T. 54; 51 B. 1=44 C.L.J. 509=26 L.W. 844 (P.C.); 11 L.L.J. 522. *Pukka adatia* contracts when wagering contracts. 57 I.C. 129=22 Bom.L.R. 406. See also 39 B. 1=16 Bom.L.R. 203; 105 I.C. 739=1927 A. 617; 1940 A.L.J. 48=1940 All. 182; 29 Bom.L.R. 147=100 I.C. 993=1927 B. 125. Where in the case of a contract of purchase through *pukka arhatias* there was no intention from the very beginning of the transaction either to make or accept delivery, it is a wagering contract and as such neither the plaintiff could recover the loss in the contract nor the defendant recover the deposit made with the plaintiff. I.L.R. (1944) All. 397=1944 A.L.J. 295=1944 O.W.N. (H.C.) 145=A.I.R. 1944 All. 196. Contract of *cricha adatia* agency is not a wagering one. 98 I.C. 338=1926 P.C. 119=51 M.L.J. 809 (P.C.). Re-sale before completion of first transaction—Transaction, if amounts to wagering contract. 14 R. 347=1936 R. 319. An agreement by way of wager though sanctioned by Government is void. 42 B. 676=19 Bom.L.R. 697. The effect of the sanction of the Government of the lottery is that no prosecution would lie in respect thereof but that sanction did not affect the Civil Law on the subject of lotteries, as the Government had no power to overrule an Act of the legislature by correspondence. 42 B. 676=19 Bom.L.R. 697. No injunction could be granted in support of a void contract. 42 B. 676. Forward contracts—No passing of goods—Dealing in difference in prices alone—*Pukka adatia*—If enforceable. 39 B. 1=16 Bom.L.R. 213. See also 85 I.C. 177=1925 B. 115; 27 Bom.L.R. 941=49 B. 689; 85 I.C. 613=1925 B. 79; 1927 B. 125; 41 Bom.L.R. 308=1939 Bom. 225; 1937 Lah. 581; 43 Bom.L.R. 269=1941 Bom. 211=I.L.R. (1941) Bom. 441; I.L.R. (1940) All. 186=1940 A.L.J. 48=1940 All. 182. Insurance on the life of another when wager. 28 B. 616; 30 B. 83. See also 37 C. 342. In transactions where a broker intervenes, especially in stock exchange transactions, it is difficult to prove that the two parties to the contract have agreed that the transaction in question is in the nature of a gamble. It is essential in order to make a gamble that there should be two; that one side is attempting to gamble and the other side is not, is not enough. The common intention of both parties at the time of entering into the contract must be not to

call for or give delivery from or to each other. Such intention is a question of fact. (1940) 2 M. L.J. 997. See also 1941 Cal. 125. Where an agent enters into a wagering contract he cannot claim to be indemnified by the principal for losses incurred thereby. In the case of a commission agent the *onus* is on him to show that he entered into the contract as agent and not principal. 67 I.C. 959=1922 L. 408; 138 I.C. 241=1932 L. 356. See also 156 I.C. 539=1935 L. 761; 1940 All. 95; 39 Bom.L.R. 1083. There can be no doubt that where a broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. Where the plaintiff acting as a broker on behalf of the defendant entered into contracts for the sale and purchase of jute, and the defendant never intended to give or take delivery and was simply gambling in differences but the plaintiff was not a party to those gambling transactions. *Held*, that the defendant could not set up a plea of gaming and wagering against the plaintiff's claim for brokerage. I.L.R. (1940) 2 Cal. 385=1941 Cal. 125. See also (1940) 2 M.L.J. 997. *Kuri* as such in Malabar is not wagering contract. 37 M. L.J. 209=52 I.C. 989. *Chit-fund* is lottery—Provision for payment of prize by lot to some of the subscribers and for payment of actual sums subscribed to others—Legality—Suit by non-winner for subscriptions paid—Maintainability. See 59 M. 562=1936 M. 225=70 M.L.J. 36 (F.B.). Agent appointed to carry on wagering contracts with other persons—Contract between principal and agent is not necessarily wagering. 50 A. 115=103 I.C. 218=25 A.L.J. 736 (1926 P.C. 119, Foll.; 1926 A. 238, Ref.) See also 188 I.C. 241=1932 L. 356; 1928 L. 420; 79 P.R. 1908; 49 A. 438=25 A.L.J. 223=1927 A. 238; 49 A. 926=102 I.C. 605=25 A.L.J. 693. Money paid as security for performance of wagering contract—Suit for recovery, if maintainable. 34 M.L.J. 561=44 I.C. 319=7 L.W. 518. A wagering contract cannot of course be enforced; but a deposit made by one gambler with the other as security can be recovered unless the amount has in fact been appropriated for the purpose for which it was deposited. 57 L. W. 137=A.L.R. 1944 Mad. 321=(1944) 1 M. L.J. 188. The sale of growing crop for cash is not gaming or wagering though the consideration is to be paid in kind out of the proceeds of the harvest. 19 N.L.R. 21=1923 N. 291. S. 30 does not affect agreements or transactions collateral to wagers. 69 I.C. 186=1923 N. 48; 38 I.C. 566=9 Bur.L.T. 228. Where a gramophone dealer got a list of persons who were to subscribe one Rupee each every week and at the end of the week prizes were to be drawn and one of them was to get a gramophone and go out of the transaction and it was arranged that the subscription should go on increasing till the 20th week when all the non-prize

winners were to get a gramophone each, and some of the subscribers having defaulted in paying subscriptions the dealer sued to recover the same. It was *held*, that the transaction did not offend against S. 294-A, I.P. Code or S. 30 of the Contract Act and the plaintiff was entitled to recover. 149 I.C. 489=1934 M. 136=66 M.L.J. 76. Wager—Sweepstake—Ticket obtained by member for outsider—Prize money won by—Suit by third party for declaration of right to prize money on the ground that the ticket was obtained for him and with his money—Not barred—Principal and agent. 63 C. 1234=1937 C. 297. Lottery is a game of chance. See 19 Bom.L.R. 697; 42 B. 676. Money paid under an illegal contract may be recovered before the contract is carried out but not afterwards. 46 I.C. 755; (1944) 1 M.L.J. 188. Money deposited with a stake-holder to abide the result of a race may be recovered if demanded before payment over to the winner. 3 R. 543=93 I.C. 105=1926 B. 48.

**BURDEN OF PROOF.**—Where a plea of wager is set up in defence the *onus* of proof is on defendant. The question of common intention is one of fact in every case. 66 I.C. 489=15 S.L.R. 193; 70 I.C. 864=15 S.L. R. 5; 60 I.C. 944=14 S.L.R. 227. It is incumbent on a party to prove that the contracts are otherwise than what they profess to be. The burden is on him who alleges turpitude. The Court must look to the surrounding circumstances and see if a common intention to wager is established. 151 I.C. 63=1934 N. 129. See also 39 Bom.L.R. 1083. Where both parties are members of stock exchange *onus* of proving transaction to be wager is on defendant. 85 I.C. 410=1925 M. 330. A claim for recovery of loss in consequence of a contract of the nature of wager is not legally enforceable and if such contract be by one person with another, who is partner of a firm and the contract is as between principal and principal, the person is not entitled to be recouped for his loss, by suit against the other partners of the firm. 1930 A. 525.

**SECS. 30 AND 31: WAGERING CONTRACT AND CONTINGENT OR CONDITIONAL CONTRACT—DISTINCTION.**—Plaintiff and defendant were co-defendants in a prior suit and plaintiff had certain documents of real value in defending the said suit. An agreement was entered into under which plaintiff was to hand over the documents to the defendant. Defendant promised to pay the plaintiff Rs. 750 if the suit ended in a compromise and Rs. 3,000, if he was successful in the suit. The suit having been decided in favour of the defendant plaintiff sued for recovery of Rs. 3,000 and interest. The defendant pleaded that the agreement was by way of wager and unenforceable under S. 30. *Held*, that the contract was not void as a wagering contract under S. 30, but was in the nature of

### CHAPTER III. OF CONTINGENT CONTRACTS.

"Contingent contract" defined.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

#### *Illustration.*

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible such contracts become void.

#### *Illustrations.*

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C died without being married to B. The contract becomes void.

Enforcement of contract contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

#### *Illustration.*

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

#### *Illustration.*

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

When contracts become void which are contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

a contingent or conditional contract and was valid and enforceable. 1935 M. 135=41 L. W. 57.

SEC. 31.—*See* 34 M. 453 (P.C.). (A contract with a condition precedent to acceptance of goods, on examination and approval by a servant or subordinate is good as a contingent contract). On this section, *see also* 12 C. 152; 23 A.L.J. 608=89 I.C. 438=1925 A. 658.

SEC. 32.—Contingent contract—Co-sharer in undivided land contracting to sell 800 acres adjoining vendee's land—Promise in sale-deed to get specified land measured out and to hand it over to purchaser as and when the joint owners agree to partition—Purchaser's suit for specific performance

not maintainable—No right to compensation. 162 I.C. 639=1936 S. 26.

SECS. 32-34.—A contingent contract is dependant for its performance on a future event and falls through if the future event on which it was dependant becomes impossible. 34 I.C. 46=12 N.L.B. 69. On this section, *see also* 23 A.L.J. 608=1925 A. 658.

SEC. 35.—Death of judgment-debtor before date fixed for payment—Surety not discharged. 8 I.C. 985. When the liability of a surety is only to come into being upon the happening of a condition he is not discharged by time having been given where it has expired before his liability arose. 8 Mys. L.J. 240.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening with fixed time.

*Illustrations.*

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

*Illustrations.*

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter, C. C was dead at the time of the agreement. The agreement is void.

## CHAPTER IV.

### OF THE PERFORMANCE OF CONTRACTS.

#### *Contracts which must be performed.*

37. The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

SEC. 37.—It is clear that there is no obligation laid down by the legislature in S. 37 to make a decree in terms of the contract and of no other terms. The section itself provides for a possible dispensation to the parties to the contract, as appears from the latter part of the section. For example, in cases in which the facts come within the provisions of the Usurious Loans Act, the strict performance is excused. 18 Pat. 13=20 P. L.T. 1=1939 Pat. 55 (F.B.). Where there is a contract to deliver goods in instalments spread over a number of months, the sellers cannot postpone the delivery of the whole until the last month as the buyers have the right to demand delivery in instalments. 42 C. 305=23 C.L.J. 62=20 C.W.N. 240. If a person reaps the benefit of a contract without being party to it he must pay the money due under it. The doctrine that no stranger can enforce a contract though made for his benefit does not universally apply in India. 41 M. 488=34 M.L.J. 193. See also 121 I.C. 337; 141 I.C. 490=1933 L. 178; 138 I.C. 263=1932 L. 566; 131 I.C. 210; 131 I.C. 1011; 131 I.C. 575; 134 I.C. 100; 55 M. 436=62 M. L.J. 533. A tender of performance must satisfy all the requirements of the contract. 46 I.C. 497=11 Bur.L.T. 9. Vendor is not

bound to see that purchaser takes delivery within time. Where it is necessary for vendee to take samples before delivery, the vendor is bound to deliver goods some time before the specified date so as to give him time to satisfy himself. 32 I.C. 720=9 S. L.R. 160. In the absence of evidence of contrary intention of parties, legal representatives can require specific performance of the contract. 49 B. 862=91 I.C. 360=1926 B. 97. A universal legatee is liable for debts of testator to the extent of testator's property in his hands. 157 I.C. 956=1935 O.W. N. 1031. An annuity for the life of a person may be created either by will or by deed. Where after the death of the promisor there is a default in the payment of the annuity, the annuitant can recover it by a suit against the legal representative of the promisor, limited of course to the extent of the assets of the deceased in the hands of the legal representative. Actions against the executor or administrator do not exhaust the remedy open to the annuitant in India. 1943 A.L. W. 78. Stock exchange transaction—Stockbroker need not retain for his client specific shares purchased. 47 L.W. 73=1938 P.C. 23 (P.C.).

*Illustrations.*

(a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representative or by B.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Effect of refusal to accept offer of performance.

SEC. 38.—Section applies to an offer which has been accepted as well as to an offer which has been refused. 73 I.C. 682. As to obligation of the other party after breach of contract, *see* 3 M.L.J. 197. Seller must give buyer opportunity to examine goods. 1927 M. 62. S. 38 only requires a reasonable opportunity to be given to the buyer to examine the goods sold. 42 I.C. 382; 97 I.C. 866 (M.). As to proper place of inspection of goods *see* 59 C. 928=1932 C. 879. A valid tender improperly refused stops further interest. 12 I.C. 502=34 M. 320; 34 L.W. 843=55 M. 458=62 M.L.J. 266. In the case of ordinary money claims not based on mortgage, a tender before suit of the amount due must be followed by payment into Court in order to stop the running of interest. 1932 M. 109=55 M. 458=62 M.L.J. 266; (38 M. 959; 16 B. 141; 34 C. 305, Rel.) In the case of mortgages, the rule is different and a tender alone has the effect, under S. 84, T. P. Act. of stopping interest from the date of tender. 1932 M. 109=55 M. 458=62 M.L.J. 266. An assignee of a promise may be able to claim what his transferor could claim, but he would not become a promisee by reason of the assignment so far as the original promisor is concerned. The power of a co-mortgagee for giving a valid discharge of the whole mortgage debt is based largely on a consideration of S. 38, but that section is confined to promisees as defined by the Act and not to the heirs or assignees of a promisee. On a devolution of a mortgagee's interest either on his legal representatives or on his assignees, the latter would be, at least amongst themselves, entitled to recover their own shares and be able to give an acquittance to that extent only and not for the shares of the others. If a co-assignee therefore is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent, much less of a constructive trustee, and any receipt by him cannot be considered to be a receipt on behalf of the others. 50 L.W. 133=1939 Mad. 818=(1939) 2 M.L.J. 214. Person pleading tender must always be ready and willing to pay the amount. Plea of tender before suit must be followed by payment into Court after suit. 16 B. 141. *See also* 39 M. 959. A tender to be valid must be a tender of the whole amount due and not of a part only and there is nothing to prevent

this general law as to tenders applying to payments decreed in respect of a mortgage. 26 O.C. 59=1923 O. 241; 130 I.C. 817=1931 N. 91. An offer which a promisor must make to the legal representatives or heirs of a deceased promisee in order to take the benefit of S. 38, should be subject to exactly the same conditions as those which it would have had to fulfil, had it been made to the original promisee. I.L.R. (1938) 2 Cal. 387=42 C.W.N. 1023. The heirs of a single promisee are for the purpose of an unaccepted tender in the same position as joint promisees, that is, a tender to one of them is a valid tender. 43 C.W.N. 423. Tender with condition is not valid. 27 C.W.N. 299=44 M.L.J. 728=1922 P.C. 347; 41 C. 493=40 I.A. 223=26 M.L.J. 25 (P.C.). Tender of a portion of the debt with conditions attached to tender vitiates tender. 25 Bom.L.R. 830=1924 B. 264; 130 I.C. 817=1931 N. 91. A conditional tender of rent demanding a receipt that the tenant paying the rent was a *kaimi raiyat* is not a good tender. 51 I.C. 793. Where a bond recited that if three instalments fall in arrears the whole principal becomes payable, a tender by the debtor of principal only without interest on overdue instalments when the latter is stipulated expressly in the bond, is not a proper tender and interest on overdue instalments is recoverable. 31 I.C. 304. A tender is not valid *pro tanto* if a large sum is in fact due and if the tender is accompanied by a demand for cancellation, and delivery of the mortgage deed. 20 I.C. 184=16 M. L. T. 365. A mere offer by post is not a legal tender. 26 I.C. 121=27 M.L.J. 482. The mere expression by letter of a willingness to execute a release deed without having a document ready to be delivered is not valid tender. 38 M. 959=26 M.L.J. 381=23 I.C. 581. Tender of money locked up in a box or of goods enclosed in a case which the other party is not allowed to open is not sufficient tender, and the tender as a plea in an action is incomplete unless accompanied by a tender in Court. 38 M. 959. Contract of sale with condition of re-purchase—Actual production of cash only is strict compliance, but conduct of vendee may dispense with strict compliance. 89 I.C. 454=1925 O. 533. On this section, *see also* 48 M.L.J. 522=90 I.C. 206=1925 M. 538. The section seems to treat each joint promisee as a partner or agent of the other joint pro-



Every such offer must fulfil the following conditions :—

- (1) it must be unconditional :
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do :
- (3) if the offer is an offer to deliver anything to the promisee the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

#### *Illustration.*

A contracts to deliver to B at his warehouse, on the first March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

Effect of refusal of party to perform promise wholly.

promisee to accept tender and payment. So payment to one has the legal effect of payment to all. 36 M. 544=24 M.L.J. 333=19 I.C. 12 (F.B.). The section does not deal with the legal consequences of an accepted tender. 36 M. 544. A valid tender must be an unconditional offer to pay a specific and ascertained sum. An offer to pay the amount found due on a settlement of accounts if the payee undertook to execute an indemnity bond, is not valid tender. 12 I.C. 502=34 M. 320; 35 M. 685=21 M.L.J. 508=10 I. C. 874. An offer by a promisor through his solicitor to pay a debt with interest due at the date of the offer, does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise, and does not satisfy S. 38 of the Contract Act. I.L.R. (1938) 2 Cal. 327 =42 C.W.N. 1023. Where there is an obligation to pay a foreign unit of account, the form in which such payment is to be made must be regulated by the Municipal law of the country whose unit of account is in question. What would or would not be a legal tender or currency must depend upon the law on that subject at the time when the tender should have been made. [(1923) 2 Ch. 466. Rel. on.] 1939 A.C. 145=180 I.C. 985=1929 P.C. 74 (P.C.). The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. 172 I.C. 786 =1938 P.C. 26 (P.C.). See also 47 L.W. 596

=1938 P.C. 136 (P.C.). In a contract of sale physical possession of goods is unnecessary for seller to be held ready to deliver. See 86 I.C. 299=1925 M. 971=49 M.L.J. 300; 1925 M. 1168=49 M.L.J. 530; 90 I.C. 206=1925 M. 888=41 M.L.J. 522; 1925 M.W.N. 592=1925 M. 1290. As to proper place of inspection in case of sale of goods, see 59 C. 928=1932 C. 879. Mortgage—Tender of mortgage amount by purchaser of equity of redemption—Offer to give cheque or cash by cashing cheque—Refusal—Legality. See 29 L.W. 220=56 M.L.J. 255. In the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee discharges the mortgagor. 73 I.C. 682; 44 I.C. 627=(1917) 3 U.B.R. 42. See also 34 M. 320; 48 M. 693=47 M.L.J. 840. But see contra 23 I.C. 8; 41 I.C. 921=68 P. R. 1917. Where a shop is owned by several co-owners payment of entire rent to one cannot operate as valid discharge. 168 I.C. 198 =1937 A.W.R. 390=1937 A.L.J. 395. Where in respect of a transaction representing a sale with condition of repurchase, the vendor deposits money in Court within the stipulated time under S. 83 of the T.P. Act proceeding on the footing that the transaction represents a mortgage by way of conditional sale, and the Court serves notices on all the vendees, there is a valid tender of the money by the vendor who is entitled to a reconveyance. 43 C.W.N. 423.

SEC. 39.—English Law same as Indian law. 4 C. 252; 104 I.C. 587=1927 O. 265. For a review of English case-law as to repudiation of contract, see 85 I.C. 118=1925 L. 217; 1930 L. 979. Application of section. 1930 A. 506. Section is an enabling one. 9 M. L.T. 479; 29 B. 46; 10 C.W.N. 932 under S. 30 there must be a refusal to perform or



*Illustrations.*

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

disablement from performing before a promisee may put an end to the contract; suspicion is not enough and one party cannot insist that one action shall precede another in time merely because he happens to be suspicious. If the plaintiff (buyer) knows and can prove that he will not get immediate possession and if under his contract he is entitled to such immediate possession he may put an end to the contract even before he has completed the purchase by paying the full consideration. 1932 M.W.N. 122. It is not open to a party to repudiate a contract and then change his mind and insist on its performance. 12 Mys.L.J. 81=39 Mys.H.C. R. 263. S. 39 of the Contract Act applies to executory and not to executed contracts. Where in pursuance of an agreement to assign certain arrears of rent in discharge of debts due, the vendor executes the deed of assignment and has it registered and the vendee gives back the vouchers there is a completed transaction. The non-delivery of the deed of assignment by the vendor to the vendee is not such an act as would render the contract null and void at the choice of the vendee. 22 Pat. 306=A.I.R. 1944 Pat. 3=26 Pat. 914. As to contract for performance of personal service, see 19 M. 18. Performance accepted after time fixed—No right to compensation. 14 I.C. 129. See also 1925 L. 217. Anticipatory breach—Facts amounting to. See 8 L. 301. See also 1938 Rang. 353. Anticipatory breach—Contract kept open—Suit for damages—Plaintiff's conditional willingness to perform not sufficient. 1930 L. 979. Where a person has by his own conduct made it impossible for himself to perform his contract in its entirety within the stipulated time, the other party is legally entitled to put an end to the contract and no question of damages will arise. 134 I.C. 779=32 P.L.R. 593. See also 149 I.C. 304=1934 A. 617=38 L.W. 533=145 I.C. 476=1933 M. 704; 44 C.W.N. 11. Where as per terms of the contract of affreightment a demand for space is made by the shipper, the fact that the shipper had no goods to ship and was attempting to obtain an advantage due to the rise in freight does not entitle the shipowner to repudiate the contract though the fact can be taken into account when considering the question of damages. 196 I.C. 529=1941 Sind 146.

CONTRACT AND CONVEYANCE.—Distinction.

9 A.L.J. 198=34 A. 273. As to implied repudiation of contract, see 1925 M.W.N. 592=1925 M. 1290. To be relieved from future performance by the conduct of the other, the conduct must amount to a renunciation or absolute refusal to perform the contract, such as would amount to rescission if he had the power to rescind. 28 C.W.N. 104=1924 C. 427; 3 Mys.L.J. 197. See also 2 Luck. 379=1927 O. 12.

SALE OF IMMOVABLE PROPERTY.—Postponement of performance—Rescission by vendor—Damages. 40 M.L.J. 13=61 I.C. 457; 23 I.C. 91=63 P.R. 1914; 29 I.C. 989=19 C.W. N. 933. A purchaser under a contract of sale is entitled to a good and a marketable title. If the title is doubtful, e.g., it requires investigation, the purchaser cannot be compelled to rescind the contract or to accept without investigation the doubtful title. 52 I.C. 971 (M.) [9 A. 705 (P.C.), Dist.] See also 51 B. 247=29 Bom.L.R. 19=1927 B. 195; 1926 C. 339. Ss. 39 and 64 and justice, equity and good conscience require that a servant who quits his master's service before the expiry of the contract period, should be ordinarily paid for the full period he worked under the master deducting the damages caused by the breach. 23 M.L.J. 680=17 I.C. 894. Under S. 39 a party to a contract can put an end to it when the other party to it fails to perform his promise in its entirety. But if he does not choose to do so the contract holds good. 10 I.C. 258=9 M.L.T. 479; 10 I.C. 18; 38 I.C. 877=2 P.L.J. 168. See also 22 M. L. J. 207=10 I.C. 320. Where the seller did not elect to treat the refusal by the buyer to take delivery of one instalment of the goods as a repudiation of the entire contract, the contract is kept alive for the benefit of both parties. The seller remains subject to all his own obligations and liabilities on it and enables the buyer not merely to complete the contract, if so advised, notwithstanding his previous repudiation but also to take advantage of any supervening circumstances, e.g., the failure of the seller to make a tender, to justify his declining to complete it. 56 M. 304=1933 M. 176=64 M.L.J. 199. Where a buyer refuses to take delivery of goods when tendered to him on the ground they were out of time, he cannot afterwards justify the refusal on the ground that the goods offered were not in accordance with the contract

*By whom Contracts must be performed.*

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

*Illustrations.*

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

Effect of accepting performance from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the sur-

and he is liable for damages for his justifiable refusal, because he gave a wrong reason for it. 49 M. 781=93 I.C. 678=1926 M. 778. See also 113 I.C. 747=1929 A. 62. Where agent had suffered losses on contracts made for principal, and the principal failed to indemnify the agent after demand was made, and failed to honour the hundy drawn on him, the default of the principal justifies rescission of the contract of agency under S. 39. 31 I.C. 450=9 S.L.R. 77. A mortgagee although he has not paid the amount due on a prior mortgage can sue on his own mortgage in respect of amounts he has paid. 105 I.C. 12=1927 O. 527.

**RESCISSION OF CONTRACT.**—Notice of insolvency—Sale of goods. 27 I.C. 102=8 S.L.R. 95. The right of rescission arises only when the other party fails to perform the contract in its entirety. 17 I.C. 37=6 S.L.R. 103; 19 I.C. 653=6 S.L.R. 187. See also 2 Luck. 279=1927 O. 12.

**SECS. 39 AND 62.**—Parties to hand-note agreeing to enter into new contract—Debtor not carrying out in entirety his part of agreement—Right of creditor to sue on hand-note. See 184 I.C. 705.

**SECS. 39, 64 AND 65.**—Under S. 39 of the Contract Act, a contract which is wrongfully repudiated by one of the parties to it does not thereby become voidable at the option of the other party so as to attract the operation of S. 64 of the Act. If the other party does not act upon the repudiation, the contract is enforceable by both the parties and continues to be so enforceable until the repudiation is acted upon by him. 44 C.W.N. 11. Mere repudiation of a contract by a party is nothing but an offer to rescind. The party not in default must act upon the repudiation so as to accept this offer. Otherwise the contract remains in force and continues to be enforceable by both the parties. Termination of the contract by the promisee

is the acceptance of the repudiation. On such acceptance the contract is at an end. At no stage, therefore, the contract is voidable as defined in the Contract Act. In the absence of any clear indication in S. 39, it cannot be held that the legislature intended to include cases under S. 39, within S. 64 of the Contract Act. 44 C.W.N. 11. When one party to a contract has refused to perform his obligation thereunder so as to give rise to a right in the other party "to put an end to" the contract under S. 39 of the Contract Act, the latter is a person at whose option the contract is 'voidable' under S. 64 of the Act, and if he does put an end to the contract, he rescinds a voidable contract. When he has so rescinded, the contract becomes 'void' under S. 65 of the Contract Act. A party who has "put an end to" a contract under S. 39 is, therefore, liable to restore any benefit received by him under the contract from the other party. He is, however, entitled to damages for the defaulting party's breach under S. 75 of the Act. 70 I.A. 35=1943 A.L.J. 387=56 L.W. 283=47 C.W.N. 497=A.I.R. 1943 P.C. 34=(1942) 2 M.L.J. 369 (P.C.).

**SEC. 41.**—S. 41 which provides for the discharge of a contract by the acceptance of performance by a third party, applies only when the contract has in fact been performed. 39 A. 178=32 M.L.J. 244=14 A.L.J. 223 (P.C.); 39 I.C. 43=44 I.A. 60 (P.C.). See also 112 I.C. 491=1928 M. 972; 1933 L. 335=34 P.L.R. 440.

**SEC. 42.**—**ENGLISH LAW**, how differs from Indian law, see 6 B. 700. Section accords with mercantile usage. 17 B. 1. *Prima facie* defendants *inter se* are liable for contribution where a joint decree for costs has been passed against them. But the defendants who did not defend the suit or took no interest therein are equitably entitled to exemption. 1929 A. 654=122 I.C. 661.

vivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfill the promise.

43. When two or more persons make a joint promise, the promisee may,

Any one of joint promisors  
may be compelled to perform.

in the absence of express agreement to the contrary,  
compel any <sup>1</sup>[one or more] of such joint promisors to  
perform the whole of the promise.

#### LEG. REF.

<sup>1</sup> These words were substituted for the word "one" by S. 2 and Sch. II of Act XII of 1891.

Sec. 43: SCOPE.—S. 43 takes away the right of a joint-debtor to be sued jointly. 27 I.C. 94=107 P.R. 1914. Right of contribution can only arise when there was admittedly a joint liability which has been discharged by one of the two persons jointly liable. 43 P.W.B. (J. & K.) 149. Under the English Law accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under S. 43. I.L.R. (1941) 2 Cal. 237=45 C.W.N. 830. On this subject, see also 85 I.C. 788=1925 A. 425; 15 Mys.L.J. 292; 89 I.C. 977. See also 78 C.L.J. 514=1942 Cal. 87. As to when payment to a joint mortgagee operates as discharge, see 48 M. 693=47 M.L.J. 840.

APPLICABILITY.—S. 43 applies only where two or more persons have made a joint promise and not where two or more persons have become jointly interested by inheritance in a contract made by a single person. 119 I.C. 419 (2)=1929 L. 783. See also 1932 M.W.N. 1111; 1934 P. 411 (2)=148 I.C. 434; 48 L.W. 383=(1938) 2 M. L. J. 287. There is nothing in the Contract Act which says that before contribution can be claimed there must be a compulsory payment. S. 43 permits any joint promisor performing the promise to claim contribution. It makes no distinction between voluntary or compulsory performance. 45 C.W.N. 357. It is not necessary for application of S. 43 that the contract must arise out of a negotiable instrument. S. 43 applies to all actions on contract express or implied, enables a creditor to sue one of several joint promisors, without impleading the others and operates to convert a joint contract into a joint and several contract to which O. 1, R. 6, C.P. Code, must apply. 1934 Pesh. 94. Contract by one partner on behalf of partnership—Right of promisee to sue one of the partners. See 30 Punj.L.R. 149. Under S. 43, each joint promisor is entitled to insist upon an equal performance by all the joint promisors of the promise. If the promisee remits the performance of part of the promise in favour of one or some of the joint promisors, such remission cannot destroy the right of the other

joint promisors to demand that all the joint promisors, should contribute equally to the performance of the remaining portion of the promise. 45 C.W.N. 357. A joint promisor is entitled to claim contribution from the others regarding the costs paid by him to the promisee, when the payment of such costs is part of the joint promise. 45 C.W.N. 357. A joint promisor cannot claim contribution from the others regarding the costs incurred by him in the legal proceedings between him and the promisee, (i.e.), the costs which he has had to pay to his own attorney. 45 C.W.N. 357. Joint promisor is bound to contribute debt kept alive by acknowledgment—Cause of action arises from date of payment. 116 I.C. 129=1929 M. 309. Under S. 43 a suit to recover the balance on an account can be maintained against some of the partners because their liability is joint and several. 53 B. 652=31 Bom.L.R. 1187. See also (1938) 2 M.L.J. 287.

EFFECT OF SECTION is to make liability of each of the co-promisors, joint and several. 33 M. 317; 17 B. 6. See also 1932 M.W.N. 1111. Decree for whole rent can be passed against one of several tenants. 8 Pat.L.T. 201=1927 P. 2=97 I.C. 373. See also 17 Pat. 662=20 Pat.L.T. 282=1930 P.W.N. 141; 17 Mys.L.J. 257. But in execution of the decree, the right, title and interest of the judgment-debtors only can be sold. 5 P. 233=94 I.C. 28=1926 P. 504. A judgment without satisfaction recovered against one of two joint debtors is not a bar to an action against the other, where the debt is joint and several. 147 I.C. 702 (2)=1934 P. 52 (2). Contract by one partner on behalf of the partnership—Promisee can sue any one of the partners for performance of the whole promise. 104 I.C. 700. One of two joint promisors cannot plead the minority and the consequent immunity of the other from liability as a bar to the promisee's claim against himself. 39 M. 409=43 I.A. 99=31 M.L.J. 18 (P.C.). A contract of sale entered into by a major and minor vendee is a joint one and can be enforced against the major vendee. 4 L. 334=1924 L. 146. Where joint debtors (who were joint tort-feasors in the suit) have under a compromise in Court contracted to pay a sum of money to the plaintiff and some of them pay the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise. 38 A. 237=38 I.C. 165. See also 11 Beng.L.R. 76. The right to contribution as between

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Each promisor may compel contribution.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

*Explanation.*—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

*partners* is not essentially different from the right to contribution as between persons who are jointly liable in respect of a debt. But a partner's action for contribution is conditioned by the special law of partnership. So long as the partnership continues or subsists, no separate action for contribution will lie, because the right of contribution is subject to the special rights and obligations created by the contract of partnership and the right to contribution can be enforced only as a part of the general suit for accounts of the partnership. Where, however, the partnership relation no longer exists and there is no likelihood of any restitution being necessary, there is no reason to apply the rule prohibiting actions for contribution as between persons who were once partners but have ceased to be such. The right to sue for contribution as between co-judgment-debtors arises out of equity, an equity all the more stringent in view of the provisions of S. 43 of the Contract Act. That is part of the general equity which requires that one shall not bear the whole burden in case of the rest and it comes into existence only when the common burden is discharged and not before. 48 L.W. 383 = 1938 M.W.N. 1041 = (1938) 2 M.L.J. 287. The doctrine of English Law that there is no contribution between joint tort-feasors cannot safely be extended to India. 38 A. 237 = 33 I.C. 165. *See also* 7 C. 702; 25 M. 599. A suit against the firm in the firm's name bars a separate suit against the representatives of a deceased partner. 43 I.C. 815 = 19 Bom.L.R. 837. The effect of S. 43 is to entitle plaintiff to get a decree against any of the co-contractors though plaintiff cannot get a decree against both. 40 I.C. 194 = 19 Bom.L.R. 370. A release granted to one of several judgment-debtors without any intention to release the others will discharge the others only *pro tanto* and not in respect of the entire debt. 51 I.C. 98 = 29 C. L.J. 245. A release of one of two mortgagors does not release the other. 50 C. 18 = 74 I.C. 1021 = 1924 C. 209. Where one of several joint tenants is liable for the whole rent, on his death leaving several heirs, all the co-parceners constitute in law one heir. 50 C. 737 = 1924 C. 165. A suit for cesses is maintainable against all the heirs

of one of the original lessees although the heirs of the other original lessees are not properly made parties. 27 C.W.N. 521 = 1923 C. 615. It is no answer to a claim for rent against three tenants that if one of them becomes an insolvent, the other persons are not liable to pay the rent. 53 I.C. 973 = 30 C. L.J. 515. *See also* 1927 P. 2. S. 43 is not applicable to a suit for arrears of rent against one of several heirs of a deceased tenant. A landlord cannot maintain such a suit without joining the other heirs. 45 I.C. 732; 27 C.W.N. 521 = 1923 C. 615; 36 I.C. 243. In order that one co-promisor can resist a suit on the ground that the co-promisors have not been impleaded, he must show that there was a definite contract that each promisor should not be separately liable. 105 I.C. 484. When the contract is by a single person as a tenant and he dies, the liability of his heirs is a joint liability, for co-heirs form a single person. The liability of joint tenants for rent is a joint and several liability. 44 I.C. 80 = 22 C.W.N. 289. Suit for arrears of rent not falling due, in the lifetime of the deceased tenant can be maintained against some of his heirs. The suit is not bad though all heirs are not joined. 36 I.C. 243. Where the parties are interested jointly by law in a contract by a single person, S. 43 cannot be applied. 35 I.C. 563 = 24 C.L.J. 371. Joint contract is not terminated by the death of one of the joint contractors. 16 I.C. 852 = 17 C.L.J. 201. S. 43 does not enable a person suing one of two partners, in their private capacity, and failing to establish his claim, to continue the suit, against them as against the firm. 31 I.C. 209 = 76 P.R. 1915; 4 L. 239 = 77 I.C. 338 = 1924 L. 148. Registered pattadar with limited interest in land paying Government Revenue can recover from other persons having interest. 12 L.W. 180 = 59 I.C. 262. Loan by partner to the partnership—Suit for recovery of—Maintainability. 64 I.C. 183. A partner in a firm can have a dual capacity, that of creditor, of the firm as well as that of partner in it. 64 I.C. 183. A suit for contribution in respect of costs is not maintainable. 33 I.C. 357 = 18 O.C. 340. A suit on hand note executed by several persons is not bad simply because one only of the joint

*Illustrations.*

(a) *A, B and C* jointly promise to pay *D* 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

(b) *A, B and C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* entitled to receive 500 rupees from *A*'s estate, and 1,250 rupees from *B*.

(c) *A, B and C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anything, and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

(d) *A, B and C* are under a joint promise to pay *D* 3,000 rupees. *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Effect of release of one joint promisor.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Devolution of joint rights.

promisors has been sued. 76 I.C. 988=2 P. 466. Where a decree creates a joint and several liability; the judgment-debtors cannot in execution claim an apportionment. If executed for the whole against any one, his remedy is to sue for contribution. 2 P. 796=74 I.C. 867=1924 P. 262; 76 I.C. 905=1924 M. 279. A person in wrongful possession cannot bring a suit for contribution of payment made in support of his own title. 15 C.W.N. 332=13 C.L.J. 646. Joint promisors—Dismissal of suit against—Appeal. 34 I.C. 138.

A person having a claim against two co-promisors alternatively, if he elects to proceed and obtain a judgment against one of them, cannot proceed against the other; by pursuing his claims against the former to judgment he abandons his claim against the latter. 165 I.C. 338=38 Bom.L.R. 610=1936 Bom. 344. On this section, *see also* 62 C. 612=39 C.W.N. 461.

SEC. 43, ILL. (a).—Where in a suit on a promissory note jointly executed by three members of a joint Hindu family, one of them having been adjudicated insolvent, the creditors discharged him from the suit. *Held*, that the suit was maintainable as against the other two executants. 144 I.C. 117=1933 N. 324; 2 P. 460; 17 B. 6; 7 P. 353. Co-heirs—Liability for rent—Claim barred against some of them—Others cannot be made liable for entire rent. 48 I.C. 536. Under the Indian Law a release by the creditor of one of the mortgagors, jointly and severally liable without expressly reserving his remedies against the other mortgagors, has not the effect of releasing the others. 44 C. 162=21 C.W.N. 740. *See also* 4 C. 336; 39 M. 548; 6 C.L.R. 212; 13 Pat. L.T. 619. (Joint decree for costs). The position as regards joint judgment-debtors is the same in principle as that as regards joint

promisors under S. 44, Contract Act. Hence a release granted to one of them without the consent of others does not absolve the latter from liability. 144 I.C. 981=1933 L. 505. (39 M. 548, Rel. on.) The English Law doctrine that the release of one of several joint debtors releases all from liability, has no application to India as evidenced by S. 44. 44 C. 162. The release of a joint judgment-debtor does not operate as a release of the others but they can claim the benefit of the amount actually paid by the released judgment-debtor. 39 M. 548=29 I.C. 303. Where on a insolvency of a firm, the creditor brought a suit against the members of a joint family firm alleged to be a partner in the insolvent firm and by the terms of a compromise in the suit, the creditor received a smaller amount than due and released one of the partners and the whole of the asset, the release operates as an absolute release in favour of the whole firm insolvent and the creditor is not entitled to prove in the insolvency for the balance. 129 I.C. 890=32 Bom.L.R. 1656=1931 B. 123.

SECS. 43 AND 44.—Construction of sections—Liability of joint contractors under English and Indian Law. *See* 62 C. 612=39 C.W.N. 461.

S. 44 of the Contract Act applies not only to the case of a complete discharge but also to one of a partial discharge of some of the joint promisors by the promisee. A partial discharge of some of the joint promisors by the promisee does not release them from their liability to contribute equally with others to the performance of the promise. 46 C.W.N. 234. The fact that the decree-holder may have released some of the joint judgment-debtors from some part of their share of the judgment-debt does not affect the liability of the others to contribute, and under S. 44 of the Contract Act it does not discharge the other

*Illustration.*

4, in consideration of 5,000 rupees lent to him by C and C promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

joint-debtors. 77 C.L.J. 434=A.I.R. 1944 Cal. 328 (2).

SEC. 45.—For an exception to S. 45 in case of Government securities, see the Indian Securities Act (XIII of 1886), S. 5.

APPLICABILITY.—Section applies to all joint promisors (as) partners, co-heirs, etc. 10 B. 32. See also 17 B. 6; 17 B. 29; 21 B. 12; as also joint family members carrying on partnership business. 6 C. 815; 7 B. 217; 18 M. 33; 18 C. 86; 33 A. 382 (P.C.). It is doubtful whether S. 45 applies to a claim for possession of land. Where, however, the suit is really for specific performance of a contract, the defendant may plead S. 45 as a bar. 57 P.R. 1911=12 I.C. 850. See also 155 I.C. 610=1935 L. 478. Distinction between action of pure tort and action of wrong arising out of contract pointed out (135 E. R. 561, Ref. to.) 1932 M. 583=62 M.L.J. 154.

EFFECT OF SECTION is to extend English law as to trading partnership to all partnership cases. 9 A. 486.

SPECIAL CASES—CO-HEIRS.—One debt creates a single and indivisible liability which gives rise to one single cause of action. One of several heirs of a deceased obligee cannot sue for his share in the money due under the bond. 33 A. 327=9 I.C. 127. (7 A. 313, Foll.) See also 1941 Cal. 595. See also 197 I.C. 321. Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. So also are payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour bond was executed. 41 M. 637=34 M.L.J. 315=45 I.C. 419; 29 I.C. 586. See also 30 I.C. 371; 7 Mys.L.J. 379. Where there are several mortgagees and there is no specification in the mortgage deed in regard to who advanced the money, the presumption is that the money was advanced in equal shares and payment whether by bond or otherwise to one of them without consent of or reference to the others does not discharge the mortgage debt due to others. 1930 A.L.J. 290=1930 A. 98=126 I.C. 364.

CO-MORTGAGEES.—Where property is mortgaged to two persons as tenants-in-common and there is no covenant to repay each separately a moiety of the amount, the right of either mortgagee, who desires to realize failing the consent of his co-mortgagee, is to sue making co-mortgagee a defendant. 46 I. A. 272=37 M.L.J. 483=24 C.W.N. 297 (P.C.). See also 31 C.W.N. 374. Where on the death of one of two joint mortgagees, the survivor alone sued on the mortgage *Held*, that the suit was defective owing to

the non-joinder of the legal representatives of the joint promisee. 1937 A.M.L.J. 118. Where there are two mortgagees and a suit is filed on the mortgage by only one of them, the absence of the other as a party becomes immaterial when during the course of the suit he dies. The person suing though he had no right to sue alone on the day on which he sued, acquired that right during the course of the suit by the death of the other. 1.L.R. (1939) Nag. 515=1939 Nag. 242. As to whether one of several joint promisees can sue for his share of the debt only, see 51 M. 1.J. 648=1927 M. 84; 105 I.C. 544 (suit by one broker for his share of brokerage fees). A mortgagor who paid the whole to one of the mortgagees in disregard of a notice by the other not to pay and who is compelled to pay again, the share of the other cannot claim a refund from the mortgagee whom he has paid in full. 24 I.C. 88. One of several co-mortgagees cannot maintain a suit for sale of the entire mortgaged property to recover his share of the debt only. 24 I.C. 88. Co-mortgagees—Suit by one for his share on allegation that others had received their shares is maintainable. 25 I.C. 440=19 C.L.J. 327. So also one of the joint promisees cannot sue for share of the debt. 51 M. L.J. 648. Co-mortgagees are presumed an equity to be tenants-in-common of the mortgage debt and their interests are severable or partible among themselves. Each of them can sue joining the unwilling co-obligors as defendants. 27 C.L.J. 453=45 I.C. 986; 46 I.A. 272=37 M.L.J. 483 (P.C.). Similarly if some of the co-mortgagees are estopped from suing, the Court can sever the debt and give decree to the others for their share. 27 C.L.J. 453=22 C.W.N. 641. A payment of the mortgage debt by the mortgagor to one of the several mortgagees is not a valid payment as against the other mortgagees. 29 I.C. 956=21 C.L.J. 570; 29 I.C. 139; 4 Lah. L.J. 23=1922 L. 64=63 I.C. 744; 3 Lah.L.J. 502. But it operates as a valid discharge of the entire mortgage if the person to whom payment is made was the manager and the agent of all the mortgagees. 105 I.C. 751. Co-mortgagees—Payment to one if discharge of debt. 5 Pat.L.J. 376=56 I.C. 403; 5 Pat.L.J. 151=55 I.C. 841; 31 L.W. 723=112 I.C. 501.

CO-PARCENER.—The manager of a joint Hindu family can enforce a contract made with the family, and the junior members are not necessary parties. 33 A. 272=38 I.A. 45=21 M.L.J. 378 (P.C.); 14 I.C. 35=9 A. L.J. 410. One of the co-promisees in respect of a promissory note is not entitled to bring a suit without making the other party to it. Under S. 45, Contract Act, the right to claim



*Time and place for performance.*

Time for performance of promise where no application is to be made and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

*Explanation.*—The question “what is a reasonable time” is, in each particular case, a question of fact.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Time and place for performance, of promise, where time is specified and no application to be made.

*Illustration.*

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

performance of the promise rests with them jointly. Where, therefore, a promissory note is executed in favour of two brothers forming a joint Hindu family, only one of them who is not the *karta* of the family is not entitled to bring a suit on basis of the note without joining the other. (1932 P. 346 and 1934 P. 85, Disting.) 17 Pat.L.T. 879=1936 P. 274. Co-parcener—Tender to manager of Hindu family is valid. 19 A.L.J. 852=14 A. 64.

CO-SHARER.—A co-sharer in whose sole name the title-deed stands is not entitled to object to the tenants paying to his co-sharers their shares. He is not bound by payments beyond their share unless they were made *bona fide* in which case he is entitled to maintain a suit for his own share of the rent without making his co-sharers parties. 28 I.C. 141=28 M.L.J. 197.

FIRM.—O. 30, B. 4, C.P. Code, contains a modification of S. 45 of the Contract Act and a suit by firm could continue without the legal representative of a deceased partner being brought on record as co-plaintiff. 21 I.C. 509=17 C.L.J. 648. Debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and when one of the partners in a firm dies, the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties. 4 L. 122=1923 L. 197; 24 I.C. 268. All partners living at the time of the institution of the suit liability. 54 I.C. 273=10 P. W. B. 1920. A payment to one of two partners constituting a firm operates as discharge of liability. 54 I.C. 273=10 P.W.B. 1920. Section 45 does not prohibit the action where a partner of a dissolved firm collects his share of debt impleading the other partners as defendants. It is open to the latter to sue again for their share of the debt. 53 I.C. 416=128 P.B. 1919. See also 1936 S. 78=90 I.C. 111. One partner cannot sue alone to

recover a partnership debt. He can, however, use the name of the firm and names of his co-partners so as to enable him to sue. 40 I.C. 108. One of several promisees in a contract for specific performance cannot claim specific performance. 13 I.O. 315=1912 M.W.N. 415. A payment to one of several joint promisees does not operate as a complete discharge of the debt. 40 I.C. 405. See also 2 Pat.L.J. 520=42 I.C. 408; 29 Bom.L.R. 147=100 I.C. 993=1927 B. 125; 13 I.C. 315=1912 M.W.N. 415; 36 M. 544=24 M.L.J. 333 (F.B.); 19 I. C. 665=17 C.L.J. 372; 49 I.C. 63=22 C.W. N. 1021.

SEC. 46.—In a contract where the dates of delivery in instalments are not indicated, the instalments must be deemed to have been distributed rateably over the period appointed for delivery of the whole quantity of goods. It is unreasonable for a person who has borrowed ornaments for use in a ceremony to detain them after the ceremony has been completed and the owner has demanded their return. 126 I.C. 682=1930 O. 395; 43 C. 305=20 C.W.N. 240. Agreement by puisne mortgagee to pay off prior encumbrances—Default—Damages recoverable by mortgagor. 48 I.C. 550; 1925 O. 132. Mining lease—Time for payment of royalty not mentioned—Royalty becomes payable within a reasonable time—Limitation. See 21 Pat.L.T. 443=1940 Pat. 609.

SEC. 47.—Sale—Vendor's duty to tender goods at the time specified—Delivery of Railway receipt not sufficient. 40 B. 517=32 I.C. 948. The nature of the property is one of the matters which has to be taken into consideration in determining whether time should be treated as of the essence of the contract. 57 B. 292=1933 B. 71=34 Bom. L.R. 1629. Where a compromise decree provides for payment of instalment on several dates it cannot be said as a proposition of law that time is not essence of the contract. 132 I.C. 580=1931 L. 696.



48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Application for performance on certain day to be at proper time and place.

*Explanation.*—The question “what is a proper time and place” is, in each particular case, a question of fact.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Place for performance of promise where no application to be made and no place fixed for performance.

**EXPLANATION.**—To determine what is reasonable time, usage of the business is also to be considered. 24 B. 97; 23 M. 441. Where the day for performance is fixed, the promisor would have to perform it at any time during the usual business hours on the day and place fixed, even if it be a Sunday. 15 B. 399.

**SEC. 48.**—See 40 B. 517 under S. 47.

**SEC. 49.**—Section does not apply where the money is payable in demand and not without application by the promisee. 15 I.C. 885 = 16 C.L.J. 279. There is no warrant for holding that S. 49 gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. 63 C. 726 = 40 C.W.N. 392 = 1936 C. 97 See also 163 I.C. 397 = 1936 R. 25. The rule contained in S. 49 applies to promises for payment of money as well as to promises for delivery of goods. In the case of a lease, it is the duty of the lessee to apply to the lessor for a reasonable place being named for the payment of the premium. When this is not done there is an implied promise on the part of the lessee to make the payment at the place where the lessor resides according to the rule that the debtor must pay where the creditor is. 1933 A. 147. S. 49 has no application to a case where, by manifest implication or necessary import, a place is fixed by the contract for the performance of the obligation. The rule in S. 49 accordingly does not apply where there is an obligation to pay the creditor, and an inference can legitimately be drawn, either from the terms of the contract itself or from the necessities of the case, that there is a further obligation on the debtor of finding the creditor so as to pay him. *Quære.*—Whether the English Common Law rule that if no place is named, it is the duty of the debtor to make the payment where the creditor is, has been superseded by S. 49. (7 Bom.L.R. 993, Dist. 53 I.A. 58 = 49 M.L.J. 806 (P.C.) and 30 B. 167, Ref.) 54 I.A. 265 = 5 R. 451 = 1927 P.C. 156 = 53 M.L.

J. 25 (P.C.). See also 142 I.C. 844 = 1933 S. 62; 163 I.C. 397 = 1936 R. 251. S. 49 has no application to a promissory note payable on demand in which no place is fixed for payment. In such a case the Common Law rule applies and it is necessary for the debtor to seek out his creditor and pay him. I.L.R. (1940) 1 Cal. 323 = 44 C.W.N. 609 = 1940 Cal. 443. A promissory note payable on demand does not imply that a demand must be made. The words “on demand” only mean that the note is payable immediately, or at sight, and the words “on demand” do not by themselves take the note out of S. 49, Contract Act. S. 49 of the Contract Act does not, however, apply to negotiable instruments. S. 49 deals with a contract between a promisor and a promisee, and has no application to matters governed by the law merchant contained in the Negotiable Instruments Act. I.L.R. (1942) Bom. 620 = 44 Bom.L.R. 495 = A.I.R. 1942 Bom. 251. S. 49 does not preclude the Court from finding out what the implied intention of the parties was in regard to the performance of the contract. 22 Pat.L.T. 282. Where there is an obligation to pay money and either from the terms of the contract or from the necessities of the case a further obligation is implied to find the creditor so as to pay him, S. 49 does not apply. (5 Rang. 451 (P.C.). Reld. on.) 1940 Lah. 85. The question as to what is reasonable time, is a question of fact in each case. 22 M.L.J. 207 = 10 I.C. 320. Choice of reasonable place lies with the buyer. 24 C. 8. Ordinarily the debtor is to see the creditor to ascertain the amount of the debt and pay it. 31 I.C. 880 = 11 N.L.R. 189; 121 I.C. 668 = 1930 N. 207. S. 49 is in accordance with the rule of English Law, that in the absence of any specification of the place of payment, the debtor must seek out the creditor. The section leaves it to the creditor to appoint a reasonable place of payment. 20 I.C. 683 = 5 Bur.L.T. 143. See also 59 B. 365 = 37 Bom.L.R. 357 = 1935 B. 283. *Quære.*—Whether it is good law in face of. 54 I.A. 265 = 53 M.L.J. 25 (P.

*Illustration.*

*A* undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place

Performance in manner or at time prescribed or sanctioned by promise.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

*Illustrations.*

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B* who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

*Performance of Reciprocal Promises.*

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

C.). See also 30 B. 167; 31 M. 223. In case *Pakki Adat* agency payment of money must be made where the constituent resides. 33 B. 364.

PLACE OF PERFORMANCE—BREACH OF CONTRACT—JURISDICTION.—Where the plaintiff at *T* gave orders to the defendant firm in *M* to send certain goods for which he sent an advance and instructed them not to send the goods per V.P.P., and when the goods were sent by V.P.P. in contravention of his order he refused to receive them and claimed the refund of the advance paid by him by a suit in the Court at *T*. *Held*, that owing to breach of contract, the amount which the plaintiff was seeking to recover became a debt, and that under S. 49 of the Contract Act where no place was fixed for the performance of the promise, it was the duty of the debtor to apply to the creditor to appoint a reasonable place and if the debtor failed to apply, the principle that the debtor must find his creditor would be applicable and that the place of performance was in *T* and the Court at *T* had jurisdiction. 40 L.W. 498=1934 M. 581=67 M.L.J. 296. Where no application has been made by the debtor to appoint a place for the performance of the promise the place of performance is to be determined with reference to the intention of the parties, and in doing so regard should be had to the fact that the obligation to pay the creditor involves the further obligation of finding the creditor so as to pay him. On an urgent request of defendant for a loan the plaintiff deposited Rs. 500 with the Kothi at Hyderabad to be paid to the defendant through the branch of that Kothi in Karachi. The plaintiff in his plaint averred that the loan had

to be returned at Hyderabad. The plaintiff brought the present suit at Hyderabad. *Held*, that even if there was no promise to return the money at Hyderabad and the agreement between the parties was silent on that point the defendant who had promised to return the loan must be presumed to have promised to return it at Hyderabad. [5 R. 451 (P.C.), Foll.] 142 I.C. 844=1933 S. 62.

SEC. 50.—Payment to unauthorised agent is not payment to principal. 13 Beng.L.R. 360. Payment not by cash but by transfer of figures in account is valid. 1925 S. 144=20 S.L.R. 335. Where a subscriber to a chit fund conducted by a company deposits with the Bank a certain amount in the manner sanctioned by the company (in a special Savings Bank Account in a Bank) for the performance of his contract, viz., the payment of future subscriptions to the chit fund in respect of the chit held by him, he having won the prize, the performance is good under S. 50. The promisee company has to take the risk, and if the Bank goes into liquidation the subscriber cannot be held liable. (1941) 2 M.L.J. 908=1942 Mad. 337.

SEC. 51.—Repudiation, what is—Sufficiently definite statement as to. 43 C. 305=20 C.W.N. 240. On this section, see also 49 M.L.J. 300=1925 M. 971; 88 I.C. 569=1925 S. 220. Where the consideration for a contract consists of a promise, the party who is bound to do the act promised, fully performs his part of the contract if he is ready to do the act when required. 20 I. C. 47 (1)=20 C.L.J. 424. In a suit by the buyer for damages for breach of a contract for sale of goods, it is incumbent upon him to satisfy the Court that he was ready

*Illustrations.*

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time in contract in which time is essential.

from time to time if the lender refuses to lend a small portion remaining due to the borrower, it has the effect of the lender putting an end to the contract and he is not entitled to claim interest at the contract rates. 1 L.W. 136=22 I.C. 627. On this section, see also 37 C. 334; 4 C. 237; 15 B. 389.

SEC. 55.—Compare Ss. 62 and 63, *infra*.

PRINCIPLE OF SECTION.—See 1927 S. 49. As to when time is essence of contract, see 88 I.C. 89; 39 Bom.L.R. 835. Time is not ordinarily of the essence of the contract for sale of land, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a certain day, or if the nature of the property intended to be sold requires it, as for instance, if the contract is for the sale of a life-interest or a mining lease given for a fixed period of time. Time is not of the essence of contract simply because a period of completion is mentioned in the contract. 63 C. 804=1936 C. 51. See also 1937 Bom. 417; 16 Luck. 357. In cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract; there is no such presumption in the case of commercial contracts. If time is originally the essence of the contract, it does not cease to be so because one of the parties had agreed to grant a short extension. 190 I.C. 554=1940 Oudh 443. Under S. 55, Contract Act, the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. Nor is the element of time introduced into S. 63. In a case where after several agreements for extension of time there is an ultimate agreement that time should be extended to a particular date, it matters not that there are gaps between the intervening agreements. What is vital is the final agreement to extend time. 48 Bom.L.

R. 274. The question whether or not time is of the essence of a contract is a question of the intention of the parties to be gathered from the terms of the contract. Where there is an express provision that time is of the essence of the contract and at the same time provision for extension of time in certain contingencies, and for the payment of a fine or penalty if the contract remains unfinished on the expiry of the time provided in the contract, such provision is inconsistent with time being of the essence of a contract. This principle applies to P. W.D. contracts. 189 I.C. 785=1940 Sind 1.

CONTRACT TO SELL.—Even where time is not of the essence of contract, the purchaser must show his readiness and willingness to perform his part of the contract within a reasonable time after the agreed date. 37 I.C. 776; 69 I.C. 41=1922 M.W.N. 47. See also 2 I.C. 460 (P.C.). Sale of goods—Delivery to be taken within a specified period—Default—Delivery of part of goods after expiry of time fixed—Refusal to take delivery of the rest—If justified. 69 I.C. 9=24 Bom.L.R. 142. Time for performance expiring on holiday—Custom as to right to perform on day following to be strictly proved. 58 I.C. 396=32 C.L.J. 140. Where in a contract for sale, the entire purchase price was to be paid within one month after the receipt of earnest money, and the vendor during that month accepted various instalments towards the purchase money, the vendor should be deemed to have waived his right for entire payment within one month and could not plead time was essence of contract. 1938 Rang. 367. In a contract by which an agent agreed to procure his principal a loan within a certain time and time was definitely known to be of the essence of the contract, the agent will not, where the loan is not secured within the stipulated time, be entitled to any commission. 15 C.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable

Effect of such failure when time is not essential.

by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisors' failure to perform his promise at the time agreed, the promisee

Effect of acceptance of performance at time other than that agreed upon.

accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

L.J. 40=16 C.W.N. 753; 30 C.L.J. 224=24 C.W.N. 330. The rule in Kuri transactions being that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, time is of the very essence of the contract and unless the security is furnished within the prescribed period the bidder loses his right to the amount payable to him. 52 I.C. 938; 1919 M.W.N. 805. Where time is the essence of the contract, claim for *quantum meruit* is unsustainable when work is delayed. 19 I.C. 48=6 Bur.L.T. 53; 69 I.C. 894=1923 N. 140. The question whether time was of the essence of the contract embodied in the consent decree would depend on the facts of each case. Where a consent decree in a suit for specific performance directed the plaintiff to execute a conveyance within a week from the date thereof and the defendant to pay the price within four months therefrom, *held*, the term did not make time of the essence of the agreement and that the defendant was bound to pay even though the conveyance was executed only two weeks later. 1930 P. 234; 11 L. 699=131 I.C. 371=1931 L. 205; *see* 49 B. 289 (P.C.). Where time is of the essence of the contract, failure to comply by specified time entitles a promise to immediately rescind. Where time is not of the essence of the contract, he has a right to damages only. But whether time is of the essence of a contract or not, in any case a contract must be performed within a reasonable time. 33 I.C. 668=9 S.L.R. 137; 50 I.C. 41=12 S.L.R. 144; 19 I.C. 48=6 Bur.L.T. 53. *See also* 25 N.L.R. 110=1929 N. 164. Where time is of the essence of the contract it is the business of the contracting party to see that money payable to the other reaches the latter in time before the due date. It is not open to him to send money by registered post with a possibility of payment being delayed when payment by telegraphic transfer without any possible delay is possible. 11 L. 699=1931 L. 205. Where a contract of sale falls through owing to the default of the vendor the latter cannot claim specific performance and the purchaser can sue to recover such portion of the price as he has already paid. 34 Bom.L.R. 1629.

MERCANTILE CONTRACTS.—In spite of S. 55

time is of the essence of the contract in mercantile contracts. 36 I.C. 96=10 S.L.R. 4 (2 A.C. 455 at 463, Ref.). *See also* 4 I.C. 945; 19 I.C. 93=80 P.R. 1913; 48 M. 538; 1925 M. 626=48 M.L.J. 374; 83 I.C. 260=1924 C. 427; 1925 M. 1232=49 M.L.J. 200; 31 N.L.R. 250=1935 N. 111.

"MONTH" in Indian contracts means lunar month, not calendar month. 36 C. 576.

CONDONATION.—Where the contract was for the delivery of a certain quantity of goods every month and though there was non-performance of the contract within the specified time limit the other party extended the time for performance. *Held*, that there was a condonation of the breach and that the party in default cannot be proceeded against for damages for breach of contract. 7 O.W.N. 668=1930 O. 417.

SALE.—Consideration to be paid by the vendee to a creditor of the vendor—Vendee's default—Vendor entitled to recover by suit. 36 M. 348=12 I.C. 353=21 M.L.J. 983. *See also* 17 Pat.L.T. 940 (F.B.).

SALE OF LAND.—S. 55 does not lay down any principle which differs from the law of England as to contracts for sale of land. In such cases, equity looks at the substance and not at the letter of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which the sale was to be completed, really and in substance intended more than that it should take place within a reasonable time. *Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties. 40 B. 289=43 I.A. 26=30 M.L.J. 186 (P.C.) (38 B. 77, Reversed); 69 I.C. 13=1922 Bom. 14; 38 I.C. 123; 97 I.C. 269=19 S.L.R. 41. *See also* 63 C. 804=161 I.C. 166=1936 C. 51. Specific performance of a contract to sell land will be granted although there has been a failure to keep the dates assigned to it, if justice can be done between the parties and if nothing in the express stipulations of the parties, the nature of the property or the surrounding circumstances, make it inequitable to grant relief. 40 B. 289. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before but not after the contract is made. 40

Agreement to do impossible  
act.

56. An agreement to do an act impossible in  
itself is void.

B. 289; 40 M.L.J. 13=61 I.C. 457; 42 M. 802=34 M.L.J. 109; 52 I.C. 590=10 L.W. 376; 70 I.C. 126=1923 R. 42; 33 I.C. 608=9 S.L.R. 137. The presumption that time is not of the essence of a contract to sell land, is rebuttable when the sale is arranged to meet the expenses of a marriage taking place on a certain date. 26 I.C. 121=27 M. L.J. 482.

**TEST OF TIME BEING ESSENCE OF CONTRACT.**—The question whether time is of the essence of the contract depends on the intention of the parties. 47 B. 607=25 Bom. L.R. 328; 38 B. 77=15 Bom.L.R. 405; 28 C. W.N. 104=1924 C. 427; 33 I.C. 347=22 C. L.J. 566; *see also* 39 Bom.L.R. 835; 11 L. 699=131 I.C. 871=1931 L. 205. The question whether time is or is not of the essence of the contract has to be decided on the facts of each case. The Court has to look at the substance and not merely at the letter of the contract and ascertain whether the parties really and in substance intended more than that the act should be performed within a reasonable time. 11 L. 699. Where time is of the essence of a contract to pay money, the party must see that money payable reaches the other party in time. Mere remittance when time is of the essence of contract is not sufficient. 11 L. 699.

**WAIVER.**—Consent decree—Time not always essence of contract—Waiver may be inferred from conduct. 36 I.C. 598=18 Bom.L.R. 803; 2 Pat.L.J. 520=42 I.C. 408. Acceptance of payment after the expiry of the time fixed operates as a waiver of the limitation as to time in the contract. 2 Pat. L.J. 520=42 I.C. 408. S. 55 puts an agreement after the original date on the same footing as an agreement just before the original date. But it must be an agreement. Mere forbearance from suing or giving a formal notice is not enough. Mere forbearance to institute proceedings or to give notice of rescission cannot be an extension of time for the performance of a contract within the meaning of S. 63 of the Act. Time for the performance of a contract can be extended only by an agreement arrived at between the promisor and the promisee. 47 Bom.L.R. 719=A.I.R. 1946 Bom. 1. A party to a contract may at the request of the other party forbear from insisting upon delivery at the contract time and may allow time to be extended, without binding himself to do so, or may expressly contract for an extension of time, and then he may claim damages for non-performance at the extended time. 45 Bom.L.R. 405=A.I.R. 1943 Bom. 229.

**SEC. 56: SCOPE.**—The question whether compensation is payable or not depends not merely on (i) whether it can, in an abstract manner, be said that the act agreed to be

done is impossible in itself or unlawful, but upon, (ii) the knowledge as to the act being impossible or unlawful, as well as the promisor using reasonable diligence in obtaining that knowledge; but this knowledge, or absence of diligence must be coupled with, (iii) the want of knowledge on the part of the promisee, and finally it depends also upon, (iv) whether the promisor could have prevented that event which renders the act unlawful. 105 I.C. 319. *See also* 130 I.C. 772; 1931 L. 347. Courts cannot read into a contract of sale an implied term that the enforceability of the contract is to be dependant upon the ability of the vendee to find customers for the goods to be purchased by him. 58 L.W. 255; 1945 M.W.N. 465=A.I.R. 1945 Mad. 291=(1945) 2 M.L.J. 24. Where a party to a contract agrees to transport goods for the other party by means of his motor trucks and the trucks are requisitional under R. 75-A of the Defence of India Rules, the contract becomes impossible of performance. There is a frustration of the contract on account of the circumstances beyond the control of the party. I.L.R. (1945) Nag. 475=1945 N.L.J. 267=A.I.R. 1945 Nag. 192.

**CONSTRUCTION OF SECTION.**—There are two matters which are dealt with by paragraph 2 of S. 56 of the Contract Act, *viz.*, an act which becomes impossible and an act which becomes unlawful. In the case of an act which has become unlawful the promisor is exonerated from performing if he is not responsible for the act having become unlawful. The first part of the paragraph does not speak of the act having become impossible by reason of the act of the promisor. Though it is not clear what exactly is meant by speaking of an act having become impossible in the sense referred in the section, there is no reason to hold that the Legislature intended to depart from the general common law rule which is that where a party has not qualified his obligation, he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause over which he has no control. 192 I.C. 768=1941 Pat. 429.

**"BECOMES IMPOSSIBLE".**—Whether absolute impossibility is meant, as applied to a contract for supply of coal, *see* 50 I.A. 142=47 B. 563=45 M.L.J. 630 (P.C.). A clear line of distinction must be made between physical impossibility and mere difficulty in carrying out a contract. 130 I.C. 772=1931 L. 347. As to what amounts to impossibility of performance, *see* 86 I.C. 362=1925 M. 907; 48 M. 538=48 M. L. J. 374. *See also* 1936 S. 26. Loss of ship before it reached the place of loading—Right to recover advance freight. *See* 123 I. C.

A contract to do an act which, after the contract is made, becomes im-

Contract to do act afterwards becoming impossible or unlawful.

possible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which

Compensation for loss through non-performance of act known to be impossible or unlawful.

the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

332. "Becomes impossible"—Contract of service—Wrongful dismissal—Broker employing under-broker—Termination of broker's appointment—Dependent contract. 47 C. 290=46 I.A. 314=24 C.W.N. 577 (P.C.). Where, in a contract to lease lands, the performance becomes impossible by acquisition of land by Government the promisee is entitled to compensation for loss. 44 A. 229=20 A.L.J. 41=65 I.C. 253. Mere difficulty or the need to pay exorbitant prices is not such physical impossibility as is contemplated under S. 56. 40 B. 301=33 I.C. 205; 47 B. 563=27 C.W.N. 974=45 M.L.J. 630 (P.C.). Where lands held under a lease are silted by floods but it was possible to put them right by means of a certain expenditure, the tenant cannot refuse to pay rent. 118 I.C. 74=1929 M. 575. Sale becoming impossible for want of sanction of Cantonment authorities—Contract of sale if becomes void. 27 A.L.J. 1122=1929 A. 837. "Becomes impossible" by a rule of the Government—Effect. 36 B. 139=12 I.C. 693. See also 58 I.C. 761=24 C.W.N. 703, e.g., wagon restrictions by Government. See 99 I.C. 459=1927 M. 89=51 M.L.J. 663. "Become impossible" Owing to war—Effect. 45 C. 28=21 C.W.N. 670; 58 I.C. 761=24 C.W.N. 703; 33 I.C. 540. "Becomes impossible" owing to exorbitant rise in price. 62 I.C. 815. Government requisitioning all steamers available for carriage of goods. See 105 I.C. 319. Strike among local workmen as defence. See 30 Bom.L.R. 49. S. 56 is applicable only to the physical impossibility and therefore does not cover every case of frustration. 70 I.C. 379=26 C.W.N. 573; 36 B. 139=12 I.C. 693. See also 47 B. 563 (P.C.). Impossibility as an excuse for non-performance of a contract must be a physical or legal impossibility. A rise in freights may be equivalent to such a scarcity of ships as to amount to physical impossibility. 63 I.C. 267; 33 C.L.J. 151. See also 47 B. 563 (P.C.). Where the contract does not expressly or by necessary implication fix any time for the performance, the law implies that it shall be performed within a reasonable time. 53 I.C. 125=26 M.L.T. 24. If the delay in transit is attributable to causes beyond the control of the defendant, he has acted neither negligently nor unreasonably. 53 I.C. 125. As to what is reasonable time, see 53 I.C. 125. Where a

sub-lease is entered into in the belief that the original contract will be subsisting during the period during which the sub-contract is to be worked, the cancellation of the contract terminates the sub-contract as well. 29 I.C. 151=2 L.W. 411; 37 I.C. 761. A contract is not rendered impossible of performance merely on account of a difficulty in performing it or a need to pay high prices. 57 I.C. 636=17 N.L.R. 1. Where a person stands surety to produce a person on a certain day in Court but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform. The agreement is not one falling under the second part of S. 35. 70 I.C. 870=1923 R. 26. Where an employee binds himself, to indemnify his employer if theft occurred of the property for which he was responsible, no question of impossibility of performance arises and the stipulation could be enforced and the employee made liable for loss occasioned by theft. 1941 A.M.L.J. 98.

TEST OF IMPOSSIBILITY.—Test of impossibility is whether it was practically impossible for the defendant to get the quality contracted for within the specified time. 35 I.C. 625=(1916) 2 M.W.N. 131. See also 11 Mys. L. J. 81. If after a contract is entered into, it becomes illegal owing to declaration of war, etc., it cannot be enforced. 33 I.C. 96=9 Bur.L.T. 99; 48 I.C. 310=11 Bur.L.T. 84; 40 I.C. 526=32 M.L.J. 446; 40 I.C. 851=41 M. 225. See also 40 B. 570=33 I.C. 353; 42 B. 473=37 I.C. 644; 33 I.C. 540; 43 I.C. 673=33 M.L.J. 410.

ASSIGNMENT OF CONTRACTUAL RIGHTS—BREACH OF THIRD PARTY—LIABILITY OF ASSIGNOR.—It is too broad a statement to assert that whenever a person enters into a contract, he must get his money or its equivalent in goods irrespective of the terms agreed upon. Where a person transfers his right under a contract for purchase of goods from a third person in favour of the plaintiff without in any way undertaking to procure delivery, the breach by the vendor of his contract to deliver does not make the contract void or impossible for failure of consideration. In such a case, the consideration for the contract is not the delivery of the goods but the right to call for delivery. That was what the plaintiff bargained for and that he has obtained. 8 Mys.L.J. 361.

FRUSTRATION.—The applicability of the



*Illustrations.*

- (a) *A* agrees with *B* to discover treasure by magic. The agreement is void.
- (b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.
- (c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.
- (d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

doctrine of frustration of contracts depends upon the particular circumstances of the case in which it is sought to be invoked. Where it has not become impossible for a party to discharge his obligation under the contract, but merely burdensome to him to do, the doctrine cannot be invoked. Before the doctrine can be invoked it must be shown that the event which produced frustration was one which the parties to the contract did not foresee and could not, with reasonable diligence have foreseen. 24 Pat. 197 = (1945) P.W.N. 106 = A.I.R. 1945 Pat. 300. See also 1942 Cal. 291. The doctrine of frustration is to the effect that when the performance or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been contemplated by the parties to the contract when they made it, a court will consider what, as fair and reasonable men, the parties would have agreed upon if they had in fact foreseen and provided for the particular event, and if, in its opinion, they would have decided that the contract should be regarded as at an end, would discharge the party who would otherwise be liable to pay damages for non-performance. 24 Pat. 197 = (1945) P.W.N. 106 = A.I.R. 1945 Pat. 300. The word frustration used with reference to a contract has to be regarded as used in a technical legal sense. It is a sort of shorthand. It means that a contract has ceased to bind the parties because the common basis, on which by mutual undertaking it was based has failed. It would be more accurate to say not that the contract has been frustrated but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance. Whether frustration occurs or not depends on the nature of the contract and on the events which have occurred. Modern English law has recognised how beneficial the doctrine of frustration is when the whole circumstances justify it, but to apply it calls for circumspection. The doctrine may apply to a contract for unascertained goods. 58 L.W. 315 = 1945 A.L.J. 272 = 1945 P.C. 144 = (1945) 1 M.L.J. 417 (P.C.). See also 1945 Nag. 192 = I.L.R. (1945) Nag. 475.

**SUIT FOR RENTALS OF TOLL—DEFENCE OF FRUSTRATION.**—In a suit by the District

Board to recover the balance of the annual rentals from toll-gate contractors, the defendants pleaded that the contracts came to an end because they became impossible to be performed by reason of an unforeseen accident. The monsoon that year was very severe; the bridges adjoining the toll-gates had been washed away and for nearly 3½ months traffic had to be suspended to a greater or smaller extent. Cl. 6 of the sale (of tolls) provided: "sales subject to all risks. Claims for compensation will not be entertained." Held, (i) that the doctrine of impossibility of performance or "frustration" proceeded on the assumption that the parties at the time of contract did not have a contingency in their mind; if they had it they would have provided for it; in a particular way that doctrine was inapplicable to the present case for the reason that the destruction of bridges by floods was one of the risks contemplated by the parties; (ii) that the interruption to the traffic for 3½ months was nothing exceptional or unreasonable; (iii) as the defendants in spite of the monsoon continued to discharge the functions and collect as much as they could, the contract did not in fact cease to be executable. The defence therefore failed. 1934 M. 85 = 66 M.L.J. 108.

**NON-LIABILITY FOR ACCIDENT.**—Clause in the contract—Accident caused by the promisor's own negligence. See 25 I.C. 924 = 7 L.B.R. 105.

**CONTRACT TO THE CONTRARY.**—Section the contract—Accident caused by the applies only when there is no contract to the be read as an implied term in contracts. 105 I.C. 319.

**SECS. 56, 65 AND 72.**—Contract for sale of goods—Subsequent order under Defence of India Act fixing price at rate lower than contract rate—Contract, if becomes void. The plaintiff entered into a contract with the defendant for the purchase of certain goods at a certain price. Before the goods were delivered, an order was passed under the Defence of India Act fixing the maximum price of those goods at a rate lower than that fixed in the contract and the order was made applicable to all contracts in which delivery was to be given on or after a certain date. The plaintiff paid the contract price and took delivery of the goods after the date fixed in the Government order. In a suit by the plaintiff to recover the differ-



57. Where persons reciprocally promise, firstly, to do certain things, which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Reciprocal promises to do things legal and also other things illegal.

*Illustration.*

*A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.*

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

Alternative promise, one branch being illegal.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

*Illustration.*

*A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.*

This is a valid contract to deliver rice and void agreement as to the opium.

*Appropriation of Payments.*

59. Where a debtor owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

ence between the contract price and the price fixed by Government: *Held*, (i) that the contract became void when the order under the Defence of India Act was passed making it unlawful to charge a price exceeding the price fixed by the order; (ii) that the plaintiff was not entitled to recover the difference between the contract price and the price fixed by the order by invoking the aid of S. 65 of the Contract Act, as that section applied only if the advantage was received before the contract ceased to be a contract by becoming void, and not where it was received after, as in this case; (iii) that the plaintiff was not entitled to recover the sum claimed under S. 72 of the Contract Act, as the difference between the contract price and the maximum price fixed by the Government order could not be said to represent a payment made by the plaintiff by mistake. If the plaintiff paid the contractual sum in ignorance of the fact, that the contract had become void, he could recover the entire amount paid and return the goods. But he could not be permitted to split up the payment made in the way he sought to do and to treat a part only of such payment as being a payment made by mistake refundable under S. 72. To do so would be to permit the plaintiff to enforce a new contract on the defendant. The Government order merely prohibited the sale above a certain maximum price but did not compel sale at that price. 80 C.L.J. 170. A contract to do an act which, after the contract was made, has become impossible, becomes void when the act becomes impossible. When a contract becomes void, any person who has received any advantage under such contract

is bound to restore it or to make compensation for it to the person from whom he received it. I.L.R. (1944) Mad. 124=1944 M.W.N. 200=57 L.W. 23=A.I.R. 1944 Mad. 239=(1944) 1 M.L.J. 58.

SEC. 57.—If the parties have treated the legal and illegal parts of a contract as inseparable and as an integral whole, the entire contract is void. 9 B. 176. On the section, see also 167 I.C. 707=1937 R. 47.

SEC. 58.—S. 58 does not apply where there is no alternative promise separable from the illegal portion of the agreement. A covenant for indemnity for failure to do an illegal act is unenforceable. 18 I. C. 9. Where a contract is only partly unenforceable, the whole contract goes unless it is severable. 30 M.L.J. 62=32 I.C. 486 (F. B.). Suit to enforce alternative promise when lies. 132 I.C. 321=1931 A. 589.

SECS. 59 AND 60.—AMOUNT DEPOSITED IN COURT—POWER OF COURT TO ORDER APPROPRIATION.—There is nothing in law under which a Court can order an appropriation. Appropriation is a matter which arises when payment is made and accepted. Where payment is not accepted by the decree-holder the appropriation towards an earlier debt or a later debt does not really arise, and there is no law under which a Court could force a decree-holder to accept payment against his wishes, particularly when the judgment-debtor is in default. I.L.R. (1945) Nag. 885=1945 N.L.J. 394=A.I.R. 1945 Nag. 277.

SECS. 59 TO 61.—Ss. 59 to 61 embody the general rules as to appropriation of payments in cases where a debtor owes several

*Illustrations.*

(a) *A* owes *B*, among other debts, 1000 rupees upon a promissory note which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B* among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

distinct debts to one person and voluntarily makes payment to him. They do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt, carrying interest on the sum adjudged to be due on the decree. 196 I.C. 625=1941 Lah. 386 (F.B.)=I.L.R. (1941) Lah. 746. Appropriation—Principles of. 30 C.W.N. 153=63 I.C. 904 (P.C.). See also 37 A. 469; 38 C. 537 (P.C.); 35 C. 630; 2 Bom.L.R. 705; 26 C. 39; 19 C.W.N. 237; 29 C.W.N. 496; 1925 C. 937; 84 I.C. 672=1924 S. 137; 29 Bom.L.R. 950=1927 B. 479. Where there is a running account between the parties, in the course of which accounts had been taken and a balance struck and the debtor makes certain payments, the natural inference is that all payments made subsequently are to be allocated first to discharge of the balance. 1936 Pesh. 143.

APPROPRIATION OF PAYMENTS.—RULE AS TO. —Reading Ss. 59, 60 and 61 together it is clear that so far as the right of the debtor to make the appropriation under S. 59 is concerned, it can be exercised only when a debtor makes the payment with the express or implied intimation that the payment is to be applied to the discharge of a particular debt. It would follow that this intimation, express or implied, must be made at the time when the payment is made. On the other hand, under S. 60 it is only when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied that the creditor may apply it at his discretion to any lawful debt. The creditor need not exercise this right at once, but he can at his discretion exercise it even later. There is nothing in the section, particularly as a past perfect tense "has omitted" has been used, to indicate that the creditor loses this right if he does not exercise it at the very time when the payment is received. In many cases it may be impossible to make the appropriation there and then, for instance, when the payment is made at a time when the amounts due under the various loans are not known and the account books are not easily accessible. When neither the debtor nor the creditor has made any appropriation, then under S. 61, it is duty of the Court to apply the payment in discharge of the debts in order of time, and if the debts are of equal standing, in discharge of each proportionately. 57 A. 605=1935 A. 221=1935 A.L.J. 177 (F.B.). On paying money to his creditor the debtor may at the time of payment, appropriate it to any particular debt, even though the creditor says he takes it in payment of another debt. If the debtor makes no appropriation to particular items,

the creditor has the right of appropriation. If no express appropriation be made by either the debtor or the creditor, it may be implied or presumed that payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account. 61 C. 711. Decree debt, payable by instalments—S. 59 not applicable. 29 Bom.L.R. 950. As to appropriation in case of payment by joint-debtor, see 1925 R. 4; 95 I.C. 175=1926 O. 514. If a series of separate debts exist between a creditor and a debtor, the debtor may pay any one of them as he may deem fit and if he specifically appropriates the payment to a later debt, the creditor is not entitled to accept the payment otherwise than in respect of the debt to which it is so appropriated by the debtor. This doctrine, however, has no application when the parties enter into an agreement regulating the order of payment of instalments in respect of a debt. 173 I.C. 133=1938 Pat. 8. Where money is paid to satisfy the kist and received and acknowledged on that account it is not in the power of one of the parties to the transaction to vary the effect of the transaction by altering the appropriation in which both originally concurred. 38 C. 537=38 I.A. 80=21 M.L.J. 1148 (P.C.). A surety has no right to control the appropriation by customer or banker of moneys paid in by the principal debtor in the absence of special agreement. 23 C.L.J. 256=20 C.W.N. 562. When the debtor has failed to intimate to the creditor as regards appropriation, the creditor can appropriate a payment to any lawful debt due. 7 L. 17=92 I.C. 947=1926 L. 183; 82 P.R. 1914=25 I.C. 560; 24 P.R. 1915=29 I.C. 346; 9 L.W. 198=49 I.C. 273. The debtor's intimation must synchronise with the payment but the creditor is entitled to make the appropriation at all times up to the time of the trial. 7 L. 17=1926 L. 183. But see *contra* 1926 M. 792=50 M.L.J. 242, in which it is held that priority of communication of appropriation must be looked to. A creditor's right of appropriation is preserved to him until the moment of his filing the plaint in Court. He should not be deprived of his right so long as it was not inequitable to do so. 37 M.L.J. 367=52 I.C. 950. So long as notice has not been given to the debtor (or to the surety for the debtor) as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make reappropriation. 1930 M. 874=59 M.L.J. 513. As to how long the creditor's right of appropriation continues, see 5 P. 326=1926 P. 330. Where there is the definite stipulation in the mortgage-deed that the money paid is to be appropriated, in the first

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is

Application of payment where debt to be discharged is not indicated.

to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

instance towards payment of interest and the balance set-off against the principal due, the mortgagee must in such a case apply the money received in accordance with the provisions of the mortgage-deed. He cannot appropriate such payments towards principal. 123 I.C. 898 (2)=1938 Cal. 20. In the absence of any agreement to the contrary, payments made by a judgment-debtor have first to be appropriated towards the interest. 67 I.C. 606=4 P.L.T. 58; 55 M.L.J. 612. In the absence of any appropriation either by debtor or by creditor, the payment must be applied to the earliest debt. 37 A. 649=30 I.C. 92. Where payments are made in liquidation of a debt and amount due on account of interest largely exceeds the amount paid, the creditor may properly appropriate such payments towards interest. 23 C.W.N. 534=1 L.C. 88; 7 Mys.L.J. 274.

**APPROPRIATION TO INTEREST, ETC.**—Applicability of section to decree debts. 41 I.C. 344=21 C.W.N. 1055. *See also* 29 Bom.L.R. 950=104 I.C. 673=1927 B. 479. A creditor is entitled to appropriate payments made by his debtor to the discharge of prior dues then outstanding and not barred by limitation. 19 I.C. 6; 58 I.C. 797=36 M.L.J. 296. Creditor may appropriate payments towards interest. 50 M. 614=1927 M. 620=113 I.C. 394=52 M.L.J. 612.

**APPROPRIATION OF REVENUES.**—Payment of revenue with direction to Collector to appropriate for one kist if can be taken for another. *See* 53 C. 886=30 C.W.N. 618=1923 C. 866.

**Sec. 60.**—When a debtor, from whom several debts are due to the creditor, makes a payment without any intention or under circumstances implying that it is in respect of a particular debt, the creditor is entitled to apply it at his discretion to any debt due to him. 152 I.C. 786=11 O.W.N. 1397. *See also* 39 P.L.R. (J. & K.) 117. Where there is an absence of express stipulation to appropriate the payment to a certain debt, the Court has got a further duty to see whether there was any intention of the parties to appropriate it to a particular debt. 197 Pat. 432=170 I.C. 480. As between a creditor and debtor the debtor in making payments may appropriate the payments in whatever manner he likes and failing such appropriation the creditor may appropriate. In addition he may appropriate payments towards debts which would otherwise be barred by limitation at any time, even to the last moment before bringing the suit. 14 Pat.L.T. 654=1933 P. 267. Or even during the pendency of litigation and before judgment. 58 A. 791=166 I.C. 423=1937 A. 1

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(F.B.). *See also* 1936 A.M.L.J. 34; 168 I.C. 714=1937 Nag. 94. In the case of a joint family debt, binding only in part on the joint family, the creditor is not entitled to appropriate a sum realized out of the sale of joint family property towards the whole debt but only towards the binding portion. 1938 A.L.J. 644=1938 All. 437; 1937 N. 94. Mortgage by manager of joint family—Portion of debt not for necessity—Payment by mortgagor—Mortgagee's power of appropriation. 58 A. 791=166 I.C. 423=1937 A. 1 (F.B.). Appropriation by a plaintiff towards a simple money decree and not to a mortgage debt was held proper. 37 M. L.J. 367=52 I.C. 950. Where a deposit of money is made by a debtor with a creditor for a special purpose, the former cannot subsequently claim to have appropriated the same to any other debt due by him. 59 I.C. 121; 8 Mys.L.J. 278. *See also* S. 230 and 42 C.W.N. 1263. Where the creditor exercises his option under S. 60 and appropriates the repayments in the account which he had with the principal debtor independently of the contract of guarantee, the surety cannot in law raise any objection to the appropriation and is not entitled to the benefits thereof. I.L.R. (1941) Lah. 323=1941 Lah. 16.

**RUNNING ACCOUNT—QUESTION OF APPROPRIATION.**—In the case of running accounts, there is no question of appropriation. It is assumed as a matter of law that the payment would go towards the earlier items in the account. 14 Pat.L.T. 654=1933 P. 267; *See also* 1936 Pesh. 143.

**LAWFUL DEBT.**—As to what would be lawful debt, *see* 104 I.C. 709=1927 C. 906. *See also* 61 C. 711. When an advance amount is paid by the tenant to the landlord under a stipulation that the same is to be applied towards the last year's rent due under the tenancy the landlord is entitled to appropriate the same towards the rent due for the instalments due for the final year, though a suit for rent due in respect of such instalments might be barred by limitation. 124 I.C. 51=1930 M. 594. The debts to which sums are applied must be proved to have lawfully existed. 1928 C. 229. Floating account contemplating a maximum which has been reached—Effect of subsequent payments. 51 M. 711=1928 M. 566=55 M.L.J. 471. Appropriation—Intention—Proof—Circumstantial evidence. *See* (1942) 2 M.L.J. 724.

**SECS. 60 AND 61: RIGHT OF APPROPRIATION.**—If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation de-

61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

*Contracts which need not be performed.*

Effect of novation, rescission, and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

*Illustrations.*

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

volves on the creditor and he may exercise that right until the very last moment and need not declare his intention in express terms. 60 C. 1265. A creditor is entitled under S. 60 to apply a payment at his discretion to any lawful debt actually due and payable to him from the debtor where the debtor has omitted to intimate and where there are no other circumstances indicating to which debt the payment is to be applied; and the creditor may exercise his option at any time. 171 I.C. 781=1937 Nag. 198. Where there has been a payment by a debtor to a creditor and no appropriation has been proved either by the debtor or the creditor, till the date of suit it is open to the creditor to appropriate the amount or any part of it towards the payment of any debt even during the pendency of litigation concerning the payment, but only until the judgment is pronounced by the trial Court and not thereafter. 58 All. 791=1937 All. 1 (F.B.).

SEC. 61.—Where moneys are received by the creditor without any definite appropriation on either side, the money so received must first be applied in payment of interest and then in payment of the capital. 44 M. 570=48 I.A. 150=40 M.L.J. 549 (P.C.). See also 29 I.C. 718; 35 I.C. 375=1 Pat.L.J. 474; 40 I.C. 809=1 Pat.L.W. 777. See also 6 M.H.C.R. 32. Where there is nothing to show that a particular payment was made towards any particular transaction, then under S. 61 of the Contract Act, the payment should be appropriated towards the earlier transaction. 1942 O.W.N. 157=1942 O.A. 88=A.I.R. 1942 Oudh 311. Where there had been successive advances by the creditor and successive payments by the debtor, the legal position is that each item of debt if unpaid becomes time barred on the expiry of three years from the date on which it is incurred; but the balance outstanding in favour of a creditor is not generally considered to consist of the oldest

items of debt. Under S. 61, each payment ought to be appropriated to the satisfaction of the oldest then outstanding debt. 186 I.C. 855=1940 Pat. 52. Where the creditor has not appropriated, in taking accounts a debt which did not carry interest should rank last. 18 I.C. 535=17 C.W.N. 25 (P.C.). The application of S. 61 is always subject to the conditions that the parties had indicated no intention inconsistent with its application. 38 B. 255=21 I.C. 343. Payments by some of the debtors who were jointly and severally liable for the debt could be appropriated in order of time towards barred items even though all debtors did not concur in making payments. 41 I.C. 421. See also 1935 A. 221=1935 A.L.J. 177 (F.B.) cited under S. 59 *supra*. If a creditor has credited certain payments towards arrears of rents it is for him to show that arrears were due and what they amounted to, and in the absence of evicence on these points, it must be held that he was not entitled to do so. 1922 P. 446.

SEC. 62: ESSENTIALS OF NOVATION AND EFFECT.—It is doubtful how far the provisions of S. 62 will apply to cases of transfer of property. I.L.R. (1938) All. 714=1938 A.L.J. 746=1938 All. 418 (F.B.). Under S. 62 there must be a present substitution of another contract for the original contract and not a mere agreement to substitute one in future. (51 A. 799 and 1928 N. 289, followed.) 163 I.C. 123=38 P.L.R. 85=1936 L. 476. See also 1937 Lah. 816; 64 C.L.J. 62=1937 Cal. 57=I.L.R. (1937) Nag. 353=1937 Nag. 104; 1939 Pat. 323=20 Pat.L.T. 825. S. 62 presupposes that the original contract is still capable of performance. 1939 Rang. 413. Where the debtors execute a promote in favour of the creditors and subsequently they execute a bond for the same consideration, but there is a condition precedent to the validity of the bond which is not fulfilled, there is no novation of contract and the suit on the promote is maintain-

able. 162 I.C. 882=1936 L. 51. See also 1935 L. 897. "*Agree to substitute*", meaning of. See 27 A.L.J. 526=1929 A. 503=51 A. 799; 1931 O. 97=8 O.W.N. 126. See also 1923 N. 213. A novation requires that the new contracting party has consented to assume liability for the contract and that the person on whom the correlative right resides has agreed to accept the new party's liability in substitution of the original liability. A novation requires that the rights against the original contractor shall be relinquished and the liability of the new contracting party accepted in their place. A mere agreement to deliver would not operate to make the deliverer under a delivery order from the vendor contractually liable to the purchaser. Even though the deliver agrees to make delivery of the goods to the purchaser, this in itself would not operate as an acceptance by him of all the vendor's contractual liabilities. I.L.R. (1944) Kar. 208=A.I.R. 1944 Sind 205. The question whether the parties intended to substitute a new contract for the old one is a question of fact in each case depending for its decision upon the circumstances of the particular cases. Where a mortgage has become irredeemable and the mortgagee has become the owner of the property there is no mortgage in existence. 1943 A.W.R. (C.C.) 179=1943 A.L.W. 577=1943 O.W.N. 476. Novation may in India as in England constitute a good consideration for a fresh promise. A.I.R. 1943 P.C. 147=(1943) 2 M. L.J. 417 (P.C.). If there is a proposal to discharge a debt by executing a mortgage but the right of reverting to original position is reserved unless the new transaction is complete, there is no true novation and there is no bar to a suit on the original cause of action. 40 P.L.R. 689=1938 Lah. 757. Whatever difficulties there might be in applying the provisions of S. 62, where the agreement to substitute a new contract for the original one is made after the breach of the original contract, it is beyond all controversy that where a breach of contract has taken place, the cause of action that arises from the breach may be discharged by accord and satisfaction. I.L.R. (1941) 2 Cal. 237=45 C.W.N. 830=1942 Cal. 87. If the parties to a handnote agree to substitute for the liability under it a new contract under which the debtor has to pay a certain amount down and to execute and register a mortgage-deed for the balance, but subsequently neither the debtor carries out his part of the promise relating to the payment of cash nor the creditor accepts the mortgage-bond the execution of which is a unilateral act of the debtor, there is no novation of contract within the meaning of S. 62 and the creditor is therefore entitled to sue on the original handnote. 184 I.C. 705=1940 Pat. 121. See also 1937 Lah. 816. Execution of second promissory note in

substitution for first—Liability under original loan—Effect on. See 49 C.W.N. 37. "Parties to contract", meaning of. See 63 C. 194. Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong. 24 Bom.L.R. 877=75 I.C. 233 [(1919) A.C. 1, Ref.]. See also 5 Bom.L.R. 617; 41 C. 137; 1925 M. 919; 1925 N. 66; 1925 N. 26; 1925 P. 228. A contract need not be rescinded by an express agreement. If the parties make a new and independent agreement concerning the same matter, the latter may be said to discharge the former especially when the latter is inconsistent with the former. 38 I.C. 278=20 C.W.N. 708; 46 C. 534=23 C.W.N. 704; 43 C. 790=20 C.W.N. 370; 41 C. 35=21 I.C. 217; 17 I.C. 227=16 C. L.J. 271. The expression "*parties to a contract*" ordinarily signifies parties to an existing contract rather than parties to a contract that has already been discharged by breach. It has no doubt been held that the provisions of S. 62 of the Contract Act do not apply after there has been a breach of the original contract and that if the promisor does not satisfy the promisee under the terms of the new agreement, the promisee is relegated to his rights under the old contract and is entitled to sue on the basis of the old obligation. But it is difficult to apply this principle to a debt, for it is strange if the mere failure to pay an outstanding debt on demand brings the case out of the scope of S. 62. Release from an existing obligation is unquestionably good consideration for a promise to undertake a fresh obligation; and it makes no difference whether the original obligation is an obligation to do something *in futuro*, or is an obligation to pay a debt already due, or is an obligation to pay compensation for the breach of a contract. Whether the failure to carry out the substituted promise revives the original promise depends on the intention of the parties. It is always open to the parties to make an express stipulation of this nature. The law, however, does not imply any such term. 63 C. 194=40 C.W.N. 808. A composition between a debtor and his creditors operates as satisfaction of the debts and affords an answer to an action by the creditors upon the original liability. 114 I.C. 109=1929 S. 49. A party who relies on a new contract in substitution for the old must prove that it was supported by consideration. 19 I.C. 981=4 P. R. 1914. Creditor taking renewed bill for old debt does not necessarily wipe off the old debt. See 31 C.W.N. 773=102 I.C. 871=1927 C. 538. An agreement to give time for the payment of money due under a pro-note is operative in India; this principle is recognised in Art. 73, Limita-

tion Act. 39 M. 129=30 M.L.J. 51 (F.B.). See also 145 I.C. 476=38 L.W. 533=1933 M. 704; 49 A. 599=1927 A. 451. This is a departure from the English law. 39 M. 129=30 M.L.J. 51 (F.B.). In the case of mere contracts, a repudiation by one party assented to by the other might put an end to the contract. But this principle is not applicable to rights of property. 20 I.C. 908=1914 M.W.N. 144. Where the contract subsisted and had failed, the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract. 75 I.C. 440=1923 N. 332. Essentials of novation—Mortgage—Sale with a view to discharge mortgage—Nature of the transaction. 72 I.C. 422=1923 N. 213. In case of cross-contracts, the second contract does not operate to extinguish the first contract completely, nor is it effective as a novation. 1925 S. 144=20 S.L.R. 335. See also 22 L.W. 195=1925 M. 1260; 8 O.W.N. 126=1931 O. 97; 1933 L. 464. There is a vast difference between the obligations imposed by statute and the terms agreed to by the contracting parties. There is no escape from the former, but the latter can always be modified by mutual agreement. 44 C.W. N. 1060.

ILLUSTRATIVE CASES.—Pawnee releasing his pledge by a subsequent transaction without intention to rescind his prior security—Subsequent transaction proved invalid—He can sue on his original security. 52 M. 465=116 I.C. 827. Plaintiff acting as commission agent for the defendant—Final closing of accounts—Plaintiff taking hundi for the balance due—No liability remaining standing—Plaintiff suing to recover money due on the hundi—Hundi inadmissible being unstamped—Plaintiff cannot fall back upon original transaction. See 1928 L. 424=112 I.C. 719; 1934 L. 128. As to necessity of registration, see 145 I.C. 159=1933 L. 174. A pro-note containing a promise to pay the debt due under a former pro-note wipes out the old debt and creates a new liability. The Court need not take up the old transaction except where express rules of law make it necessary to do so, *e.g.*, where the debt acknowledged is barred by time so as to exclude the application of S. 19, Limitation Act. 52 A. 169=1929 A. 980. Where a Hindu father executed a promissory note partly in renewal of an obligation incurred before partition and partly because of new advances made after partition, and the promissory note contained a more onerous obligation in respect of interest than what was originally agreed on, *held*, that the promissory note represented a novation by which there was new liability in the place of the old one. 1930 M. W. N. 658. Mortgage-deed by husband and wife jointly—Second deed by husband alone may constitute novation of the first. 192 I.C. 388=1936 R. 396. If a contract is clear and unambiguous, its true effect cannot be changed merely by the

course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that, such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. 172 I.C. 786=1938 P.C. 26 (P.C.). Where the original schedule of rates, payable to the contractor fixed under a contract between the Railway and the contractor was abandoned with the consent of both the parties and the new enhanced rates proposed to be substituted by the Railway for those rates were not accepted by the contractor, but the contract employing the contractor remained in operation and the contractor did the work for the Railway, which the latter accepted, the amount which the contractor is entitled to recover from the Railway for the work done should be determined on the basis of fair and reasonable rates. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=(1938) 1 M.L.J. 640 (P.C.).

EFFECT OF NOVATION.—Novation is a question of fact. 7 Mys.L.J. 440. Where for a note from a firm, another was accepted from surviving partners, the estate of the deceased partner is free from liability under the principle of S. 62. 42 I.C. 815=19 Bom.L.R. 837. See also 9 Bom.L.R. 364; 15 C. 309; 12 L. 239=1930 L. 985; 8 Mys. L.J. 326; 1930 P. 442. A contract by the purchaser of a property to pay the whole or part of the consideration retained by him for payment to the vendor's creditors can be enforced by the latter, though they were not parties to the contract. 22 C.W.N. 279=36 I.C. 792. The basis of the purchaser's liability is not novation or a substituted contract, but because of the fact that the purchaser is a trustee of the vendor's creditors for the money in his hands to be used for their benefit. 22 C.W.N. 279. Sometimes an agreement may be enforced by a stranger to the contract, that is, in cases of trust, quasi-contracts or near relationship. 22 C.W.N. 279. See also notes under S. 37, *supra*. Where a debtor has disabled himself from performing his promise under a later contract which had been intended to be a substitute for an earlier one, it is open to the creditor to enforce the earlier contract rescinding the later, and S. 62 is no bar. 66 I.C. 47=2 L. 323. When the terms of a mortgage by conditional sale are altered by mutual consent, there is novation of contract and the original sale clause cannot be enforced. 24 I.C. 684=189 P.L.R. 1914; 29 M.L.J. 125=1915 M.W.N. 408. Under S. 62 there can be an agreement to cancel or vary the old contract or substitute a new contract, even after the breach of the original contract. 45 M. 180=42 M.L.J. 236=67 I.C. 905. A new contract changing the place of per-



63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

formance falls under S. 62 and no fresh consideration is necessary. 1917 M.W.N. 779=45 I.C. 401. A negotiable instrument given in discharge of a debt does not extinguish the debt, but only suspends payment. The creditor can fall back on the original contract if, for any reason, the new contract fails. 14 I.C. 399=8 N.L.R. 7. See 1936 N. 225. Effect of novation—Mortgage—Agreement to substitute fresh deed not fulfilled—Effect of—Estoppel. 30 I.C. 323=2 O.L.J. 402. A person not a party to a novation is not discharged from his liability under the original contract. 6 Bur.L.T. 171=21 I.C. 222.

**BURDEN OF PROOF.**—In a suit based on a novated contract the plaintiff must prove (1) the existence of liability under the original contract and (2) the extinguishment of that liability by the novated contract. 183 I.C. 855=1939 Pat. 477.

**INVALID NOVATION.**—Invalid novation—Mortgagee deed executed in consideration of previous bonds—Non-registration—Effect of—Remedy of promisee. 13 I.C. 858=14 Bom.L.R. 26; 34 P.L.R. 440=1933 L. 335. To effect a novation pursuant to an agreement to accept a new contract, the contract which was substituted must be one capable of enforcement in law. 14 Bom.L.R. 26; 16 I.C. 246=16 C.L.J. 264. Where an insufficiently stamped hundi was given in renewal of a prior hundi, the plaintiff could fall back on the prior hundi, 67 I.C. 856=1922 L. 56; 1934 L. 128. Where the contemplated substituted security itself fails the parties could not be taken to have intended that the liability under the original contract would also cease. 10 L.W. 466=54 I.C. 318; 13 I.C. 858=14 Bom.L.R. 26; 26 I.C. 393=16 M.L.T. 489. A renewal of a debt does not *ipso facto* extinguish the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security. 26 I.C. 393=16 M.L.T. 489. A pro-note accepted in full satisfaction of a claim debars the plaintiff from bringing a suit on the original claim. 9 I.C. 896; 112 I.C. 719. But see 52 M. 465.

**DISPUTE AS TO MONEY DUE—SETTLEMENT OUT OF COURT—CONSIDERATION.**—Where there is a dispute between the parties as to the amount really due from the defendants, *held*, that the settlement of such a dispute without the necessity of going to a Court might form a valid consideration in law. 147 I.C. 1175=1934 L. 163 (1).

**ALTERATION OF CONTRACT—LIABILITY OF ORIGINAL PARTY—BURDEN OF PROOF.**—Where a contract note relating to the sale and purchase of certain shares was originally drawn up by the appellant who was a sharebroker, in the name of the respondent, but at the

latter's request his name was deleted and the name of one H was substituted therefor in the note. *Held*, that the onus was on the appellant, and it would require very strong evidence, to show that notwithstanding such alteration in the contract note, the respondent remained liable to the appellant in respect of the transactions in the shares. 154 I.C. 1090=68 M.L.J. 530 (P.C.).

**SECS. 62 AND 63.**—No fresh consideration is necessary for an agreement which falls under the purview of S. 63 of the Contract Act and for the purpose of enforcing it, it is hardly necessary to invoke the aid of S. 62. 123 I.C. 225 (2). See also 131 I.C. 510=1931 R. 189; 146 I.C. 562=1933 L. 464.

**SEC. 63.**—S. 63 of the Contract Act has nothing to do with the interpretation of S. 92 of the Evidence Act. 1930 A.L.J. 1193=1930 A. 721 (F.B.). The section is intended to apply not to cases where the whole contract has been supplanted by a new one but to cases where the old contract subsists, but there is a voluntary remission of performance of some promise in it, for example, a remission of part of the debt at the time when it becomes payable. S. 63 will not cover a case of a binding promise to dispense with or remit performance in the future unless that waiver is made the subject of a fresh contract, because then S. 92 of the Evidence Act will stand in the way. 54 M. 889=1931 M. 636=61 M.L.J. 556. S. 63 makes a wide departure from the English Law inasmuch as it does not refer to any agreement and valuable consideration. It should not, therefore, be enlarged by any implication of English doctrine. 1. L. R. (1941) 2 Cal. 237=45 C.W.N. 830; 76 C.L.J. 514. In a case falling under S. 63 no fresh consideration is necessary. 132 I.C. 321=1931 A.L.J. 481=1931 A. 589. *Quære.*—Whether consideration is necessary for the remission of a part or whole of the contract under S. 63. 148 I.C. 501=1934 P. 144. See also 156 I.C. 743=1935 R. 188; 58 M. 702=69 M.L.J. 360. For an agreement to remit consideration is necessary; but if the creditor has actually remitted a portion of the debt due to him and not merely promised to remit it, no consideration is necessary. But actual remission is not completed until the creditor accepts the part payment in full satisfaction. 49 L.W. 684=1939 Mad. 688. A creditor can extend the time under S. 63 even after the time fixed for payment has expired. (23 B. 348, not foll.) 132 I.C. 321=1931 A.L.J. 295=1931 A. 589. See also 1935 R. 188; 69 M.L.J. 360. Under S. 63 a promisee can remit in part the performance of a promise made to him whether it has or has not already fallen due and whether or not such remission causes cessation of the subsisting contractual re-



*Illustrations.*

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B* to pay them a [composition] of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

## LEG. REF.

<sup>1</sup>This word was substituted for the word 'compensation' by sec. 2 and Sch. II of Act XII of 1891.

lation altogether. It is therefore, open to the promisee to remit a portion of the obligation under the section, even though the obligation on the part of the promisor to perform the unremitted part still continues. The section deals with actual remission, as distinguished from an agreement to remit, and in order to produce the legal effect such a remission does not require any support either in the shape of a consideration or of any prior agreement. A future liability can be remitted in *praesenti* and a remission of such liability will not necessarily require an agreement to remit. 1943 Cal. 181.

*Per Pal, J.*—(1) An agreement to remit to be enforceable must be supported by consideration. (2) The answer to the question whether the remission or the agreement to remit need be expressed in any particular form in order that it may have the intended legal effect, depends upon the facts of any particular case. The remission of the performance of a promise to pay interest on a promissory note is not required by law to be put in any particular form. I.L.R. (1943) 1 Cal. 101=76 C.L.J. 115=47 C.W.N. 213=A.I.R. 1945 Cal. 181. Acceptance of performance—Cheque for smaller amount accepted and cashed—Effect of. 20 A.L.J. 717=44 A. 718, S. 63 not applicable where parties stand in the position of decree-holder and judgment-debtor and not in that of promisor and promisee. 24 I.C. 391. No consideration is needed for relinquishment of debt but free assent must be established. If the debt is enforceable, it can also be released under S. 63. It is doubtful, however, whether a lower debt could be discharged by verbal relinquishment. 47 C. 537=24 C.W.N. 335. English law requires consideration to support a release or relinquishment of debt. See 19 M. 398; 20 B. 636; 15 C. 319; 9 M.L.J. 270. See also 34 M. 156. S. 63 does not entitle a promisee for his own purposes and without the consent of the promisor to extend time to his own advantage. There must be an agreement or mutual understanding to waive. 68 I.C. 912=1923 L. 117. See also 30 L.W. 293=1929 M. 794; 116 I.C. 646=1929 N. 137. A promisee is not bound to accept part perfor-

mance of a contract. 59 I.C. 971=3 L.L.J. 141. A promise to remit rent coupled with conditions is not an absolute promise of remission and the landlord is not estopped from enforcing his rights in full. 26 I.C. 958. This section would include what would be a conditional release in English law. 34 M. 156. See also 1942 Cal. 87. Under S. 63 no consideration is necessary to forego a portion of the rent or debt payable. 25 I.C. 741=16 M.L.T. 184; 122 I.C. 641=53 M. 127=58 M.L.J. 503; 23 S.L.R. 294=114 I.C. 97=1929 S. 153. See also 116 I.C. 646=1929 N. 137 (No consideration is necessary for an agreement to extend time for performance). See 47 Bom.L.R. 719. A suit cannot be brought for the recovery of the amount remitted when a remission had been made and communicated by the creditor to the debtor. 9 I.C. 763=9 M.L.T. 270. There is nothing in law to prevent a discharge by acceptance of something in lieu of the performance of the contract. 64 I.C. 461. An agreement to discharge a previous debt in consideration of the prompt receipt of a shorter sum is a valid agreement. 20 I.C. 544. Where a party to a contract of marriage having accepted cash and jewels repudiates the marriage, he is bound to return what he has taken. 65 I.C. 812 (15 C. 319, Ref.). Creditor extending time for payment without consideration, valid and binding. English law may be different on this subject. 49 A. 599=25 A.L.J. 385=1927 A. 451. See also 39 M. 129=30 M.L.J. 51 (F.B.). On this section, see also 1930 L. 193 (2).

ARRANGEMENT WITH CREDITORS—EFFECT OF.—Under an arrangement with creditors including the plaintiff, to pay them a composition of six annas in the rupee the defendant offered the amount due to the plaintiff firm, but the agent of the plaintiff firm refused to accept believing that the defendant had some other property which he was concealing. It was also proved that several other creditors of the defendant were paid according to the settlement. Held, that the case was fully covered by Ill. (e), S. 63 and that the plaintiff could not be allowed to resile from the agreement made with the defendant. 145 I.C. 801=1933 O. 361. Under S. 63, it is no doubt open to a promisee to remit his claim in whole or in part even without consideration. But when a person who is on the verge of insolvency purports to make a remission the validity of that transaction as against

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

the Official Receiver cannot be determined merely with reference to S. 63 of the Contract Act. Where the remission is without consideration it would obviously be inoperative as against the Official Receiver in view of S. 53 of the Provincial Insolvency Act. Standing surety for the debtor in connection with certain loans and joining him in executing a mortgage to his creditor cannot in law amount to consideration so as to validate a remission by a debtor on the verge of insolvency as against the Official Receiver. 1940 M.W.N. 495=1940 Mad. 737. See also 44 L.W. 722=1936 Mad. 798.

SEC. 64: SCOPE OF SECTION.—See 11 Bom. L.R. 693. Section does not apply to contracts originally known to be void or illegal, 9 B. 358; 15 C.W.N. 408. See also 49 B. 576=88 I.C. 643; 44 L.W. 722=1936 M. 978; 44 C.W.N. 11. The word 'rescinds' as used in S. 64, implies an "express and unequivocal cancellation of the contract". Where a domestic servant employed as sweeper of the house leaves his master without any notice and the master does nothing except engaging another person for doing the work the contract with the former servant is not necessarily rescinded by the master and hence the servant is not entitled to get the pay for the work done. 176 I.C. 526=1938 Rang. 207. Agreement to execute contract to Municipality—Committee rescinding contract—Other party relieved of his obligation. 157 I.C. 879=1935 Pesh. 124. When a sale of minor's property by his *de facto* guardian is set aside, the minor must return to the vendee the amount of benefit received by him thereunder. 10 L.L.J. 183=1928 L. 250; 113 I.C. 53. The term 'benefits under the contract' extends only to the money paid as consideration and not to the improvements effected by a usufructuary mortgagee. 124 I.C. 731. See also 8 P. 1. "Benefit or advantage"—Meaning of—Money received by a party in partial discharge of the consideration, though it may have been employed for the purpose of carrying out the receiving party's obligation under the contract, is nevertheless a "benefit" refundable under S. 64 on rescission. I.L.R. (1943) 2 Cal. 213=46 Bom.L.R. 178= (1943) 2 M.L.J. 369 (P.C.). A party guilty of a breach of contract cannot claim damages arising out of his own default. Nor can he claim a refund of earnest money advanced as a guarantee for the fulfilment of the contract. 41 A. 324=50 I.C. 948. See also 39 C.W.N. 174; 23 B. 56; 24 L.W. 386=1927 M. 204=52 M.L.J. 33; 100 I.C. 860=1927 N. 168. Suit for compensation recoverable under S. 64 is barred if brought after ten years. 19 I.C.

624. Alienation by minor—Alienation set aside—Minor's liability to restore benefit received. 60 I.C. 519. See also 26 N.L.R. 85=1929 N. 156; 122 I.C. 266; 117 I.C. 371=1929 L. 331; 29 I.C. 972; 30 C. 539; 32 A. 25. Where a sale by a guardian on behalf of a minor is held to be void *ab initio*, the vendee cannot claim compensation for the improvement effected by him, on the property. Sections 64 and 65 do not apply to this case. 38 P.L.R. 1913=18 I.C. 485. See also 116 I.C. 713=1929 L. 332; 31 Bom.L.R. 88 (applicability of section to transaction of person of unsound mind). If a guardian sells his ward's property for purposes not binding and the price is utilized for the purchase of other lands for the ward not contemplated at the time of the sale, the lands so purchased do not constitute the benefit within S. 64 and need not be conveyed to the vendee from the guardian when the ward avoids the sale by the guardian. 42 M. 36=35 M.L.J. 652. As to borrowing by the Karnavan of a Malabar tarwad in excess of his powers, for the purpose of the *tavashi*, see 23 L.W. 186=93 I.C. 20=1926 M. 398. Where the Karnavan acted in excess of his powers in executing a *kanom* over the properties of the *illom*, but where the money so borrowed was utilised for the benefit of the *illom*, such as, for the marriage of a female member of the *illom*, the transaction could be set aside only on condition of the *illom* or its Karnavan paying the alienee the amount he had paid. 35 L.W. 171=1932 M. 303. Financing of litigation—Money advanced in part—repudiation—Right to recover. 47 I.C. 563. See also 11 O.W.N. 603=1934 O. 170. Under S. 64 a person who puts an end to a contract under S. 39 is the party rescinding a voidable contract. 38 I.C. 915=12 N.L.R. 177. Mistake—Restoration of benefit. 66 I.C. 461=1922 O. 152; 1930 A. 252; 1930 A.L.J. 327. In the case of a breach of a revocable contract or trust the choice of the remedy lies with the party whose rights are infringed, and not with the promisor or trustee. 20 I.C. 783.

SECS. 64 AND 65.—Ss. 64 and 65 do not refer by the words "benefit" and "advantage" to any question of "profit" or "clear profit". Money received by a party under a contract is a benefit or advantage to him even though it has been spent to enable him to perform his part of the contract. 70 I.A. 35=56 L.W. 283=47 C.W.N. 497=A.I.R. 1943 P.C. 34=(1943) 2 M.L.J. 369 (P.C.).

SECS. 64, 65 AND 72 AND 73.—Applicability—Debtor of insolvent executing promis-

65. When an agreement is discovered to be void, or when a contract becomes

Obligation of person who has received advantage under void agreement or contract that becomes void.

void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it.

sory note to creditor of insolvent on eve of insolvency and making payments thereunder after insolvency and after notice by Official Receiver—Transaction held to be fraudulent preference—Right to recover payments made —“Void”—Failure of consideration or mistake. 44 L.W. 722=1936 Mad. 978. See also 1940 Mad. 737. The transfer of Property Act does not provide expressly for the return of a portion of the purchase money paid in pursuance of a contract of sale, when the buyer fails to complete the payment and the sale in consequence falls through. The provisions of the Contract Act, however, apply generally to contracts of sale of immovable property. In cases not falling under S. 74 of the Contract Act, where there is no stipulation that a certain payment shall be “earnest” or penalty, the right of the seller to damages on the failure of the buyer to complete payment would arise under S. 73 or 75 of the Contract Act, and is something quite independent of the amount of any part payment made. Under S. 64, the party rescinding a voidable contract must restore such benefit as he may have received from the other party. If the buyer fails to complete payment, and the seller avoids the contract, he must pay back the buyer the payments made by the buyer, &c., restore the benefit. I.L.R. (1941) Kar. 495=A.I.R. 1942 Sind 37. Contract for purchase of machine—Deposit —Provision for forfeiture in case of breach of condition—If penal—Power of Court to grant relief—Hire purchase. 1944 Mad. 526 = (1944) 2 M.L.J. 74.

Sec. 65: SCOPE OF SECTION.—Section is also applicable to contracts under local or special laws. 1929 L. 742=11 L. 121; I.L.R. (1940) Nag. 553. But see 137 I.C. 574=1932 O. 193 (F.B.). S. 65 covers the case of a contract void from its inception as much as one subsequently discovered to be void. 137 I.C. 574=1932 O. 193 (F.B.). I.L.R. (1942) Nag. 294=1944 Nag. 159=1944 N. L.J. 124; 44 L.W. 722=1936 M. 798; I.L.R. (1937) N. 111. See also 39 Bom.L.R. 1124; 1941 Nag. 273; 1941 Pat. 510 also cases under “Discovered to be void”. S. 65 applies also to a case where there is a transfer of property and not a mere agreement. 70 I.A. 1=18 Luck. 130=I.L.R. (1943) Kar. (P.C.) 19=47 C.W.N. 509=A.I.R. 1943 P. C. 29=(1943) 1 M.L.J. 508 (P.C.). S. 65 deals with two matters: (a) an agreement which is discovered to be void and (b) a contract which becomes void. The first matter is concerned with an agreement which never amounted to a contract because it was void *ab initio*, the fact of its being void being discovered at a later stage. The word used is “agreement” and not contract. The

word “discovered” in the first part of the section is used in contradistinction to the word “becomes” in the second part. The word “discovered” connotes the pre-existence of that which is discovered. The second matter deals with a contract (*i.e.*, with an agreement enforceable at law) which was good at its inception and which becomes void at some later stage by reason of some supervening circumstance. What the section says is that if any body receives any advantage *under such a contract* he is bound to restore it or make compensation for it when the contract becomes void. The advantage must have been received under the contract. As a contract is an agreement enforceable at law, see S. 2 (h), the advantage must have been received under an agreement enforceable at law. If the advantage is received after the agreement ceases to be enforceable at law (*i.e.*) ceased to be a contract, it cannot be said that it is an advantage received under the contract. The section applies only if the advantage is received before the contract ceases to be a contract by becoming void. If it is received after, the section does not apply. 80 C.L.J. 170. Leases granted by a Municipality, which do not comply with the requirements of S. 69 of the Madras District Municipalities Act are merely agreements which are void *ab initio*, to which S. 65 of the Contract Act is applicable. The Municipality can therefore maintain a suit against the lessees for damages for use and occupation, though the leases themselves are not enforceable at law. 43 L.W. 39=1936 M. 98. See also 162 I.C. 362=1936 O. 280; 164 I.C. 945=1936 O. 1033; I.L.R. (1939) Mad. 928=1939 Mad. 957=50 L.W. 440. Where a contract of suretyship entered into with a Local Board by a person standing surety for a contractor of lease of fisheries is discovered to be void on account of non-compliance with the formalities of the statute, S. 65 of the Contract Act would apply, where advantage has been received by one or other of the parties and the Court can act on the principle of *quantum meruit*. But when no advantage has been received, this cannot be done. I.L.R. (1940) Kar. 347=1940 Sind 199. See also 47 L.W. 668; (1942) 2 M.L.J. 364. The criterion which causes the Court to say that it will or will not assist the parties to recover the moneys paid under an unlawful agreement is not whether they have had *locus penitentiae* before carrying out the purpose of the fraud, but whether it would be contrary to morality and public policy to give the parties assistance in a Court of Law, where the purpose of the fraud has actually been wholly or partially successfully carried

*Illustrations.*

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1000 rupees paid in advance.

out. (35 C. 551, Rel. on.) 14 R. 597=1936 R. 358. S. 65 not only applies to agreements and contracts but also to transfers of property. See (1943) 1 M.L.J. 508. Where therefore a mortgage is found invalid, a mortgagee can recover the mortgage-money under S. 65, if he prays for such relief in the mortgage suit. 1937 O. W.N. 784=1937 Oudh 410. See also I.L.R. (1937) Nag. 111; 46 Bom.L.R. 70=(1943) 1 M.L.J. 508 (P.C.). Where a mortgage is discovered to be void by reason of its having been granted in violation of para. 11, Sch. III, C.P. Code, the lender is not obliged to proceed on the personal covenant. He can repudiate or rescind the contract of loan and claim his money back by way of restitution under S. 65 of the Act, if such claim is not barred by limitation. He cannot however claim at one and the same time both under the covenant to repay and also under S. 65 of the Contract Act. The lender cannot be said to have elected to affirm the personal covenant merely by reason of any arguments addressed by him hypothetically or by way of alternative to his main contention in his suit that para. 11 did not touch the transaction. Election to affirm must, if it is to be gathered from action, be gathered from unequivocal acts. 70 I.A. 1=18 Luck. 130=206 I.C. 457=1943 O.W.N. 214=1943 A.L.W. 381=9 B.R. 353=15 R.P.C. 94=1943 A.L.J. 421=(1943) 1 M.L.J. 508 (P.C.). Where after the assignment of mortgagee rights the mortgage is declared void *ab initio*, the consideration for the assignment fails, and the mortgagee is, therefore liable to refund the money received by him to the assignee. 40 P.L.R. 528=1938 Lah. 566. Where the assignee of the mortgagee rights in regard to a mortgage of an occupancy holding, which is prohibited by the Agra Tenancy Act, is ejected, and sues for the recovery of the consideration paid by him, he must be taken to have known that the mortgage was void at the date of the assignment itself and he could not be heard to say that he came to know that the transaction was void at the date of the ejectment. 1944 A.L.W. 244. Where a transfer is set aside under S. 53, T. P. Act, the case is governed by S. 65, Contract Act, and the transferor is bound under S. 65 to restore to the transferee the price that he has received in respect of the transfer. The transferee is not however entitled to recover the money

spent in suing the creditors of the transferor, where he himself was a party to the conspiracy to defeat the creditors and was aware of all the facts. 1936 N. 268. See also 44 L.W. 722=1936 M. 978; 11 Mys.L.J. 81; 22 Pat. 334. The words "when a contract becomes void" are sufficient to cover the case of a voidable contract which had been avoided. 59 I.A. 147=62 M.L.J. 451 (P.C.). Where the defendant got possession in pursuance of a contract procured by undue influence and fraud voidable by the plaintiff, if there is no proof of undue delay in bringing his suit, and no difficulty in putting the parties back in *status quo ante*, the plaintiff is entitled to an account of the rents and profits of the immovable properties—not merely from the date of the institution of the suit—but from the date when defendant got possession, the latter being entitled to credit for all payments made by him to the plaintiff. 59 I.A. 147=7 Luck. 64=1932 P.C. 89=62 M.L.J. 451 (P.C.). When a contract becomes void under S. 65, any person who has received any advantage under the contract is bound to restore it. Where the landlord arranged for the surrender of a holding by a tenant and executed a lease to a third person and made a profit by the transaction, he is bound to restore it to that lessee when he loses possession by reason of the mother of the original tenant moving the Revenue Court and getting placed in possession on the ground that the transaction was in violation of the C. P. Tenancy Act. 1942 N.L.J. 324. See also 1942 All. 409=1942 A. L. J. 390. Where in a suit for recovery of balance, in respect of transactions by the plaintiff with a third person, arrived at after appropriating to the losses arising out of such transactions the defendant's remittances, the defendant counter-claims the amount so appropriated on the ground that the transactions entered by the plaintiff are void, the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S. 65. But as the plaintiff has applied the amount or has become legally liable to meet losses arising from the carrying out of the defendant's instructions, the plaintiff cannot be said to have received an advantage within the meaning of S. 65. The fact, that there was no privity of contract between the defendant and the third person makes no difference, if the plaintiff has incurred the

liability to the third person in carrying out the defendant's instructions. 1938 A.L.J. 77=1938 P.C. 4 (P.C.). The principle of restitution embodied in S. 65, in case of a contract found to be invalid, is that of giving relief upon *quantum meruit*. That, however, is the general rule which does not apply to a case governed by special law. 137 I.C. 574=1932 O. 193 (F.B.). But see also 1929 L. 742=11 L. 121. See also 37 L.W. 429=1933 M. 332; 1937 Nag. 111; 1940 Sind 199. An action for money had and received does not lie if the consideration fails only in part. 1932 B. 386=56 B. 501. The maxim *in pari delicto, potior est conditio possidentis* is not applicable to a case where the parties did not know of the illegality at the time they entered into the contract. So, where the parties effected a lease without the sanction of the Deputy Commissioner without knowing that such sanction was necessary, the lessee is entitled to get back the consideration paid by him. (16 N.L.R. 129 and 32 N.L.R. 136, Dist.; 20 N.L.R. 87, Foll.) 134 I.C. 281=1931 N. 137. See also 1935 L. 401. Where a contract is held to be void a party is not entitled to claim the penalty under the contract. The right to claim relief however on the *quantum meruit* basis is not necessarily based on an agreement between the parties and if a party is otherwise entitled he should be given the relief. 39 L.W. 508=149 I.C. 503=1934 M. 335. Where in a case of supply of goods the contract is found to be void and S. 65, Contract Act, is found to be applicable, it is the doctrine of "*quantum valebat*" and not that of "*quantum meruit*" that must be applied; and where the actual goods cannot be returned, restitution must be fixed at the price at which they were sold by the vendors. 37 L. W. 429=1933 M. 332. See also 45 I.C. 412=1933 M. 105; 152 I.C. 135=1934 N. 248. A suit is maintainable for the recovery of the money actually paid by the plaintiff to the defendant as a consideration for the latter arranging the marriage of his sisters' daughter with the plaintiff's brother, which he failed to do. 1937 P.W.N. 175=1937 Pat. 330. Where the recitals in a mortgage deed suggest that money is likely to have been applied to pay off business debts and is applied to pay off business debts and not applied in any manner for the benefit of defendants there is no right to relief against the defendants, under S. 65. 44 L.W. 725=1936 M. 495. The Madras District Municipalities Act (IV of 1884) makes provisions in Ss. 45 and 46 concerning only with contracts, but it is silent with regard to any agreement entered into by a Municipal Council. Therefore if a Municipal Council makes an agreement and it is found that such an agreement is not enforceable by law as not having been properly executed the agreement becomes void; but when an agreement is discovered to be void the Municipal

Council which is a person in law, who has received any advantage under such an agreement is, under S. 65, Contract Act, bound to restore it. 1934 M. 480=67 M.L.J. 38. See also 1940 A.W.R. (H.C.) 243; 46 C.W.N. 393; 1937 Lah. 781 (Agreement to purchase plot after sanction of Municipality to "lay out" scheme and earnest paid thereon—Sanction suspended by order of commissioner.—Vendor is bound to return earnest money). The agreement to sell the right of a reversioner is void from its inception, because its subject-matter is incapable of being bound by sale. The vendee in this case was given the purchase-money and interest at 6 per cent. from the date of suit. 44 M.L.J. 489=45 A. 179=50 I.A. 69 (P.C.). S. 65 is not applicable when the object of the agreement was illegal to the knowledge of both parties. 8 I.C. 161=15 C.W.N. 408; 41 I.C. 877=13 N.L.R. 114. See also 89 I.C. 684=1926 L. 159; 26 A.L.J. 492; 89 I.C. 143; 1925 O. 212; 1925 O. 737; 49 B. 576; 48 M.L.J. 598; 48 M.L.J. 413; 1940 M.W. N. 342=1940 Mad. 558. Right of subscriber in chit transaction, to get back the amount subscribed and paid to the stake-holder. See 49 M.L.J. 791=92 I.C. 968=1926 M. 168. Where money belonging to the plaintiff was wrongly obtained by the defendant from another person under a contract with him and such person was not an agent of the plaintiff and was not held out by the plaintiff as such, the plaintiff is entitled to recover the amount from the defendant. S. 65 may not apply directly to such a case but the same principle would apply. 68 C.L.J. 94. Breach of promise of marriage—Liability to restore ornaments given to bride. 165 I.C. 247=1936 O.W.N. 879.

**VOIDABLE CONTRACT.**—A mortgagor who sues for the cancellation of a mortgage must refund the amount paid by the mortgagees under the mortgage. 27 I.C. 130. A rescinded contract becomes a void contract and the person who has received any advantage under it is bound to restore it to the other party. 27 I.C. 130. See also 1933 M. 145.

**"BECOMES VOID."**—S. 65 does not apply where it cannot be said that the agreement was discovered to be void or became void after it had been entered into. 18 I.C. 9; 44 A. 229=20 A.L.J. 41; 41 B. 546=40 I.C. 1002; 42 B. 499=38 I.C. 771; 40 B. 529=33 I.C. 536; 11 Mys.L.J. 81. See also 89 I.C. 684; 1941 Pat. 510; 1941 Nag. 273; 31 S.L.R. 170=1937 Sind 211; 1927 O. 177; 188 I.C. 865=1929 N. 257; 116 I.C. 497=1929 N. 241; 1930 S. 282; 8 Mys.L.J. 361. Where a contract has become unenforceable by reason of the fact that the claim to enforce the contract has become barred by limitation it does not become void so as to attract the provisions of S. 65. A.I.R. 1945 Mad. 171=(1945) 1 M.L.J. 158. S. 65 applies even though the contract was not void *ab initio* but becomes void subsequently and a suit

to recover money paid under such a contract is maintainable. 67 I.C. 367=56 P.L.R. 1922; 42 C. 286=21 C.L.J. 642. S. 65 does not apply to contracts known to be void *ab initio* by reason of the illegality of the consideration. 27 P.L.R. 1915=27 I.C. 1003; 51 I.C. 412=42 P.R. 1919; 21 I.C. 517; 37 I.C. 285; 27 A.L.J. 801=1929 A. 659. The words "when a contract becomes void" in S. 65 are sufficient to cover the case of a voidable contract which has been avoided. Where, therefore, an occupation tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord in a suit brought under S. 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage-money. (59 I.A. 147, Foll.) 36 P.L.R. 233=1934 L. 853 (2) (F. B.). See also 1935 A. 256; 18 Mys.L.J. 246=45 Mys.H.C.R. 132. A contract of sale in contravention of the provisions of the Punjab Alienation of Land Act is not void *ab initio*, because the vendee can have the defect in his title removed by securing the sanction of the Deputy Commissioner. If he fails to apply for such sanction, or if such sanction is applied for and is refused, the so-called permanent alienation takes effect as a usufructuary mortgage in form (a) permitted by S. 6 for such term as the Deputy Commissioner considers to be reasonable. Where a vendee alleged himself to be a member of an agricultural tribe but was found by the Courts to be a non-agriculturist, the case is covered by S. 65 of the Contract Act, and the vendee can recover the price paid by him to the vendor. 151 I.C. 172=1934 L. 979. Where a lease is void because the term of the lease exceeds the statutory term there is no actual illegal purpose intended or carried into effect and as such the maxim *in pari delicto potior est conditio possidentis* will not apply, but S. 65 will apply with the result that the lessor will be entitled to get back possession on the lease becoming void at the expiry of the statutory period on payment of compensation to the lessee. 1935 N. 58. See also (1941) 2 M.L.J. 216 (Loan by local authority without sanction—Right of creditor to relief). 43 Bom.L.R. 800 (Illegal contract by village panchayat—Suit to recover money on the basis of such contract). Lease for a term—Payment of money in advance—Subject-matter of lease burnt by fire—Tenant entitled to refund of lease money for unexpired period. 31 N.L.R. 368=158 I.C. 358=1935 N. 208. See also 1936 P. 462. Where there was an admission to tenancy and conferring of occupancy rights on the plaintiff for consideration but owing to the passing of the U.P. Tenancy Act the plaintiff was dispossessed and the holding restored to a former ejected tenant, in a suit by the plaintiff to recover the consideration paid *held*, that the covenant between the parties was valid when it was made and that

as there was no guarantee in the contract against an act of the legislature the plaintiff could not recover the consideration paid. I.L.R. (1943) All. 745=1943 A.L.J. 317=A. I.R. 1943 All. 27. A person exchanging a house worth more than 100 rupees by an unregistered deed, can recover possession of the same but must refund the consideration he received in exchange. 203 P.L.R. 1913=19 I.C. 236. Expression 'becoming void' in the section pre-supposes enforceability and that which is not enforceable cannot become void. 57 I.C. 680; 9 I.C. 743; 38 M. L.J. 256=55 I.C. 697=43 M. 703. The second part of S. 65, namely "or to make compensation for it" only comes into play when the advantage cannot be restored. Moreover interest on the money paid under void contract would only be payable after the advantage has been refused to be restored. Where therefore a contract of sale by District Board is found to be void for want of sanction of the Commissioner and the money paid under it is repaid to the vendee after the Commissioner had refused his sanction and it is not proved that this money had earned any interest in the hands of the District Board, the vendee is not entitled to any interest from the date when the money had been paid by the vendee to the District Board to the date of institution of suit for damages. Moreover the claim for interest cannot be granted on the ground of negligence on the part of the Board in overlooking the provisions of the law as it is equally the duty of the vendee to know the law. 1939 Lah. 564. S. 65 does not apply to a mortgage which becomes unenforceable for want of legal necessity and benefit to the family. 5 Pat.L.J. 622=58 I.C. 303; 77 I.C. 378. See also 128 I.C. 907=32 Bom.L.R. 1376=1931 B. 39; 134 I.C. 1116=1931 L. 694. Nor to a contract which is not enforceable by reason of the law of limitation. (1945) 1 M.L.J. 158. Contract by trustee in contravention of scheme of management—Moneys advanced with notice to trustee not recoverable. See (1940) 1 M.L.J. 547=1940 Mad. 517. Impossibility by action of executive—Effect of. 51 I.C. 412=42 P.R. 1919. On this section, see also 1 Luck. 144; 1929 A. 387=119 I.C. 436; 18 Mys.L.J. 246=45 Mys.H.C.R. 132. Sale and purchase of goods—Provision declaring indent null and void if goods not supplied for any cause whatsoever—Effect of. See 47 C.W.N. 86; 47 C.W.N. 89=1943 Cal. 206.

DISCOVERED TO BE VOID.—"Discovered to be void"—Meaning of. 44 B. 631=44 M.L.J. 489=50 I.A. 69=1922 P.C. 403 (P.C.); 34 M.L.J. 561=44 I.C. 319; 41 M. 197=34 M. L.J. 282=41 I.C. 783; 26 I.C. 489=1915 M. W.N. 8; 39 Bom.L.R. 1124; 15 Mys.L.J. 395; 4 O.W.N. 256=101 I.C. 265=1927 O. 177. See also 64 M.L.J. 403 (P.C.). S. 65 does not apply where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. It can-



not be said that such an agreement is an agreement discovered to be void within the meaning of that section. 43 C.W.N. 260. See also 1938 Nag. 335 (F.B.); 1938 Lah. 721; 1938 Nag. 451; 39 Bom.L.R. 1124; (1940) 1 M.L.J. 547. Under the general law a plaintiff whose hands have not been tainted with corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another. 44 B. 631. Where a mortgage is found to be void and unenforceable for want of proper attestation, the mortgagee is entitled to a money-decree for the amount advanced by him. 43 I.C. 266=20 O.C. 306. Although normally the time at which an agreement is discovered to be void within the meaning of S. 65 of the Contract Act is the date of the agreement, there may be special circumstances in which it is so discovered at a later date. Where in a suit to enforce a mortgage hit by the provisions of para. 11, Sch. III, C. P. Code, it was found to be an honest transaction and its invalidity was at the time of its execution obscured by the difficulty in applying the paragraph correctly to the particular facts of the execution proceeding and to the terms of the orders as recorded; and payments of interest were made and received thereunder for ten years. *Held*, that in the special circumstances of the case, the mortgage was not discovered to be void until after the suit to enforce it was instituted. 70 I.A. 1=18 Luck. 130=I.L.R. (1943) Kar. (P.C.) 19=47 C.W.N. 509=A. I.R. 1943 P.C. 29=(1943) 1 M.L.J. 508 (P.C.). Contract not performed owing to event not contemplated by parties—Refund of amount advanced—Interest as compensation. See 152 I.C. 644=1934 N. 248.

**LIMITATION.**—In a suit to recover money paid under a void agreement the *terminus a quo* for purposes of limitation is the date of the agreement that being the time at which (in the absence of special circumstances) the agreement was discovered to be void within the meaning of S. 65 of the Act. 60 I.A. 13=54 A. 1067=64 M.L.J. 403 (P.C.). See also I.L.R. (1942) All. 817=1943 A.L.W. 360=197 I.C. 498. A suit to recover money advanced under S. 65 in respect of a void mortgage has to be brought within some period beginning from the execution of the agreement of mortgage. 1942 A.L.J. 390=A.I.R. 1942 All. 409. When a transfer is void owing to a provision of law, so that a cause of action to recover the consideration under S. 65, arises, time runs, ordinarily, from the date of the agreement. 1938 N.L.J. 409.

**ILLEGAL CONTRACT.**—The obligation to do justice rests upon all persons natural and artificial and where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it cannot retain it. It must either return it or make compensation for it. 43 C. 790=35 I.C. 305=20 C.W.N. 370; 43 C. 115=19 C.W.N. 919; 38 B. 249=23 I.C. 602; 42 A.

7=52 I.C. 331. S. 65 has no application where the contract embodies a purpose known to be illegal to which both sides are parties. 54 I.C. 794; 14 M.L.T. 489=21 I.C. 879; 46 I.C. 326.

**MONEY ADVANCED TO PERSON WHOSE ESTATE IS UNDER COURT OF WARDS.**—The question whether a contract is void or voidable presupposes the existence of a contract and cannot arise in the case of a person who is disqualified from contracting by any law to which he is subject. S. 65 has no application to such a case in which there never could have been any contract. Where therefore the consideration for a promissory note consists of advances made to a person whose estate is under the superintendence of the Court of Wards and who is consequently incompetent by S. 31, C. P. Court of Wards Act, to enter into any such contract, the contract is an absolute nullity and the creditor is not entitled to recover the advance under S. 65. The fact that a Government ward is incompetent to enter into any contract, rules out any action founded on S. 65. 31 N.L.R. (Supp.) 62=1936 N. 15.

**MINOR'S CONTRACT.**—S. 65 is not inapplicable to minors; and minors are not excluded from the persons who have to restore benefits in accordance with the section. It is the duty of Courts to protect the interests of minors; but it is no part of their duty to stretch the law to do injustice on behalf of minors nor to let them escape responsibilities which properly and fairly fall upon them. 18 Mys. L. J. 246=45 Mys.H. C.R. 132. Vendee, who was minor at the date of purchase, can recover consideration money, if he is subsequently dispossessed of the property purchased. 35 A. 370=19 I. C. 610. Where persons, who are, in fact, under age by false and fraudulent misrepresentation as to their age, induce others to purchase property from them, they are liable in equity to make restitution to the purchasers of the benefit they had obtained before they could recover possession of the property sold. 1933 A. 371. See also 1937 O.W.N. 1012. S. 65 has no application to a case where there never was or could have been any contract between competent parties, as for instance, where one of the parties to a contract is a minor. 45 B. 225=59 I.C. 245; 35 A. 370=19 I.C. 610; 40 A. 558=48 I.C. 478; 10 L.W. 225=53 I.C. 14; 23 N.L.R. 8=98 I.C. 650=1927 N. 116; 100 I.C. 860=1927 N. 168; 103 I.C. 209=1927 N. 200; I.L. R. (1939) All. 860=1937 A.L.J. 688=1937 All. 610 (F.B.). But see next case. A minor who seeks to recover the property sold by him after cancellation of the sale, must restore the benefit he had received. 24 O.C. 348=64 I.C. 771; 53 I.C. 65=15 N.L. R. 149 (11 O.C. 1, Foll.); 40 A. 558; 8 O.L. J. 287, Ref.). See also 4 Bur.L.J. 197=1926 R. 7; 1937 A.L.J. 688=1937 All. 610; 18 A. 373; 44 B. 175; 45 B. 225. It cannot be said that in every case in which relief is granted to a minor he should be made to



Mode of communicating or revoking rescission of voidable contract.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

return the benefit derived by him from the contract. Nor could it be said that in no case can any person who seeks to avoid a contract entered into by him in his minority be made to pay compensation to the other party. The absence of fraud or misrepresentation on the part of the minor coupled with the fact that the vendee was cognizant of the minority of the person concerned was held to disentitle the vendee in such a case from claiming compensation. 15 Luck. 265=1940 Oudh 119. *See also* 194 I.C. 824=1941 Pesh. 38. In a suit on a bond, the defendant pleaded and the Court found that the executant was a minor at the time he executed the bond and got the money from the plaintiff. It was also proved that there had been no fraudulent misrepresentation by the defendant as to his age. *Held*, that plaintiff could not claim restitution under S. 65 of the Contract Act; nor could he get any compensation under S. 41, Specific Relief Act. 61 C. 1075=1935 C. 198. (*See* Notes under S. 11, *supra*.) S. 65 cannot be availed of and does not apply to a case in which there never was and never could have been a contract. Nor can the transaction be upheld under S. 43, T. P. Act. S. 43, which is based on the principle of estoppel cannot apply to the case, as estoppel cannot be pleaded against a statute so as to prejudice a minor who enjoys the protection of the law. I.L.R. (1937) All. 860=1937 A.L.J. 688=1937 All. 610 (F.B.).

**ABKARI LICENCE.**—Some persons entered into a contract under which each of them was to advance a certain sum of money to the first defendant, who was to bid at an abkari sale to be held, and as consideration for the money paid by them they were to share in the business which the first defendant was to bid for. The first defendant did bid and obtained the business and it was alleged he also made profits. The plaintiffs brought a suit for the dissolution of partnership and accounts. *Held*, that on no ground could the plaintiffs, to any extent, succeed, as the contract was illegal and could not be sued upon. It makes no difference if the contract had been entered into before the auction and not subsequently. 57 L.W. 325=A.I.R. 1944 Mad. 415=(1944) 1 M.L.J. 434.

**MONEY PAID IN CONSIDERATION OF MARRIAGE.**—Money paid in consideration of a marriage between a bride and a bridegroom of disparate ages, and not on account of expenses can be recovered under S. 65 if the marriage does not in fact take place, although the agreement under which the money is paid is void under S. 23 of the Act. S. 65 makes no distinction between agreement void *ab initio* and subse-

quently discovered to be void. I.L.R. (1944) Nag. 535=1944 N.L.J. 124=A.I.R. 1944 Nag. 159.

**CONTRACT WITH LUNATIC.**—S. 65 cannot bind a party to a contract with a person of unsound mind. Such contract being void, no refund of money paid to unsound person can be claimed. 41 P.R. 1912=15 I.C. 404; 32 I.C. 804. (*See* Notes under S. 12.)

**TRUST PROPERTY.**—Where an alienation made by the shehais of a deity is held to be void, and the alienee has spent large sums of money in carrying on litigation against those persons who were in illegal occupation of the *debutler* estate, and spent money for repairs of the temples and for carrying on *deb-sheha* which was neglected by the shehais, the plaintiff before he can recover the properties on behalf of the deity must compensate the alienee for all the expenses which he has legitimately incurred. 45 C.W.N. 665.

**INSOLVENTS.**—Where a mortgage effected by the receiver of the insolvent's property is set aside by the District Judge, and the adjudication is annulled, the mortgagee, in a suit by the mortgagor for possession, is entitled to remain in possession until he is repaid by the mortgagor the sum advanced on the security of the land. 1935 L. 112. *See also* 44 L.W. 722=1936 M. 798. (Fraudulent preference). 58 M. 702=69 M.L.J. 360.

**SECS. 65 AND 70.**—S. 65 proceeds on the basis of there having been a contract. S. 70 on the other hand does not require a contract to exist for its application. I.L.R. (1937) Bom. 782=39 Bom.L.R. 835=1937 Bom. 417. Where a lessee under an instrument not satisfying the requirements of S. 107, T. P. Act, spent money on putting up a shed and chabutra without giving notice to the lessor or obtaining her consent as he should have done under Cls. (f) and (p) of S. 108, T. P. Act, it was held that he was not entitled to reimbursement as S. 65 of Contract Act would not apply to the agreement since it was not void and that S. 70, Contract Act, also would not apply as the requirements of Cls. (f) and (p) of S. 108, T. P. Act, were not complied with. 1941 O.A. 1050=17 Luck. 530=1941 O.W.N. 1395=1942 Oudh 231.

Sec. 65, ILL. (d) is a departure from the English law. *See* 44 C.W.N. 11.

Sec. 66.—Where one party shows by acts and conduct amounting to a clear renunciation or absolute refusal to perform the contract, the other party will be justified in regarding himself as discharged from all continued liability under the contract. 43 C. 790=20 C.W.N. 370. *See also* notes under Ss. 3 and 5 *supra*.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

*Illustration.*

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

## CHAPTER V.

### OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

168. If a person incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessities supplied to person incapable of contracting, or on his account.

#### LEG. REF.

<sup>1</sup>S. 68 has been amended in the Central Provinces by the C. P. Court of Wards (Amendment) Act (I of 1915).

SEC. 67.—Where the defendants had practically repudiated the terms of the contract it is not necessary that any actual tender of money should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money. 1923 L. 56.

"BREACH OF CONTRACT".—What amounts to. 10 I.C. 105=9 M.L.T. 454.

SEC. 68.—See 156 I.C. 710. Supply of excessively costly articles though of real use, and objects of mere luxury are not necessities. 36 C. 768. The term 'necessaries' is not confined to goods. It can include other things such as good teaching and instruction whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessities. For example, the term includes costs incurred in defending a suit to save the minor's property and to defend him in a criminal prosecution; so also reasonable marriage expenses of a minor himself or a sister or other co-parceners and such religious ceremonies as the minor would have had to perform if he had been an adult. (Case-law referred). 175 I.C. 149=1938 Nag. 65. See also 45 Mys.H.C.R. 403. Word "necessaries" in S. 68 includes money urgently needed for the requirements of a minor and cannot be restricted to what is necessary for elementary requirements of minors such as food and clothing. 1930 A.L.J. 347=123 I.C. 827=1930 A. 128. To a claim under S. 68 for the price of necessities supplied to a Ward of Court. S. 37 of the Court of Wards Act is no bar. But a supplier of goods which are necessities must take care to see that he is really protected by S. 68. A claim for an amount in respect of necessities, very disproportionate to the allowance granted to the ward could not be recovered. 204 I.C. 38=1942 A.W.R. (C.C.) 343 (2)=1942 O.W.N.

560=1942 O.A. 507=1943 Oudh 119. Cloth supplied to a minor and cash lent to him to effect necessary repairs in his house are "necessaries" within the meaning of S. 68. 1936 N. 12. S. 68 refers to a person who supplies a minor with necessities suited to his condition in life. It does not validate a mortgage executed by a guardian of the ward's properties. 11 R. 193=146 I.C. 922=1933 R. 83. If a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate, the minor's estate is liable. (49 A. 52, followed.) 1936 A. L. J. 155=1936 A. 172. Where the *de facto* guardian of a minor executed simple money bonds and borrowed money to meet the expenses of the marriage of the minor's sister, whom the minor was under his personal law bound to maintain. *Held*, that the minor's estate was not liable on the contract executed by the guardian but that the amount may be recovered from the minor's estate as money expended on necessities under S. 68 of the Act. (32 A. 325, Foll.; 42 M. 185, Ref.; 18 N.L.R. 119, Doubtful.) 145 I.C. 350=1933 N. 285. Where the properties of a minor are threatened to be attached and there is imminent danger of the same being sold for revenue, if a creditor realising the difficulties the minor was in, advances money which is utilised to avert the danger the creditor advancing money is entitled to be reimbursed from the property of minor. 1930 A.L.J. 347=1930 A. 128. As to proof of necessities, see 101 I.C. 702=1927 L. 414. A guardian cannot impose a personal liability on his ward and a minor cannot be bound by a personal covenant in a contract by his guardian. The minor's personal law may, however, affect the position. S. 68 of the Contract Act allows a person who has supplied a minor with necessities such as maintenance and litigation expenses to reimburse himself from the minor's property; and he can also claim interest on equitable grounds; and a fair rate would be the Court rate of 6 per cent. per annum. 1940 Mad. 106=I. L.R. (1940) Mad. 27=50 L.W. 323. In a

*Illustrations.*

(a) *A* supplies *B*, a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessaries suitable to thier condition in life. *A* is entitled to be reimbursed from *B*'s property.

case where a creditor seeks to make the estate of the minor liable for advance made for necessaries, mere *bona fide* enquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice, but the creditor should not be required to prove actual application of the money. To require this of the creditor is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate, the absence of any other source from which the necessity could be met at the time of transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. 175 I. C. 494=1938 Nag. 68. During the lifetime of his father, money borrowed by a person incapable of entering into a contract, to pay for the *Sradh* of his mother, is not necessity. 32 I.C. 937. Money spent on the *obsequies of the father of the minor* cannot be deemed to be necessaries supplied to the minor within the meaning of S. 68 of the Act and an acknowledgment by the mother, as the guardian, of a debt borrowed for the above purposes is not binding on the minor. 10 O.W.N. 188=1933 O. 132. Discharge of decree-debt by stranger as owner of property of the deceased, while deceased's minor sons were living would not avail the stranger. 1925 A. 213. A money-lender advancing money to a minor alleging that it was for necessaries must draw the bond so as to bind the minor's estate. 37 M. 38=21 M.L.J. 1077. Litigation expenses—Payment of father's debts, if necessaries. 18 N.L.R. 119=64 I.C. 851=1922 N. 247. Costs of defending minor in civil and criminal cases are necessaries. 21 C. 872; 7 C. 140; 17 M. 257. It is one thing to lay down set of rules with respect to a transaction which denudes a minor of his property, or a part of it, and quite another to determine whether money and articles supplied to him which add to his property or to his convenience and comfort are necessaries or benefits within the meaning of S. 68. The test of 'fair and proper' can be applied in both cases, but the standard must necessarily differ for what is fair and proper in the shape of benefits conferred or comforts supplied, may not be fair and proper in the case of an alienation. One important point of distinction between the two classes of cases is this: in the case of an alienation where necessity is alleged, enquiries made in good faith protect the transferee, whereas in the case of necessaries such considerations are irrelevant. Then again an alienation by a minor would be void whatever the purpose for which it was made, but in the case of

necessaries supplied to him it is immaterial whether the order comes from him or from his guardian, in both the cases the test is precisely the same: the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction. 175 I.C. 49=1938 Nag. 65. Neither the property nor the person of a ward under Court of Wards is liable for necessaries. 61 I.C. 563=17 N.L.R. 20. When a guardian borrows money for the necessaries of a minor in such circumstances as to give him a right to be reimbursed from the latter's estate, his creditor may be subrogated to the guardian's rights. 56 I.C. 740. *See also* 31 Punj.L.R. 471. Under Hindu Law a minor is under an obligation to provide for the marriage expenses of his sister and such a provision is necessary within the meaning of S. 68, but the money cannot be recovered unless the money is spent and constitutes a 'debt'. 61 I.C. 278=8 O.L.J. 94. *See also* 145 I.C. 350=1933 N. 285. A covenant by the guardian of a Hindu minor to sell immovable property of the minor cannot be enforced against him, although if a conveyance had been executed by the guardian the vendee would have obtained a valid title to the property on account of pressing necessity for such a sale. Earnest money paid by the vendee to the guardian is not recoverable from the minor or his estate. Such money is paid as a guarantee or security for the performance of the contract which in law is no contract at all. It cannot be regarded as having been paid to the guardian for necessaries or benefit of the minor. S. 68 of the Contract Act does not apply, and the vendee cannot therefore recover it under S. 68 or under Hindu Law as having been paid for the benefit of the minor's estate. I.L.R. (1938) Mad. 928=48 L. W. 112=1938 Mad. 765=(1938) 2 M.L.J. 277. Advancing of funds to a male Hindu minor for meeting his own marriage expenses, is not supplying him with necessaries suited to his condition in life within the meaning of S. 68. I.L.R. (1940) Nag. 632=1940 N.L.J. 358=1940 Nag. 327. But see, *contra* 42 I. C. 963=2 P.L.J. 627. Liability of minor for sums borrowed by mother for procuring necessaries for minor. 101 I.C. 255=1927 N. 196. *See also* 7 Pat.L.T. 32=1926 P. 399; 32 A. 325. Guardian executing bond in personal capacity—Recitals in bond as to benefit of minor—Same not corroborated by evidence—Liability of minor under the bond. *See* 7 O.W.N. 481. Surety for Court guardian—Payment of debt incurred by guar-

Reimbursement of person paying money due by another in payment of which he is interested.

69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

*Illustration.*

*B* holds land in Bengal, on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B*, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid.

dian for expenses of minor girl's marriage with sanction of Court—Right to reimbursement from person succeeding to estate. *See* 45 Mys. H.C.R. 403. Where a guardian of a Hindu minor borrowed money for Diwali expenses, *held*, that the amount would not be allowed as it was not necessary. 175 I.C. 149=1938 Nag. 65. A sale by the administrator of the estate of the deceased of property of his minor heirs is void and cannot be supported under S. 68, nor can the sale be ratified by minor subsequently. 9 L.B.R. 186=50 I.C. 324=12 Bur.L.T. 27.

**CLAIM ARISING UNDER S. 68—REIMBURSEMENT—EXTENT OF RIGHT.**—Where a claim does not arise out of contract at all but under the special provisions of S. 68, the plaintiff is only entitled to reimbursement out of the minor's estate and nothing more and he cannot claim any interest on the amount claimed. 1936 N. 12.

**BURDEN OF PROOF.**—To succeed in a suit for reimbursement for 'necessaries' supplied to a minor, not only must it be shown that the articles supplied are necessaries in the sense they are things ordinarily required by the minor in question but that they were actually necessary at the date when they were supplied. There is a *prima facie* burden upon the plaintiff to show this much at least that he did make inquiries in order to ascertain whether the minor, had an actual necessity of being supplied with the goods at the time when they were supplied. 1943 A.L.W. 303. In the case of necessaries supplied to an infant, the onus of proof lies on the creditor. He has to show first that goods or the money which represents them are suitable to the condition in life of the infant and secondly that they are suitable to his actual requirements at the time; or in other words that the infant has not got a supply from other sources. 175 I.C. 149=1938 Nag. 65. Under S. 68, it must be shown not only that the moneys were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to her actual requirements at the time of sale and delivery. As any one who supplied necessaries to an infant is in the position of a legal creditor, so any one who advances money to an infant for the purpose of procuring necessaries is entitled to stand in the position of a legal creditor. 1938 Rang. 359.

**LIMITATION.**—*See* 50 L.W. 323=1940 Mad. 106=I.L.R. (1940) Mad. 27 (Art. 69 or Art.

120, Limitation Act, applies).

**SEC. 69: APPLICABILITY.**—S. 69 applies where a person has paid money which another is bound by law to pay. It is obvious that the section cannot apply unless the obligation of the other to pay was in existence at the date when the payment in respect of which the suit is laid was made. It is further necessary that the plaintiff must be interested in the payment of money, and this interest must be in order to avert some loss or to protect some interest which would otherwise be lost to him. I.L.R. (1945) Nag. 820=1945 N.L.J. 563. Under S. 69, two elements must exist in order to entitle a person to claim reimbursement, *viz.*, (1) he must on the date, on which he made the payment, have been interested in the payment of the money; (2) the person from whom reimbursement is sought must have been bound by law to pay it. The law of India does not recognise equitable estates. Unless the conditions are satisfied, S. 69 cannot apply. Unless the party making the payment has a contract to pay, or interest present, future or contingent a payment by him can only be regarded as a voluntary payment. 46 Bom. L. R. 822=A.I.R. 1945 Bom. 187.

**SCOPE OF SECTION.**—Contribution means payment by each of the parties interested, of his share in any common liability. 24 I.C. 259=18 C.W.N. 1308. *See also* 1933 Oudh 478; 61 C. 510=59 C.L.J. 423=1934 C. 709. "Interested" does not mean only persons with real interest. 1925 P. 201; 1925 P. 737=1925 P.H.C.C. 236; 26 A.L.J. 435; 113 I.C. 441. *See also* 1927 M. 1060. There is no reason why a person legally bound to pay should be held to be not a person who is interested in the payment. As between a defaulting landholder and his mortgagee, the former is personally bound to pay and this initial liability does not cease because to protect his security, the mortgagee pays off the arrears. 178 I.C. 485=1938 Nag. 459. Mortgagee paying Government revenue on mortgaged land can recover it from the mortgagor. 144 I.C. 392=1933 R. 112. *See also* 1936 Rang. 47; 16 Mys.L.J. 399=43 Mys.H.C.R. 557 (Hindu reversioner paying Government Revenue for protection of estate). The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or any detriment at any rate capable of being assessed

in money. Thus where an insolvent fraudulently transfers his land and during annulment proceedings by the receiver, the creditor pays the land revenue to avoid sale, the creditor is a person interested in payment of such money. (1914 Cal. 338, Foll.) 1937 Rang. 350. The words "a person who is interested" do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. All that is necessary for a person making a payment to recover it is that he should really and honestly believe that he must make the payment in his own interest. 54 A. 140=136 I.C. 66=1932 A.L.J. 63=1932 A. 332. Where a person in possession of an estate, in good faith, pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. The case of Government revenue would stand on quite a different footing from other outgoings incurred by the person in possession of an estate without title and it would be open to him to maintain an action for the recovery of the amount paid. It may also be open to him to set-off the amount in a suit for damages or mesne profits against him; what could be set off can always be claimed in an independent suit, and the fact that a set-off was not claimed against a demand in a prior suit would not preclude the claim being agitated in an independent action. 54 L.W. 286=1941 Mad. 847=(1941) 2 M.L.J. 866. A person asserting claim may pay to avert sale in execution and may get reimbursed by the true owner though he could not make good his claim. 29 C.W.N. 1052=43 C.L.J. 83=1925 C. 1097. As to right of *benamidar* setting aside Court sale in assertion of adverse title, see 85 I.C. 855=1925 M. 95=47 M.L.J. 622. A suit for contribution is a suit brought by one of several co-sharers who has discharged the liability to compel others to make good their shares. Mutuality is the test of contribution. 24 I.C. 259=18 C.W.N. 1308 (17 I.C. 45; 13 I.C. 144, Rel. on). Where a person on whom there was no longer any obligation to pay as surety, as subsequently discovered, had been erroneously made to pay in execution, by coercive process, the decretal debt due by another a claim by the former against the latter under S. 69 of the Contract Act for reimbursement would be quite legal and valid. I.L.R. (1944) Nag. 638=1944 N.L.J. 433=A.I.R. 1944 Nag. 282. Where a rent suit filed against two defendants is dismissed as against one and decreed as against the other, and another person interested in the payment of the decretal amount satisfies the decree, such person is not disentitled by the mere fact of the dismissal of the suit against one of the defendant from claiming

reimbursement from him also, if he is otherwise entitled. 48 C.W.N. 454=A.I.R. 1944 Cal. 272. Where in execution of a mortgage decree against two persons, the properties belonging to them were sold and one of the judgment-debtors deposited the entire decretal amount under O. 21, R. 89, C. P. Code, to set aside the sale, he is entitled to contribution from the other in respect of the latter's share of the properties. 10 P. 528=134 I.C. 139=1931 P. 394. He is not entitled to contribution in respect of the compensation to the auction-purchaser under O. 21, R. 89, C. P. Code. 10 P. 528; 53 L.W. 644=1941 Mad. 635=(1941) 1 M.L.J. 793. S. 69 only applies to cases in which the person who makes the payment of money is himself not liable to pay. 17 I.C. 45=16 C.L.J. 143; 9 I.C. 489=15 C.W.N. 404; 15 C.W.N. 332=9 I.C. 219; 31 C.W.N. 630=103 I.C. 120=1927 C. 518. A purchaser of property subject to a charge, is alone liable to pay it and hence he is not entitled under S. 69 to recover the amount paid by him from the person who might originally have been liable in respect thereof, either alone or along with the person who has made the payment. I.L.R. (1940) All. 71=1940 All. 104. Purchaser in execution of property subject to mortgage paying off mortgage—Real owner of property establishing his title and recovering property from the auction-purchaser—Right of the latter to recover money paid to the mortgagee either from him or from the real owner. 56 L.W. 596=(1945) 2 M.L.J. 513. Firm paying super-tax invalidly assessed on a member cannot recover it from him. Principle of the section laid down. 29 C.W.N. 1052=1924 C. 1097. Vendee aware of defect in title—Discharge of incumbrance—Right to amounts paid when title fails—Relief. 74 I.C. 416=1923 M. 392. See also 41 C.L.J. 571=52 C. 914 (Payment by receiver). Vendee discharging debts of true owner out of sale consideration—Sale void—Subrogation. 37 M.L.J. 113=51 I.C. 57; see also (1945) 2 M.L.J. 513. Ss. 69 and 70 of the Contract Act do not apply to claims for contribution under S. 82 of the T. P. Act. 32 M.L.J. 347=39 I.C. 405. Where crops on a portion of the land in the possession of a tenant are attached by Government for rent due by him for another plot and both the plots are in one patta, the tenant is entitled to pay off the dues and claim to be reimbursed from the landlord notwithstanding the illegality of the attachment. 33 I.C. 234=1915 M.W.N. 643; 39 M. 965=30 M.L.J. 369. A person who owns one of two lands on both of which Government revenue was jointly assessed and pays the whole revenue is entitled to claim contribution for the proportionate sum due from the other land. Neither S. 69 nor S. 70 is applicable. 28 I.C. 456; 33 I.C. 234=1915 M.W.N. 643. See also 144 I.C. 392=1933 R. 112; 223 I.C. 282. The section contemplates only a personal liability and does not refer to any lien or charge on any

property. 26 M.L.J. 74=22 I.C. 253; 18 I.C. 247=25 M.L.J. 312. *See also* 54 A. 140=136 I.C. 69=1933 A. 332. S. 69 is intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the land held by them. It is not a correct view to take that the section is restricted only to a case of personal liability. 1940 All. 104=1939 A. W.R. (H.C.) 855. A Hindu reversioner who pays off a mortgage decree against the estate in the hands of a widow is entitled under S. 69 to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. 35 M. 426=22 M.L.J. 364. *See also* 1928 M.W.N. 398. Where trustee of a temple borrowed money for the temple, he must be indemnified from the trust estate. 12 I.C. 335. S. 69 contemplates cases where one person is bound to pay money to a third person and another person is interested in such payment; it has no application where the person is bound to pay directly to the person who has incurred the expenses. This interest referred to in S. 69 is a pecuniary one. 35 M. 728=21 M.L.J. 600. *See also* 1923 N. 53; 63 C.L.J. 287=40 C.W.N. 1037. The doctrine of contribution applies only when the position under a joint contract by two or more persons remains unaltered. 22 I.C. 263=16 O. C. 285.

**BONA FIDES.**—Payment by a person without title and without possession but expecting to get title in a pending litigation does not entitle him to take advantage of Ss. 69 and 70. 2 Pat.L.J. 676=42 I.C. 839. A volunteer who pays of a previous attaching creditor of the person liable to pay does not stand in the shoes of the debtor but has only a cause of action against him personally. 35 I.C. 448=10 Bur.L.T. 67. As to the period of limitation for a claim under S. 69, *see* 1937 Nag. 402; 18 Lah. 623.

**"BOUND BY LAW TO PAY".**—Meaning of "bound by law to pay". *See* 49 M.L.J. 88=1925 M. 1041; 43 I.C. 482=42 B. 93; 16 Mys. L.J. 27=42 Mys. H.C.R. 637; 25 A.L.J. 791=103 I.C. 289=1927 A. 713; 7 Mys.L.J. 107; 79 C.L.J. 50. The expression "bound by law to pay" means a legal liability and not a contractual liability. 39 I.C. 405=32 M.L.J. 437; 53 I.C. 796=1916 M.W.N. 878. *See also* I.L.R. (1930) 2 Cal. 226=43 C.W.N. 831. The phrase "bound by law to pay" in S. 69 of the Contract Act not only includes personal liability of the "other" but also liability on his property even when he was under no personal liability to pay. 48 C.W.N. 454=A.I.R. 1944 Cal. 272. *See also* 223 I.C. 282. The liability for which payment may be made under S. 69, need not be statutory. A contractual liability by the defendant to pay the amount which the plaintiff with a view to protect his own interest has to pay would entitle the plaintiff to be reimbursed by defendant for the amount paid by him. Any person substituted to the

position of the defendant would also be equally liable. 1940 A.L.J. 320=1940 All. 214. The section includes cases not only of personal liability but all liabilities to payment of which owners of land are indirectly held liable. 138 I.C. 137=1932 O. 222. The section does not authorize a person who made a payment to protect his own interest from recovering it from the person on whose behalf he ostensibly paid it, unless the latter was bound in law to pay the money. 3 Pat. L.T. 122=64 I.C. 226; 59 I.C. 172. (N.) *See also* 34 C.W.N. 41=1930 C. 344. Purchaser of the right of one of the co-sharers is bound in law to pay the amount of the decree for arrears of rent for the period prior to his sale, against the co-sharers, although he was not a party to the decree. 30 C.W.N. 366=94 I.C. 159=1926 C. 657. Where a decree for rent against two joint lessees is satisfied by one of them, who sues the other for contribution, it is not open to the defendant to plead that he is not liable to contribute. 10 P. 168=132 I.C. 107=1931 P. 234. *See also* 20 N.L.J. 73=1937 N. 152. A landlord cannot under S. 69 or 70 recover from his tenant the cost of sweepers and *bhishtis* employed under an order of the Municipal Board to keep the premises clean. 26 I.C. 77=12 A.L.J. 931; 10 I.C. 458=8 A.L.J. 622; 45 B. 638=60 I.C. 892; 41 I.C. 242=21 C.W.N. 628. Where one of the judgment-debtors satisfies the decree by payment under compulsion of legal process, he is entitled under Ss. 69 and 70 to call upon the other judgment-debtors for contribution. 29 C.L.J. 200=19 C.W.N. 458; 32 I.C. 200=23 C.L.J. 125. A party liable to be affected by a sale under a rent decree obtained by a co-sharer landlord can satisfy the decree and sue for reimbursement. 24 I.C. 259=18 C.W.N. 130; 22 I.C. 720. One of several judgment-debtors, who purchases the decree cannot execute it against the other judgment-debtors, but can sue them for contribution under S. 69. 20 I.C. 569=18 C.W.N. 113. A co-sharer who pays the full decretal amount due to the landlord on account of a decree obtained against all the co-sharers is entitled to contribution from the other co-sharers. 13 I.C. 457; 16 C.W.N. 975=17 C.L.J. 179; 30 C.W.N. 366=1926 C. 657; 95 I.C. 545=1926 C. 1031. *See also* 41 C.W.N. 428. A man can recover the money paid to avoid attachment of his property in execution of a decree against another, from the judgment-debtor. 9 I.C. 966. Darpnidar undertaking to pay *paini* rent—Such rent paid by mortgagee from Darpnidar to avoid *putni* sale—Mortgagee has a right to be reimbursed by *patnidar*. 43 C.W.N. 852. The surety who pays a decree debt, which other persons besides the judgment-debtor for whom he stood surety, were bound by law to pay can recover under this section. 40 M.L.J. 529=62 I.C. 706. If a purchaser of the equity of redemption pays off at the time of redemption the amount of a bond not charged on the property, he cannot re-



cover it from the mortgagor under S. 69. 28 I.C. 697. Where a mortgagee with possession failed to pay the Government revenue and the mortgagor paid the same, he can recover it with interest. 24 L.W. 607=51 M.L.J. 633. See also 171 I.C. 740=1937 Nag. 225. A co-sharer who is not bound by law to pay a rent-decree in favour of the superior landlord is not also liable to contribution where the decree is paid off by the other co-sharer. 56 I.C. 949. See also 64 I.C. 918=20 A.L.J. 42; 41 C.W.N. 428; 1937 P. 103; 1935 A. 758.

**INTERESTED IN PAYMENT.**—The words "interested in the payment of money" used in S. 69 do not mean that the interest should be such as would stand the test of a judicial trial. It is sufficient if the person who makes the payment honestly believes that his own interest requires that it should be made, even though that belief is not quite sound in law. I.L.R. (1945) Nag. 247=1945 N.L.J. 98=A.I.R. 1945 Nag. 179. Interested in payment—Puisne mortgagee paying prior mortgage—Right to reimbursement. 63 I.C. 604=19 A.L.J. 840; 54 C. 424=101 I.C. 130=1927 C. 393. Attaching creditor interested in paying money to release property from another attachment. 97 I.C. 319=1926 A. 745. The words "interested in payment" do not exclude a person who is also bound by law to pay, whether under contract or otherwise. 62 I.C. 881; 22 I.C. 9=26 M.L.J. 66; 48 I.C. 69=34 I.C. 367. See also 63 C.L.J. 287=40 C.W.N. 1037; 19 A.L.J. 73=61 I.C. 892; 113 I.C. 441. But see 39 M. 795=29 M.L.J. 639 and 1927 Mad. 1060. (Vendor of property paying charges on land between the date of vendee entering into possession and execution of sale deed at a later date can recover the money so paid). See also on this point, 6 Mys.L.J. 584; 1927 M. 59; 43 Bom.L.R. 225; 25 A.L.J. 791=1927 A. 713; 104 I.C. 358=1 Luck. C. 275 (Lessor failing to pay land revenue—Lessee paying the same to avoid forfeiture is entitled to be indemnified). The words "interested in payment of money" may include the apprehension of any kind of loss or inconvenience or at any rate, any detriment capable of being assessed in money. I.L.R. (1940) All. 580=1940 A.L.J. 511=1940 All. 416. The interest of the person lending the money under this section must be one as would be recognised by law. 61 I.C. 278=8 O.L.J. 94; 55 I.C. 60. An interest resting merely on grounds of sentiment or on moral or on social obligations is not an "interest" which would give in law a right to repayment. 61 I.C. 278=8 O.L.J. 94. Pre-emptor paying off mortgage when vendee had undertaken with vendor to pay—If can recover from vendee. 46 I.C. 83=16 A.L.J. 531; 19 A.L.J. 16=43 A. 268; 7 O.W.N. 475=1930 O. 266. Where a person redeemed a mortgage under the *bona fide* belief that he was entitled to the property under mortgage, he will be allowed a refund of

his redemption money in a suit for possession by the legal owner. 18 I.C. 811=11 A.L.J. 179. Mortgagee paying Government revenue can recover it from mortgagor. 1933 R. 112=144 I.C. 392. Mortgagee paying rent decree amount to set aside rent sale can recover from the purchaser from the mortgagor under a private sale. 43 C.L.J. 172=94 I.C. 811=1926 C. 765. See also 144 I.C. 392=1933 R. 112. Where in a suit for contribution between co-tenants, the defendant co-tenants prove an agreement between them and the plaintiff, that the plaintiff alone must pay the entire rent due from the co-sharers jointly, the plaintiff is not entitled to claim contribution. 1938 Cal. 413=44 I.C. 669. Contribution in case of joint decree debt paid by one. 22 C.W.N. 347=45 C. 691. One of several judgment-debtors paying off decree. 49 I.C. 627; 3 P.L.T. 122=64 I.C. 226; 122 I.C. 765. "Interested"—Interest must be lawful. 34 I.C. 341=21 C.W.N. 394; 22 C.W.N. 347=45 C. 691. See also 1945 N.L.J. 98=1945 Nag. 179. Reversioner interested in payment of revenue by the widow. 19 M. L. J. 331. Decree for rent against Hindu widow—Deposit by reversioner—Sale cancelled—Reversioner, whether entitled to reimbursement. 19 C. L. J. 72=18 C. W. N. 778. Decree for rent against co-sharer satisfied by one alone—Suit for contribution. 15 I.C. 55=18 C.W.N. 327; 21 I.C. 102=19 C.L.J. 525; 11 I.C. 155; 9 I.C. 615. When a person *bona fide* believing himself to have a claim to a property, pays off the charges on the property, he is entitled to recover the amount. 78 I.C. 177=1923 N. 301; 134 I.C. 1211=34 L.W. 669; 1930 M.W.N. 601; 1940 N.L.J. 337=1940 Nag. 285; 18 Mys.L.J. 290; I. L. R. (1940) Nag. 437; 50 B. 309; 53 B. 309=1929 B. 89; 32 Bom.L.R. 424=1930 B. 439 on the point. Person obtaining probate and paying off claim against deceased—Probate revoked—Suit to recover amount paid. 59 I.C. 128. As to right of contribution of co-defendants in respect of costs, see 32 Bom. L. R. 1246. As to right of equitable reimbursement and the principle thereof, see 53 M. 952=60 M.L.J. 13=1931 M. 207; 1930 A.L.J. 1103=1930 A. 517. The Court of Wards assumed superintendence of a deceased Mahomedan's property and paid off his creditors from out of his pensions and jagirs. The heirs who instituted the suit for partition of their shares were held not entitled to the pensions and jagirs. Held, that the heirs could not take advantage of the payments made by the Court of Wards and were bound to recoup the Court of Wards to the extent of the payments made by it and the fact that the pensions and jagirs did not belong to the Court of Wards was a question entirely between it and the head of the deceased's family appointed by the Government. 193 I.C. 829=1941 Lah. 88.

**PAYMENT MUST BE IN CASH.**—Mere execution of mortgage is not enough to entitle



70. Where a person lawfully does anything for another person, or delivers

Obligation of person enjoying benefit of non-gratuitous act. anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered.

*Illustrations.*

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

one to contribution. 161 I.C. 152=1936 O. W.N. 301=1936 O. 253.

SECS. 69 AND 70.—Ss. 69 and 70 of the Contract Act are applicable even as between co-owners and the fact that plaintiff also benefits by the payment made by him is no bar to his claiming reimbursement. 71 M. L.J. 1 (Supp.)=44 L.W. 214=1936 M. 752. Ss. 69 and 70 deal with entirely different conditions and they cannot both apply to the same set of facts. If one applies, the other cannot. Further more, they deal not with contribution but with reimbursement. If a plaintiff can make out a case under either of these sections, he is entitled to recover the whole of the money spent and not merely a part of it. Neither of these sections can have any application when a man pays a debt for which he himself is personally liable. 40 C.W.N. 711. A payment made by a person who puts forward a *bona fide* claim to property in dispute is entitled to the protection afforded by S. 69, even though it ultimately transpires as a result of litigation that he had not in law or in fact the interest for the protection of which the payment was made by him. A payment in satisfaction of a decree by a person who is a party to a decree is a payment lawfully made within the meaning of S. 70. The principle underlying these sections would also apply to the case of a person who advances money to the person making the payment in such circumstances. The basis of the doctrine is that if a person has received some property or benefit from another, it is just that he should make restitution as otherwise he would be unjustly enriched at the expense of the other. This is, however, always subject to the limitation that a man cannot make another liable for a benefit done officiously. 48 Mys. H. C. R. 534=22 Mys. L. J. 150. Where a person, not personally bound by a maintenance decree, is only impleaded because he held a mortgage upon the property charged by the decree, he is not legally bound to pay the decretal amount within the meaning of S. 69. Other judgment-debtors are however legally bound under the decree. By the payment therefore of the decretal amount, such person obtains a right under S. 69 to be reimbursed by the other judgment-debtors. Even if he may not acquire a right under S. 69 he acquires a right under S. 70. The judgment-debtors are therefore liable to the mortgagee's claim for contribution

under Ss. 69 and 70. A person's right under Ss. 69 and 70 can be kept separate from his rights of subrogation under S. 92 and the right of contribution which is a personal one. 30 N.L.R. 148=148 I.C. 815=1934 Nag. 84. See also 1935 L. 981. S. 69 of the Act applies to suits for contribution where both the plaintiff and the defendant are equally liable for the money paid by the plaintiff, and the fact that a decree for costs against the plaintiff, and defendant makes them jointly and severally liable does not render S. 69 inapplicable to a suit by the plaintiff for contribution in respect of payment made by him under the decree. Even if a matter does not come under S. 69, it can come under the wider language of S. 70 of the Act; there is no distinction between a case where execution is proceeded with by attachment and sale of the properties of the plaintiffs and one where execution has been arrested because the plaintiffs have paid the money. If the defendants have got the benefit of the payment made by the plaintiffs they are liable to contribute. 61 C. 864=38 C.W.N. 758=1934 C. 609. The plaintiff who had purchased some Zamindari shares of the defendant paid revenue for a period dating prior to the sale and terminating after that date. Held, that the purchaser could not recover the amount paid as revenue from his vendor. 151 I.C. 351=1934 A. 712; 188 I.C. 116; 16 Mys. L. J. 184=43 Mys. H.C.R. 105. Patnidar having 2/3 share paying entire rent to prevent sale—Darpatnidar and Sepatnidar under other patnidar contracting with him to pay his patni rent to Zamindar—No liability to contribute. I.L.R. (1939) 2 Cal. 226=43 C.W.N. 831=1939 Cal. 645. Suit for reimbursement of money paid towards mortgage decree—Limitation. See (1945) 1 M. L.J. 341.

SEC. 70: SCOPE OF SECTION.—Section 70 of the Contract Act must be interpreted according to its clear and explicit terms and not in reference to the provisions of the English law relating to the matter. The section is much wider than the English Law and goes far beyond it. 33 Cal. 377; 120 I.C. 615=1930 L. 364. See also 1936 M. 930. Where there is an express contract S. 70 does not apply. 62 C. 612=39 C.W.N. 461; 32 I.C. 511. See also 13 L. 561=140 I.C. 621. S. 70 can only have application where there is a direct benefit to the person for whom the work is done. 58 L.W. 338=1945 M.W.N. 441=A.I.R. 1945 Mad. 427=(1945) 2 M.L.

J. 155. S. 70 provides for a case where (1) a person lawfully does anything for another person or delivers anything to him, (2) the lawful act or delivery is not intended to be done gratuitously, and (3) the other person enjoys the benefit thereof. If these three conditions are fulfilled, the section applies and the latter person is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. The compensation to be made is in respect of the benefit enjoyed by the second person. I.L.R. (1937) Bom. 782=39 Bom.L.R. 835=1937 Bom. 417. The question whether compensation (remuneration for services rendered) should or should not be awarded must depend upon the intention of the person at the time of his doing the thing for which he demands the compensation. He is obviously the person to state what his intention was. Where it is clear that he was under the impression that he would receive remuneration for the services, it cannot be predicated that he intended to act gratuitously and so he is entitled to claim reasonable compensation. 45 L.W. 355=41 C.W.N. 672=39 Bom.L.R. 720=(1937) 1 M.L.J. 719 (P.C.). Section applies although there exists another remedy. 62 O. 612=39 C.W.N. 461. The section though wide, will enable the Court to do substantial justice. 42 B. 556=19 Bom.L.R. 650. See also 1925 P. 201; 90 I.C. 337=1925 M. 571; 1925 N. 19; 21 L.W. 336=47 M.L.J. 622; 1930 L. 193. The provisions of sec. 70 are applicable when one of the persons concerned is a corporation or other public body. 10 B. 523=140 I.C. 737=1932 R. 176. Section does not apply to the case of a minor. 1931 L. 344. Person paying money due to save property from sale, believing the property to be his can recover the same from the rightful owner. 99 I.C. 845=1927 M. 459. See also 29 C.W.N. 1052=42 C.L.J. 83=1925 C. 1097; (1946) 1 M.L.J. 63. Payment of land revenue is a necessity and can be recovered. 84 I.C. 580=1925 N. 33; 117 I.C. 107. See also 1933 R. 112 (Mortgagee paying Government revenue). Sale by lambardar—Name not removed from Record of Rights—Payment of revenue on citation being issued to him—Right to recover the amount from the transferee. See 117 I.C. 107. Suit on hundi—Hundi held inadmissible—Plaintiff can still succeed if his suit can be treated as one for money had and received or for compensation of money paid to defendant's creditor. 51 A. 530=27 A.L.J. 333=116 I.C. 293. Compensation for use and occupation which is described sometimes as fair rent or occupation rent which in English Law is looked upon as based on implied contract cannot be so viewed in India inasmuch as the Contract Act does not speak of it in Ch. V. 30 M.L.J. 492=34 I.C. 6. Sec. 70 applies to all cases of benefit *bona fide* conferred by one person upon another and which benefit is enjoyed by the other person. It is not necessary under the section that the defendant must have an option before the benefit is conferred of accepting or declining it. 38 M. 235=25

M.L.J. 433; 141 I.C. 68=1933 L. 95. But see 28 I.C. 697; 25 I.C. 783=16 M.L.T. 375; 1931 M. 51=129 I.C. 828. If he retains or enjoys the benefit of something lawfully done for him, he is bound to make compensation. 134 I.C. 139=1931 P. 394; 150 I.C. 1131=1934 P. 346. In construing the section, Courts in India should be guided more by justice, equity and good conscience than by English precedents. Even though plaintiff might have an interest in paying money, yet it might none the less be for defendant. 38 Mad. 235. Where a portion of the amount deposited by the plaintiff was appropriated by Government for the satisfaction of a debt due from the defendants, it is not a case of any voluntary payment by the plaintiff, but of one of appropriation without consent. As the defendants obtained the benefit of the appropriation, an implied obligation on their part to repay the plaintiff arose, on which he can sue to recover the amount. 1938 A.L.J. 223=1938 All. 206. On this section, see also 1927 M.W.N. 872; 1930 M.W.N. 601.

ENJOYING BENEFIT.—Plaintiff is not entitled to compensation under sec. 70, where payment was not made by him for defendant's benefit or with his knowledge or consent. 40 B. 646=35 I.C. 794; 75 I.C. 624=1923 A. 404 (2); 62 I.C. 615=25 C.W.N. 813; 53 I.C. 90=30 C.L.J. 34; 1931 M. 51; 141 I.C. 68=1933 L. 95; 58 L.W. 338=(1945) 2 M.L.J. 155. The word "enjoys" should not be construed as meaning "accepts and enjoys." Two conditions are essential for establishing a liability to contribution under sec. 70: (i) The work must have been done in part at least for the benefit of the defendant. It is not enough that it has in fact resulted in benefit to the defendant. (ii) The defendant should have had after the execution of the work an opportunity or option of accepting or rejecting the benefit. 1931 M.W.N. 1231=34 L.W. 859; 1936 M.W.N. 761=44 L.W. 518=1936 M. 930; 16 Pat.L.T. 649=158 I.C. 25; 148 I.C. 1052=1934 O. 307. To sustain a claim under sec. 70, the person benefited should have had an opportunity of accepting or rejecting a benefit. So, where a co-owner, whose interest was the same as that of the co-owner defendants, produced evidence, engaged counsel and succeeded in defeating the plaintiff and, incidentally and without any special effort on his part, the other defendants derived advantage, it cannot be said that the contesting co-owner had done something for the benefit of the others for which they would be bound in law or equity to make a proportionate reimbursement. 141 I.C. 68=34 P.L.R. 28=1933 L. 95. See also 34 I.C. 54. It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. (2 I.A. 131, Ref.) 11 O.W.N. 606=

1934 O. 307. In a suit for compensation where the sole or dominant motive for the payment is not to save another man's property, the payment cannot be said to have been made for such other man and compensation under sec. 70 cannot be given. The mere fact that the person can benefit by such payment is not sufficient. 1930 M. 644. Purchaser of the share of one co-sharer is a person benefited by payment of the amount of the decree for arrears of rent he obtained against all the co-sharers, though the rent sued for relates to a period prior to the purchase. 30 C.W.N. 366=94 I.C. 159=1926 C. 657. *See also* 148 I.C. 1052=1934 O. 307. The liabilities of joint tenants for rent is joint and several under sec. 43 and if one of them pays the whole rent, he can sue the others for contribution. 27 I.C. 334=20 C. L.J. 492; 21 C.W.N. 394=34 I.C. 341; 61 P.R. 1914=25 I.C. 542; 10 P. 168=132 I. C. 107=1931 P. 234. Where a person is bound to do an act or would do an act, whether another consents to it, or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. 43 M.L.J. 271=1923 M. 64 (45 I.C. 786; 21 C. 496; 33 M. 15; 16 M.L.T. 375 Foll.). Under sec. 70 it is sufficient if the payment is lawful and not intended to be gratuitous, i.e., it should be a *bona fide* payment. It is not necessary that the payer should be interested in paying the money as in sec. 69, 51 I.C. 857=9 L.W. 435. *See also* 38 C.W.N. 554=1934 C. 667. Suit on promissory note—Execution not properly proved—Benefit of loan taken—Restoration of benefit. *See* 1934 A. 390=154 I.C. 405; 120 I. C. 615=1930 L. 364. A person who claims compensation under sec. 70 need not have acted from purely disinterested motives because the very expression "not intending to do so gratuitously" suggests that there must be an element of self-interest also in the act performed by him. 10 P. 528=134 I.C. 139=1931 P. 394. The authorities do not sanction recovery under sec. 70 when the person primarily liable has no knowledge, actual or imputed, that expenditure is or probably may be necessary on this behalf. 39 M. 965=30 M.L.J. 369. Where a creditor lends money to an executor even if it be for a purpose sanctioned by the will, he has no right in a suit to recover the debt to enforce his claim against the estate itself and sec. 70 cannot be invoked for that purpose. 35 C.W.N. 850=59 C. 216. Where the plaintiff and the defendant were co-sharers in the properties sold in execution and the plaintiff deposited the entire decree amount to redeem the properties, he must be deemed to have acted 'for' the defendant also so as to be entitled to contribution. 10 P. 528=1931 P. 394. Village panchayat rendering latrine service is entitled to charge for service rendered. 1935 N. 242.

Where the Government effects repairs to an irrigation tank owned by the Government jointly with a shrotriendiar and sues the latter (co-owner) for contribution in respect of the expenses incurred for the repairs, it must

be held that the Government in carrying out the repairs has acted lawfully and has not intended to carry them out gratuitously, and that the defendant co-owner, who has enjoyed the benefit of the repairs which were necessary and but for which his lands would have suffered is liable to pay contribution to the Government. All the conditions of sec. 70 of the Contract Act having been fulfilled, the Government would be entitled to recover contribution. Though under the English law, the defendant would not be liable, the provisions of sec. 70 of the Indian Contract Act are wider than the English law, and therefore the defendant is liable under sec. 70. 1943 M. W.N. 6=(1942) 2 M.L.J. 800 (F.B.)=1943 Mad. 85.

**COMPENSATION—BASIS OF.**—The basis of compensation under sec. 70 would plainly not be the same as on contractual rights. Under sec. 70, it would be in proportion to the benefit enjoyed by the party bound, and appropriate compensation is to be awarded mainly from that aspect. I.L.R. (1937) Bom. 782=39 Bom.L.R. 835=1937 Bom. 417.

**MINOR—LIABILITY OF.**—Sec. 73 of the Contract Act does not apply to a minor. In the circumstances set out in sec. 70, the law implies a promise to pay. A minor who is incompetent to contract, cannot be made liable on such a contract. An implied contract is nothing more than a promise which is inferred from certain circumstances. The basis of a suit under sec. 70 is a contractual one and consequently a minor cannot be sued under sec. 70. A liability which cannot be imposed by an express contract cannot be imposed under an implied contract. 19 Pat. 739=21 P.L.T. 587=1940 Pat. 324 (F.B.).

**CONTRACT WITH MUNICIPALITY.**—contract for delivery of goods was made with the plaintiff by or on behalf of the Municipal Committee which not being in writing under seal was not binding on the Municipal Committee under sec. 47, Punjab Municipal Act. Plaintiff who delivered the goods to the Committee claimed the price thereof and the committee resisted the claim on the ground that the plaintiff was entitled to the return of the goods only and not its price. The Municipal Committee also resisted the plaintiff's claim for amendment of the plaint by inserting a relief for the return of goods under sec. 70, Contract Act. *Held*, that as the Committee resisted the plaintiff's claim to amend the plaint by inserting a relief for the return of the goods, it was not open to the Committee to say that the plaintiff was entitled to a return of the goods only and not for recovery of its price. 145 I.C. 687=1933 L. 14. *See also* 13 L. 54=140 I.C. 621. Sec. 70 contains a provision for finding a person to make compensation under conditions which do not postulate a contract. The applicability of the section cannot be excluded by the fact that there is no enforceable contract, *e.g.*, that there is no contract binding on a Municipality by reason of the requirements of the Municipal Boroughs Act not having been followed. Sec. 70 does not depend upon the

existence of a contract binding on the parties and does not provide for contractual liabilities. I.L.R. (1937) Bom. 782=39 Bom. L.R. 385=1937 Bom. 417. Where a plaintiff sues for recovery of money on the basis of an alleged agreement which is found against and there is no relief asked for under sec. 70, it is not open to the Court to grant that relief. I.L.R. (1938) Lah. 511=1938 Lah. 71. See also (1941) 2 M.L.J. 469=1941 Mad. 887.

Co-OWNERS.—See 167 I.C. 42=18 Pat.L.T. 333=1937 P. 103. Irrigation—Contribution—English and Indian Law. 28 M.L.J. 384=28 I.C. 309. Suit for contribution for repairing irrigation channel belonging to plaintiff and defendant by plaintiff alone. See 1927 M. 122=93 I.C. 838; 18 Pat.L.T. 333=1937 Pat. 103. Such suit is not maintainable if repair is done by plaintiff without defendant's consent and under his exclusive supervision and to his substantial benefit. 27 L.W. 406=1928 M. 320. Where the villages have utilized water from the pyne on the construction of the bund, contribution towards the construction is payable on account of the villages under sec. 70. 150 I.C. 1131=1934 P. 346. Where several persons join together in instituting a suit to secure a common benefit, and one of them bears the expenses of the litigation, he is entitled to be reimbursed by his co-plaintiff under sec. 70 in the absence of an express agreement between them settling the proportions which each had to bear. 34 I.C. 54=2 Pat.L.W. 437.

EXTENT OF BENEFIT.—In order to take advantage of sec. 70 the plaintiffs must prove the extent of benefit derived by the other party. 30 I.C. 178=29 M.L.J. 597; 60 I.C. 414. See also 132 I.C. 78=1931 O. 242. Work done under contract not validly executed—Right to compensation for benefit taken can be enforced though not suit based on contract. 38 P.L.R. 618. As to measure of damages, see 1944 Nag. 279=1944 N.L.J. 283.

'NOT INTENDING TO DO SO GRATUITOUSLY.—Where a pleader works for a client without any contract as to remuneration he will be entitled to a reasonable payment for his services. 20 I.C. 47 (1)=20 C.L.J. 424. Where there has been no express agreement about the fees to be paid to a medical man he is entitled to a reasonable amount to be fixed by the Court. 25 I.C. 777. Hindu joint family—Execution of decree against individual member—Payment by him—Suit for refund. 54 I.C. 807=11 L.W. 115; 27 A.L.J. 902=119 I.C. 81=1929 A. 834. Sec. 70 is not applicable to a case where a person does some act for his own benefit unavoidably. 45 I.C. 786; 54 I.C. 807=11 L.W. 115. See also 1941 O.A. 1050 (lessee under an invalid lease spending money on shed and building is not entitled to reimbursement). Act done by plaintiff primarily for his own benefit, but resulting in indirect benefit to defendant—No liability on defendant to compensate plaintiff. 1936 M.W.N. 761=44 L.W. 518=1936 M. 930. The question whether compensation (remuneration for services rendered)

should or should not be awarded must depend upon the intention of the person at the time of his doing the thing for which he demands the compensation. He is obviously the person to state what his intention was. Where it is clear that he was under the impression that he would receive remuneration for the services, it cannot be predicated that he intended to act gratuitously and so he is entitled to claim reasonable compensation. 167 I.C. 5=45 L. W. 355=1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.). When it is proved that the plaintiff has really done some work under a contract, which he alleged but failed to prove the alleged contract, reasonable compensation should be given to the plaintiff for the work done. 30 I.C. 223=2 O.L.J. 332. Where a contract placed by a District Council with the plaintiff was not reduced to writing, plaintiff is nevertheless entitled under sec. 70, to be compensated for the work done on the principle of *quantum meruit*, though he could not sue on the contract. 10 R. 522=140 I.C. 737=1932 R. 176. See also 54 C. 189; 1936 A.M.L.J. 37; 1935 C. 347. Where the contract is to do work for a lump sum nothing could be recovered as *quantum meruit* for part only of work done. 19 I.C. 48=6 Bur.L.T. 53; 16 I. C. 692=1913 M.W.N. 956. Where by the terms of a contract, the person agrees that he is not entitled to any remuneration unless the work has been check-measured, he cannot claim for any work which has not been check-measured. There is no room for any implied contract, where there is an express contract in existence, and in such a case the principle of *quantum meruit* cannot be applied. 54 L.W. 342=1941 Mad. 887=(1941) 2 M.L.J. 469. Where no relief was asked for on the footing of *quantum meruit* the Court has no jurisdiction to grant any. 37 L.W. 313=142 I.C. 683=1933 M. 344. See also 1938 Lah. 71.

'LAWFULLY'.—The word 'lawfully' means merely '*bona fide*.' 9 Mys.L.J. 364. The word "lawfully" as used in sec. 70 of the Contract Act is of the very essence of the section, and in every case we have to find out whether the person making a payment of money had any lawful interest in making it at the time when the payment was made. If a person holding a charge on a property makes a payment in order to save it from being sold *bona fide* believing that it is necessary to do so in order that it may remain intact for satisfaction of his debt the payment is made 'lawfully' within the meaning of the section. I.L.R. (1945) Nag. 247=1945 N.L.J. 98=A.I.R. 1945 Nag. 179.

Sec. 70 of the Contract Act applies when a person lawfully does something for another, not intending to do so gratuitously. The section must not be read so as to justify the officious interference of one man with the affairs or property of another man, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered. The word 'lawful' in the section contemplates cases in which a person

Responsibility of finder of goods.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

72. A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

holds such a relation to another as either directly to create, or by implication reasonably to justify an inference that by some act done for another person the party doing the act is entitled to look for compensation for it to the person for whom it is done. It is impossible to hold that when a person divests himself of all interest in property and gifts it to another and agrees that he shall no longer have any right to the management of that property and vests the sole rights of management in another, he can be said to stand in the relationship contemplated above. I.L.R. (1945) Nag. 820=1945 N.L.J. 563. *See also* (1946) 1 M.L.J. 63. Money left with vendees for payment to mortgagees—Property mortgaged different from property sold—Vendees not entitled to recover amount paid in excess of that directed to be paid by the vendors. 40 A. 555=47 I.C. 903; 11 L.L.J. 435=1929 L. 737; 1930 M. 644. *See also* 14 C.W.N. 699; 18 Bom.L.R. 730. Hindu reversioner paying money to prevent sale for road cess—Right to recover from widow or life estate holder. 25 C.W.N. 1029=49 C. 470=1922 C. 353. *See also* 86 I.C. 737=1925 M. 1175. A payment under Q. 21, r. 89, C.P. Code, is a valid payment for the purposes of sec. 70. 13 I.C. 144=16 C.L.J. 156. *See also* 1931 M. 753; 10 P. 528=1931 P. 394; (1946) 1 M.L.J. 63. But compensation paid to the auction-purchaser cannot be recovered as plaintiff also was responsible for the sale. 10 P. 528=1931 P. 394. A person paying rent in order to create title must be deemed to be making it voluntarily and not lawfully and so sec. 70 would not apply. 15 C.W.N. 332=9 I.C. 219=13 C.L.J. 646; 9 I.C. 615. (21 C. 142, Foll.) A payment made by the purchaser of certain property to redeem an antecedent mortgage which was not disclosed to him at the time of his purchase is a lawful payment within the meaning of the section. 128 I.C. 907=32 Bom.L.R. 1376=1931 B. 39. In ascertaining whether an act is lawfully done within the meaning of the section, it must be ascertained whether the person so acting held such a position to the other as either directly to create, or by implication reasonably to justify, the inference that by the act done for the other person, he was entitled to look for compensation. (*Ibid.*) A person who pays assessments honestly and under the belief that he has title to the land could not recover them from the defendant, if it is clear that the defendant and not he is the real owner. 12 M.L.T. 261=17 I.C. 253. Co-sharer making improvements—Right to recover. 10 I.C. 694=7 N.L.R. 11.

LANDLORD AND TENANT.—Unauthorised use of water. 22 I.C. 34=1914 M.W.N. 66. *See also* I.L.R. (1940) Kar. 200 (suit for com-

pensation for use and occupation).

LEGAL PRACTITIONER.—Suit for fees on basis of agreement barred by sec. 28, Leg. Prac. Act—Claim for reasonable compensation not sustainable. 8 Pat.L.T. 175.

PRINCIPAL AND AGENT.—Where an agent borrows money for the benefit of his principal without proper authority from him, the principal is liable jointly and severally with the agent for such money as is applied for his benefit. 39 P.L.R. 208.

INTEREST.—Where compensation is awarded under sec. 70, it is open to the Court to award interest on such compensation. 134 I.C. 1028=32 P.L.R. 546=1931 L. 457.

SEC. 72.—Coercion in this section is used in its general sense. 5 R. 653. Where a municipal toll-contractor insists upon the payment of tolls every time a vehicle enters the municipal limits, and the vehicle cannot cross the municipal limits without such payment the payment made by the owner of the vehicle must be presumed to be not voluntary, but under coercion. A suit by the owner of the vehicle to recover the payments made on the ground that the collection of the same by the municipal contractor was wrongful and unauthorised cannot be defeated on the ground that the payment was voluntary. 15 Mys.L.J. 489. Contract for sale of goods—Subsequent order under Defence of India Act fixing price at rate lower than contract rate—Buyer taking delivery of goods paying contract price—If entitled to recover difference between contract price and price fixed by Government order. *See* 80 C.L.J. 170.

MISTAKE.—Sec. 72 is unambiguous, and under that section, if money is paid to a person by mistake, he is bound to repay it. There is nothing to sec. 72 to suggest that it should only be applied when there is privity between the payer and the payee. I.L.R. (1942) Mad. 669=55 L.W. 233=1942 M.W.N. 335=A.I.R. 1942 Mad. 590=(1942) 1 M.L.J. 441. Sec. 72 does not apply to a case where a person has been required by an order of a Court of competent jurisdiction to pay the money and the validity of the order has been challenged. Moreover the section relates to questions of fact and not questions of law. 171 I.C. 401=1937 Rang. 234. As the section lays down that a person to whom money is paid by mistake or coercion must repay or return it, it implies that the money was not really due to the person to whom it was paid. 43 A. 272=60 I.C. 881; 45 M.L.J. 497=4 L. 284=50 I.A. 162 (P.C.); 42 B. 161=42 I.C. 869. A person who makes a payment of a tax to a municipality under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in

*Illustrations.*

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

error. Payments made by mistake of law cannot be recovered. 52 L.W. 437=1940 Mad. 956=(1940) 2 M.L.J. 469. A mistake as to the construction and meaning of a contract is not a mistake of fact but a mistake of law. If a party acts on a mistaken view of his rights under a contract, he is not entitled to any relief under the heading mistake and if money is paid, it is money paid under a mistake of law and not a mistake of fact and is not recoverable. 22 Pat. 220=A.I.R. 1943 Pat. 327=210 I.C. 426. The fact that a person pays a tax such as octroi to a local body without a protest at the time does not lead to the inference that the payment is voluntary so as to disentitle him from suing for refund of the tax paid on the ground that the tax has been illegally levied. Where the consequences of not paying the tax would be that the articles on which tax is claimed would be seized and detained, the payment of tax to avoid such consequence is a payment under duress and not a voluntary payment and can be recovered under sec. 72. 18 Mys.L.J. 477. A person who has paid taxes and licence fees to a panchayat Board under the mistaken belief that the properties or business in respect of which the taxes or fees were paid were situate within the jurisdiction of that Board, must be held to have done so under a mistake of fact and is entitled to recover them as money had and received under sec. 72. 51 L.W. 437=1940 Mad. 660=(1940) 1 M.L.J. 582. Mistake of law—If and when a ground for redress—Pure mistake of law—Mistake bearing upon private or special right of party—Distinction. 56 M.L.J. 269. Payment of money on mistake of fact—Suit for recovery of—Nature of suit. See 1928 P.C. 261=21 L.W. 72 (P.C.). A person paying under a mistake of fact, however, ignorant he may be and however forgetful he may have been, is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered his position by parting with the money. But the mistaken payment must be of such a nature that if such payment is not rectified a liability will be created against the person paying. 151 I.C. 1018=12 R. 25=1934 R. 66. Money paid under pressure of legal process—Mistake—Action for money had and received—Maintainability. 56 B. 501=34 Bom.L.R. 791. Money paid into Court to set aside Court sale in execution of decree—Decree subsequently set aside or reversed—Claim for refund of money paid into Court is maintainable—Right to restitution. (1940) 1 M.L.J. 340=52 L.W. 226=1940 Mad. 725. Money paid under mistake to person supposed to be heir—Real heir's right subsequently established—Liability of person receiving payment to refund amount to real

heir—Interest whether chargeable. See 50 A. 818=115 I.C. 114. Money paid under a mistake of fact on the part of both the parties is recoverable. 1922 C. 1 (2); 16 I.C. 131=16 C.L.J. 437; 90 I.C. 906=1925 M. 762. (Power of Court to take notice of facts arising subsequent to suit). The doctrine of equitable restitution has no application where the defendant labouring under the same mistake as the plaintiff has *bona fide* parted with the goods to others. 43 M.L.J. 142=70 I.C. 751=1923 M. 17; 15 I.O. 361=5 Bur.L.T. 75. Where the plaintiffs through negligence wrongly accepted the position of drawees of hundi presented by a bank, held there was gross carelessness on their part in not detecting the mistake and in not intimating the bank of it and they were not entitled to recover the money from the bank. 50 B. 49=91 I.C. 342=27 Bom. L.R. 1229=1926 B. 66. Money paid to wrong person by plaintiff's broker contrary to plaintiff's instructions can be recovered under sec. 72. 1925 S. 93=18 S.L.R. 65. Money paid under a decree which is afterwards found not to be due cannot be recovered as money had and received in a fresh suit, unless the decree is set aside or superseded by some ulterior proceeding. 46 I.C. 562. Banker and customer—Countermanding payment of cheque—Bank making payment in forgetfulness of order of countermand—Bank can recover amount paid from payee. 11 Lah. 667=31 Punj.L.R. 369. Where a debtor alleges that he overpaid his creditor under a mistake of law but makes the payment voluntarily he is not entitled to claim a refund of it. (1920 Bom. 192; 1930 Bom. 430, Ref.) 1933 L. 523. See also 150 I.C. 890=1934 M. 420=67 M.L.J. 566. Money paid in excess under mistake of fact by officer of Court—Claim for refund by other creditors—Maintainability. See 29 Bom.L.R. 1167. On this section, see also 1928 L. 316=111 I.C. 554.

**CORRECTION.**—Where property of one person is wrongfully attached in execution of a decree against another and the real owner pays off the decree amount under protest the owner is entitled to demand repayment from the decree-holder. This is the law both in England and in India. 40 C. 598=40 I.A. 56=25 M.L.J. 104 (P.C.) [8 I.A. 93 (P.C.), Rel.]. See also 1933 A. 953; 47 L.W. 188. Where a third party who had purchased the property prior to the attachment deposited the purchase-money under O. 21, r. 89, O. P. Code, to set aside the sale in execution and subsequently succeeded in his suit for a declaration of his right to the property he is entitled to a refund of the deposit so made by him from the decree-holder-auction-pur-



## CHAPTER VI.

## OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Compensation for loss or damage caused by breach of contract.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Compensation for failure to discharge obligation resembling those created by contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

chaser (irrespective of the applicability of r. 89) under sec. 72 of the Contract Act, as an involuntary payment made under coercion. 34 L.W. 599=1931 M. 753. See also 57 B. 601=35 Bom.L.R. 462=1933 B. 239; 1943 A.L.W. 277; (1941) 1 M.L.J. 793. The word "coercion" in sec. 72 is used in its general and ordinary sense and not in the sense in which it is defined in sec. 15. 40 C. 598=40 I.A. 56 (P.C.). See also 5 R. 653; 47 L.W. 188; 65 I.C. 517; 17 I.O. 205=14 Bom.L.R. 854. Where a municipality, erroneously conceiving itself justified, makes a demand in the common form requiring the assessee to either pay or show cause for not paying the same and in default warning him that distraint will be made, payment in pursuance of such notice is not sufficient to take it out of the category of voluntary payments. Payment made without any expression of objection or unwillingness, under the erroneous belief that it was unobjectionable, cannot be recovered. 39 L.W. 660=1934 M. 420=47 M.L.J. 566. See also 1934 P. 605; 1933 L. 523. Money paid under legal process—Recoverability. 43 C. 269=20 C.W.N. 188; 53 I.C. 553. Money paid by a person under arrest in a non-compoundable case with a view to stifle a prosecution amounts to payment under coercion. 40 M. 285=31 M.L.J. 264. A landlord collected water-cess from plaintiffs at a penal rate and paid it to the Government. He was not liable to be sued by the plaintiffs for the recovery of the water-cess so paid by them. 29 M.L.J. 597=30 I. C. 178. A payment of water-cess made under fear of coercive process is not a voluntary payment. 37 M. 322=24 M.L.J. 365. Personal decree against Hindu widow—Estate attached in execution—Owner paying decretal amount to avoid sale—Money could be recovered. The fact that the person paying could have been made liable for the amount paid, had suitable proceedings been taken, was held to make no difference. I.L.R. (1938) Nag. 382=1938 Nag. 225. Money paid under compulsion of a legal process

cannot be recovered as money had and received unless it was realized by fraud or some unconscionable dealing or by a grave mistake which a Court of equity will relieve against. 46 I.C. 534=3 P.L.J. 465. On this section, see also 32 Bom.L.R. 424; 44 L.W. 722=1936 Mad. 978. Money paid to official assignee under garnishee order cannot be recovered back. 171 I.C. 401=1937 Rang. 234. Landlord and tenant—Tenant leaving rent in arrears—Part of arrears barred by time—Landlord locking up premises preventing tenant from carrying on business therein—Payment by tenant to get rid of improper re-entry of landlord—Right to recover back amount of barred arrears paid by him. 49 Mys.H.C.R. 522. Sec. 72 uses the word 'mistake' without any qualification, and it contemplates not only a mistake of fact but also a mistake of law. There is no conflict between this section and sec. 21 of the Act. Sec. 21 speaks not of a payment made, under a mistake of law but of "a contract caused by a mistake of law". Sec. 72 does not speak of a contract at all but merely of a payment made under a mistake. If therefore a payment made under a mistake of law is not the origin of a contract such payment would be refundable under sec. 72. The English Common Law rule that a payment made under a mistake of law is not recoverable can have no application. 80 C. L.J. 170.

Sec. 73: SCOPE.—See 18 N.L.J. 313. Section merely prescribes method of assessing damages. It does not take away right of seller to sue for price when property in the goods has passed to buyer. 34 B. 192; 36 C. 736. The buyer has no right without the consent of the seller to extend the time and claim damages at the rate prevailing on the deferred date. 97 I.C. 269=19 S.L.R. 41; 37 Mad. 321. Section applies only when contract has been broken. See 4 Bom.L.R. 874. The party to be entitled to compensation must have done something to his own prejudice in the performance of his part of



*Illustrations.*

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) *A* contracts to buy of *B*, at a stated price 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the price if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

the contract. Where therefore the vendors have no goods to deliver they suffered no injury by the vendee's breach not to take delivery and the vendors are not entitled to any damages. 151 I.C. 56=1934 N. 129. When a person is guilty of a breach of contract then ordinarily, the other party to the contract has open to him two remedies, one by a suit for damages and the other by a suit for specific performance of the contract. Of course, some kinds of contracts cannot be specifically performed, but in every case there is a right of action for damages, and in India that applies to contracts for the sale of immovable property just as much as to contracts for the sale of movable property. 189 I.C. 23=1940 Rang. 146. No difference between movable and immovable property. 1927 S. 49; 1930 M. 748; 32 Bom. L.R. 272=1930 B. 213. Law does not regard collateral and consequential damages arising from delay in payment of money. See 35 C. 623. So also loss of profits on breach of contract is not to be considered in measuring damages. See 21 M. 172; I.L.R. (1938) 2 Cal. 88. As to delivery by instalments, see 21 M.L.J. 182. See also 30 C. 477; 1 C. 264. When a buyer of goods becomes aware of a breach of a condition of the contract by the seller, he is entitled to a reasonable time to consider what he will do and his failure to reject the goods at once does not prejudice his right to reject them within a reasonable time. What is a reasonable time must always be a question of fact. 44 C.W.N. 1069. Where a person is not prepared to wait even a short time before giving final instructions for the cancellation of his contract to purchase goods to see whether the injunction prohibiting importation of his contracted goods was to be continued as to future importations, nor does he care on its discharge to cancel his letter of cancellation which he could easily have done by cable, in spite of the fact that the

vendors were still prepared to keep the contract open, the cancellation is not due to the granting of the injunction but is a voluntary act on the part of the person for which the person obtaining injunction is not liable. 1829 P.C. 222=57 M.L.J. 558 (P.C.). See also 1930 L. 103. Plaintiff can claim damages as on the date when the defendant failed to take delivery of goods. 54 C. 97=99 I. C. 244=1927 C. 291. Measure of damages where no time is fixed for delivery. See 14 A.L.J. 597. As to damages in case of breach of promise of marriage, see 42 B. 499. Also 152 I.C. 913=35 P.L.R. 480=1934 L. 544. Under the terms of sec. 73, the compensation is only for loss actually suffered, and such compensation is not to be given for any remote and indirect loss or damage sustained by the breach of contract. The section would give no cause of action in respect of a mere contingent liability, unless and until the damage is actually suffered. 222 I.C. 315. Where a contract is entered into between two Hindus that the daughter of the one should be given in marriage to the son of the other, the agreement is between or on behalf of the respective families of the parties to the marriage. When it is broken, damages of two kinds may naturally result: (1) the pecuniary loss, if any, and injury to the feelings and prospects to the bride or bridegroom personally; (2) the pecuniary loss and the loss to the credit and reputation of the family of the injured party. A suit by the father of the bride for damages suffered by him as head of the family and as father of the bride is not strictly an action for breach of promise of marriage as known to English law. Sec. 73 of the Contract Act which prescribes the general measure of damages for all contracts must be applied to the case. A claim to recover amounts by way of increased expenditure on the bride's subsequent marriage alleged to be due to her having been discarded cannot be al-

(f) *A* contracts to repair *B*'s house in certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freight rises and on the first of January the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made, by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) *A*, having contracted with *B* to supply *B* with 1000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be re-built by *B*, who, in consequence loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of re-building the house for the rent lost, and for the compensation made to *C*.

(m) *A* sells certain merchandise to *B*, warranting it to *B* of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

lowed, because the increased expenditure cannot be said to arise naturally and directly from the breach of the first marriage and is generally too remote a consequence. 1937 M.W.N. 1274. See also 43 Bom.L.R. 35. A master can claim compensation for breach of contract of service by his servant. 32 P.L.R. 275 = 1931 L. 133 (2). Manager of a joint Hindu family personally liable in damages for failure to perform a contract for sale of immovable property when the sale is not binding on the minor coparceners. 100 I. C. 422 = 1927 L. 252. As to the duty of plaintiff suing for damages to take all reasonable steps to mitigate the loss consequent upon breach of contract, see 43 C. 493 = 43 I.A. 6 (P.C.). In general the date of breach is the date when the contract ought to have been but was not fulfilled and not the date of refusal of liability or repudiation. 11 P. 600 = 63 M.L.J. 270 (P.C.). In the case of a C.I.F. contract ordinarily the date of breach is the date on which the documents would have to be tendered. 26 S.L.R. 167. Where a lessee from a District Board of the right to collect certain ferry dues according to certain rates on being threatened with prosecution for charging rates contrary to the

schedule of rates agreed upon gave up charging those rates and sued the statutory body for the loss sustained by him in not being allowed to charge the higher rate, held, that the suit was not maintainable as the plaintiff had no cause of action, for there was neither a breach of contract by the Board nor any wrongful act which would justify a claim for damages. 1943 A.L.W. 145. Apart from the question whether the principle of liability of the manufacturer of an article of food, medicine or the like to the ultimate consumer to take care that the article is free from defects likely to cause injury to health, applies to the manufacturer of a motor car, the consumer who suffers damage has two independent cause of action, one in tort against the manufacturer and the other on contract against his seller. 50 C.W. N. 213 (2).

SET-OFF.—Where a contract for the sale of goods falls through by the default of the purchaser, the latter is entitled to recover the purchase-money paid by him (excluding the earnest or deposit), and the seller can only resist the claim by seeking to set-off against the said sum any damages which he might have incurred by reason of the pur-

(n) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day. *B* in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

(p) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mills.

(q) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A* by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) *A*, a ship-owner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and *B* after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B*, his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.

chaser's non-performance of the contract. Put before the seller can substantiate his claim to set-off, he should prove his readiness and willingness to perform his part of the contract and that he was in a position to perform the contract on the date fixed for the performance of the contract. 1941 Mad. 108=(1940) M.W.N. 756=52 L.W. 251.

INTEREST ACT.—There is no conflict of any kind between the Interest Act and this section. 21 N.L.R. 16=1925 N. 451. See also 8 L. 310=100 I.C. 846=1927 L. 333. Interest Act permits the Court to allow interest in certain circumstances but does not limit its doing so only to those circumstances. 1925 N. 451. In cases not covered by the Interest Act, the Court cannot award interest by way of damages, under sec. 73 of the Contract Act, as component of the compensation to be fixed for the loss caused to the plaintiff by reason of the breach of contract, unless the plaintiff proves special loss or damage sustained by him in consequence of the non-payment of money. A mortgage-deed provided that the mortgagee should pay the peishkush and the cess due on the land. The mortgagee defaulted and the mortgagor who was compelled to pay the amount sued for the recovery of the amount and claimed interest thereon. *held*, that (i) the case was not governed by the Interest Act, (ii) apart from the Act, in the absence of proof of special loss or damage, interest cannot be awarded under sec. 73 of the Contract Act, as damages for the mere wrongful detention of money. 145 I.C. 721=1933 M. 729=65 M. L.J. 623; 1940 O.W.N. 581=1940 Oudh 308; 1940 Pat. 155. Where plaintiff is kept out of his money and the defendant has the use of the money in breach of his obligation to the plaintiff. Sec. 73 applies and the plaintiff is entitled to receive not only the money he ought to have been paid on the due date but also interest at a reasonable rate for the period during which he has been kept out of

it. 1936 M. 486=70 M.L.J. 433. See also 156 I.C. 643=1935 C. 347. Where a vendor fails to give possession to the vendee of the property sold, and the vendee files a suit for recovery of the amount paid and damages, interest by way of damages can be allowed for breach of the contract even though the formalities required by the Interest Act have not been complied with as the Interest Act has no application to such cases. 146 I.C. 154=1923 L. 556. Even though there is no agreement to pay interest, Court can award damages for wrongful detention of money. 93 I.C. 647=1926 C. 755; 95 I.C. 175=1926 O. 514. Interest cannot be awarded as damages when there has been no demand. 101 I.C. 57=1927 A. 444. Besides the Interest Act and Ill. (n) to sec. 73 there are other circumstances in which interest can be awarded on general grounds of equity. 1932 A.L.J. 733=139 I.C. 158. See also 1936 R. 141.

INTEREST—AWARD OF.—The Illus. (n) to sec. 73 does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=42 C.W.N. 985=1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.). Sec. 73 is merely declaratory of the common law as to damages. Interest cannot be allowed at common law by way of damages for wrongful detention of debt. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=1938 A.L.J. 169=1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.). The rule of law is that, in the absence of special circumstances, interest cannot be allowed on damages for breach of contract for sale of goods. 40 P.L.R. 531. Interest cannot be recovered as damages under sec. 73 where it is not recoverable under the Interest Act. As interest can be recovered under the Interest Act only on debts of sums certain payable at a certain

time no interest can be allowed on compensation decreed for use and occupation of land because it cannot be said that it relates to sums payable at a certain time. 1942 A.L.W. 659. Though where payment of money is claimed on a contract interest cannot be allowed except under the provisions of the Interest Act, the position is different where interest is claimed as part of the damages for breach of the contract and it can be allowed. 1945 O.W.N. (H.C.) 275=1945 A.L.J. 459=1945 A.L.W. 322. Interest cannot be given merely because money due has been withheld but can be awarded by way of damages under sec. 73. Where damages can be claimed, interest can usually also be allowed under sec. 73 unless there is any other measure of compensation, such as the difference between the purchase price at the time of the contract and the purchase price at the time of the breach. 30 N.L.R. 213=143 I.C. 822=1934 N. 78. *See also* 1940 O.W.N. 581=1940 Oudh 308; 1939 P.W.N. 769. *Also* 12 P. 216. Interest should not be allowed on unliquidated damages. 11 L.L.J. 537=120 I.C. 482=31 *Punj.L.R.* 294=1936 L. 374; 26 S.L.R. 167. Where under an improvement lease it was provided that the lessee was to pay rent when the land was assessed by Government and the lessor later on instituted a suit to recover the arrears of rent with interest, *held*, that interest could not be allowed under sec. 73, III. (n), because there was no agreement or usage to support the claim. 31 L.W. 655=1930 M.W.N. 428. Difference in prices represents the full amount of compensation to be given under sec. 73, Contract Act, on account of loss sustained by fall of market prices and decree for interest on such amount should not be given. But plaintiff is entitled to interest on account of delay in payment of amount due to him as loss and it can be awarded as compensation calculated on basis of interest. 1930 A.L.J. 674=1939 A. 132. *See also* 27 A.L.J. 674=1929 A. 801; 12 P. 216. Increased interest on default—If allowable. 144 I.C. 215=1924 N. 224. Breach of contract—Vendee obliged to pay third person—Interest on that amount—Right of vendee to recover. 1933 A.L.J. 963=1933 A. 455.

**RIGHT TO DAMAGES.**—Sec. 73 is general and can equally apply to contracts for sale of immovable property. But the damage alleged to have been caused must have arisen "naturally in the usual course of things from such breach". Damages recoverable for consequential expenses are limited by the test of what a prudent man might have reasonably done under the circumstances. 23 *Mys.L.J.* 105=49 *Mys.H.C.R.* 509. The remedy in a suit for damages for breach of a contract need not be one of the terms of the contract, but becomes available under law in case of a breach of a contract without any express stipulation. 23 *Pat.L.T.* 11. Right to sue for damages not transferable. 25 A.L.J. 811=102 I.C. 766=1927 A. 621. Party rendering performance impossible cannot get damages. 1925 N. 119 (2). Where a person contracts to indemnify another in respect of any liability which the

latter may have undertaken on his behalf, such other person may compel the contracting party before actual damage is done to place him in a position to meet the liability that may hereafter be cast upon him. 1931 A.L.J. 687=1931 A. 754. Damages in such way must be awarded to purchaser, if vendor fails to make good title to property sold by him. 85 I.C. 421=1925 L. 262. *See also* 19 S.L.R. 337=1927 S. 120. **INTEREST.**—Whether can be awarded by way of damages. 12 P. 216. Delay in delivery—Award of—Right to fix the date for performance by notice and claim damages. 9 *Mys.L.J.* 240. For a case of *quantum meruit*, *see* 56 C.L.J. 285. Compensation can only be claimed under sec. 73 of the Contract Act when loss or damage has been caused, and it is doubtful whether it could be held that the mere passing of a decree in favour of a third party in respect of property actually causes any loss or damage to the purchaser before the decree is executed. 1936 O.W.N. 143=1936 O. 141. The doctrine of frustration of contract only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract: Interference leaving a considerable part capable of performance will not be an excuse. Impossibility arising from the promisor's own act or default is not in any case an excuse for non-performance of his contract. 19 *Pat.* 1=1940 *Pat.* 204. The doctrine of "frustration of venture" is based not upon the existence of any actual impossibility in fact but upon the existence, in the circumstances of the case, of an implied condition. In order to justify such an inference, the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended. I.L.R. (1941) 2 Cal. 78=45 O.W.N. 660=73 C.L.J. 294. *See also* 19 *Pat.* 1=1940 *Pat.* 204.

**DUTY TO MINIMISE DAMAGES.**—Every person who has a right to damages for breach of contract must take all reasonable steps to mitigate the loss arising from such breach. Where a tenant who promised to pay Government revenue and cess has failed to pay it, but the landlord who has notice of the intended sale takes no steps to avoid the sale by paying necessary dues and the property is ultimately sold, the landlord in a suit by him for damages for breach of contract cannot claim as damages any loss which he could have mitigated by taking necessary steps. 186 I.C. 852=1940 *Pat.* 88. *See also* 49 *Mys.H.C.R.* 509. If a contracting party has suffered damages through breach of contract by the other contracting party, it is his duty to minimise that damage and if he fails to do so when it was in his power he cannot recover in respect of the damage which he could have avoided. 1933 A.L.J. 670=1933 A. 511. The duty on the part of the plaintiff to minimise damages arises only after breach has occurred. 83 I.C. 260=1924 C. 427. *See also* (1938) 1 *M.L.J.* 857; 1940 *Pat.* 88; 49 B. 25=86 I.C.

521. Sec. 73 lays down the general principle of law where there is no provision in the deed of contract regarding re-sale. The re-sale in such circumstances must take place within a reasonable time. The purchasers can, regarding the time of the re-sale to the sellers, however, agree to give uncontrolled discretion and they can also agree that they will not raise any objection regarding a re-sale taking place after an unreasonable lapse of time. Such a clause though harsh is not unconscionable or illegal in mercantile contracts. There can be no question in a mercantile contract of one party being able to dominate the will of the other party or to overreach it. In such circumstances the Court cannot relieve the purchaser on equitable grounds of the effect of a harsh or onerous term to which he has agreed by means of a solemn written contract. A.I.R. 1945 Lah. 35.

**MEASURE OF DAMAGES.**—The theory of damages is that they are a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damages suffered should, as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is getting damages. 196 I.C. 529=14 R.S. 70=1941 Sind 146. *See also* 19 Pat. 1=1940 Pat. 204. Measure of damages to which a promisee is entitled in a case of a breach of contract is the difference between the contract rate and the market rate on the date of breach of contract. 43 C. 493=43 I.A. 6; 36 C. 617; 41 M. 409; 22 M.L.J. 413. *See also* 38 C. 458; 5 Bur.L. J. 198; 102 I.O. 628; 97 I.C. 871; 1926 M. 162=57 M.L.J. 243; 116 I.C. 551; 1930 M.W.N. 195=1930 M. 748 and 1933 N. 263 (immovable property); I.L.R. (1941) Kar. 495; 1940 Rang. 146; 63 M.L.J. 270=11 P. 600 (P.C.); (1944) 1 M.L.J. 391=1944 M. W.N. 275. In the case of breach of contract of sale of goods, the damages must be based on the difference between the market price and the contract price, if there was an available market for the goods at the date of breach. 1936 A.L.J. 704=1936 A. 514. *See also* 1937 Nag. 345; 1938 Rang. 359; 1939 Rang. 139=1939 Rang. L.R. 622; 1940 Rang. 146. Where on the buyer committing breach of contract by failing to take delivery of the goods within the time agreed upon, the seller sells the goods, the measure of damages is the price of the goods on the date of the breach and not on the date of the sale. 44 C.W.N. 792; I.L.R. (1935) 2 Cal. 88. As to estimate of market value where no market rate is proved, *see* 9 Mys.L.J. 249. In the case of goods specially made to order, a distinction has to be drawn between goods which are marketable and which are not marketable and in the latter case the price of the goods is the measure of damages. 1931 L. 742. Regarding measure of damages in cases of re-sale, *see* 1927 M.W.N. 549. *See also* 100 I.C. 422=1927 L. 252. Regarding measure of damages in case of anticipatory breach, *see* 1933 R. 25. Breach of contract—Measure of damages—Costs incurred in defending suit by

party committing breach—No right to recover. 1940 Rang. 146. Time spent in survey of the goods does not postpone date of breach. 45 B. 129. Value created for special purpose is irrelevant. 26 B. 235 (239). Due date is date when goods ought to be delivered according to contract. 7 Lah. L.J. 360=1925 L. 513. In a contract which fixes the date for performance the due date is a rule also applicable. (*Ibid.*) Damages, measure of—Time, if essence of contract. *See* 40 B. 1=1924 B. 473. Consignment of 200 bundles forwarded by railway—Nine bundles missing—Damages, extent of. 1933 A.L.J. 1249=1933 A. 595. Measure of damages—Failure of commission agent to obey instructions. 1933 Sind 247. Lease of rice mill—Failure to give possession—Measure of damages—Applicable to cases of contract affecting immovable property. *See* 4 Bur.L.J. 93=1925 R. 261. In cases of loss arising from dispossession, *see* 1937 N. 75=94 I.C. 990. *See also* 1940 N.L.J. 486 (Building contracts). Sale—Part of consideration retained with vendee for payment to a mortgagee—Failure to pay—Decree and sale on the mortgage—Personal decree, under O. 34, r. 6 for balance—Vendor's right to recover from vendee the amount of decree. 1939 A.W.R. (H.C.) 161=1939 All. 289.

**EARNEST MONEY AND DEPOSIT—FORFEITURE OF.**—In the absence of stipulation vendor must prove special damage when claiming forfeiture of earnest money when contract is broken by vendee. 1925 N. 109=20 N.L.R. 192. *See also* (1944) 2 M.L.J. 74. Where there is a stipulation that earnest money shall be forfeited and there is a breach of contract by the party who claims the return of the earnest money his claim is not entertainable because the opposite party has the right under the contract between the parties to retain it in case of breach by the person claiming it. 1944 A.L.J. 427=1944 O. A. (H.C.) 226=1944 A.W.R. (H.C.) 266=1945 All. 70. The use of the word 'deposit' in contract implies an agreement that the sum deposited may be forfeited in case of breach by the depositor. 1937 Lah. 847. In the case of mercantile contracts, even in respect of sale of goods, it has been customary in India to receive sums of money by way of deposit or earnest and such sums can be forfeited by the vendor when default is committed by the vendee in the performance of his part of the contract. The fact that the vendor was equally at fault in performing his part of the contract makes no difference. 1941 Mad. 108=52 L.W. 251=1940 M.W.N. 758. *See also* 1937 Rang. 357; 1938 Lah. 62. An advance or a deposit paid by a purchaser must be regarded as security for the fulfilment of the contract of sale, more especially when the deposit is insisted upon by the vendor as a term of the contract. Though there is nothing specific said about forfeiture, the mere fact that a deposit is demanded carries with it the implication that it should be forfeited if the contract is broken, unless the vendee proves an agreement to the contrary. Where a sale-deed recites that the consideration for

74. <sup>1</sup>[When a contract has been broken, if a sum is named in the contract

Compensation for breach of contract where penalty stipulated for.

as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have

been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

#### LEG. REF.

<sup>1</sup> These paragraphs were substituted for the first paragraph of sec. 74 by sec. 4, Act VI of 1899.

the sale should be paid before the registering officer, the implication is that the same must be paid within four months which is the period limited for registration of the document. Where the vendee after paying a deposit and taking delivery of the sale-deed from the vendor returns it to the vendor being unable to find the purchase money and allows the period of four months' time for registration to pass without making any further payment, he is not entitled to claim back the deposit paid by him and plead that the vendor has treated the contract as at an end. The vendor is not bound to sue for damages against a vendee who has no money to pay the vendor. 1937 M.W.N. 1288=1938 Mad. 246. Where money is agreed to be paid by instalments and it is provided that in case of default in the payment of any instalment, the amounts paid till then would be forfeited, the provision is in the nature of a penalty and in case of default only a reasonable sum can be claimed as damages. 15 Luck. 550=1940 O.W.N. 395=1940 Oudh 257. Breach of contract—Amount not deposited as earnest money and not appropriated by payee to loss due to breach—Amount is not liable to forfeiture on breach. See 90 I.C. 573=1925 Sind 254. See also 103 I.C. 158=1927 N. 281; 100 I.C. 860=1927 B. 195. When the breach is not by vendee he can claim back his earnest money. 51 B. 247=101 I.C. 229=29 Bom.L.R. 19=1927 B. 195.

SEC. 73, EXPL.—SCOPE OF.—The explanation to sec. 73 of the Contract Act seems to cast a burden upon the person complaining of the breach of contract to show that he did not possess the means of remedying the inconvenience caused by the non-performance of the contract. 1942 O.W.N. 664=A.I.R. 1943 Oudh 17=18 Luck. 327. See also 49 Mys. H.C. Rep. 509.

ILLUSTRATIONS: SCOPE OF.—The illustrations to sec. 73 are not more than general rules. 196 I.C. 529=1941 Sind 146. The words 'which naturally arose in the usual course of things from such breach' in sec. 73 do not mean that general rules such as those given in the illustrations to the section must be followed irrespective of the facts, but only impose a limitation upon the damages which can be allowed that the damages must not be remote. 196 I.C. 529=1941 Sind 146.

MISCELLANEOUS.—Clause empowering vendor on vendee's default to pay on due date

to re-sell at any time and on such terms and conditions as vendor might decide is valid provided vendor acts within its limits. 49 B. 25=86 I.C. 521. As to what amounts to repudiation of a contract, see 1931 R. 126. Right of buyer to extend time without consent of seller and claim damages, see 1927 Sind 49=19 S.L.R. 4. An agreement between the Government and a person was entered into by which the latter was to be responsible for the loss of public money which was caused otherwise than by act of God or the King's enemies. While the agent of such person was going to the Bank to deposit public money, he was attacked, stabbed and robbed of the money. Held, that he was liable to make good the loss as the loss which had been suffered was neither by an act of God nor the King's enemies. 200 I.C. 429=A.I.R. 1942 Pesh. 33.

PENALTY.—The stipulation in a post-decreetal agreement to pay the amount of the decree in instalments and that if one instalment is not paid the whole amount shall be paid forthwith is not a penal provision. 25 S. L.R. 279=131 I.C. 710. Relief against penalty can be granted even in compromise decrees. 1925 M. 264 (1)=80 I.C. 925.

SECS. 73, 51 AND 54.—Sale of property—Vendee retaining part of consideration to pay off previous mortgage—Vendor undertaking to compensate vendee for defect of title—Vendee not discharging mortgage—Vendor's property sold in execution of mortgage decree—Vendee dispossessed of small portion of property owing to defect in vendor's title—Vendor's right to damages for breach of contract. See 222 I.C. 315.

SEC. 74: SCOPE.—The section as it originally stood was intended to do away with the distinction between penalty and liquidated damages. 9 C. 689 (692); 3 M. 224; 11 C. 545; 5 A. 238; 27 C. 421; 3 C.W.N. 43 (45); 17 B. 106 (111). S. 74 boldly cuts the most troublesome knot in the common law doctrine of damages. Whether actual damage or loss is proved or not, the Court is entitled to award reasonable damages not exceeding the stipulated amount. 189 I.C. 785=1940 Sind 1. The right of a party complaining of a breach of contract to reasonable compensation under S. 74 is not dependent on proof of actual loss or damage. Even when no actual damage or loss is proved to have been caused by the breach the party is entitled to compensation. 1937 A.L.J. 1385=(1938) A. W.R. (H.C.) 11; 1943 Mad. 598=(1943) 1 M. L. J. 297. Agreed liquidated damages, if to be enforced, must be the



<sup>1</sup> *Explanation*.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

*Exception*.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the <sup>2</sup>[Central Government] or of any [Provincial Government,]<sup>3</sup> gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

*Explanation*.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

#### Illustrations.

(a) *A* contracts with *B* to pay *B* Rs. 1,000 if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practises as a surgeon within Calcutta, he will pay *B* Rs. 5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000 as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.]

(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.]

(f) *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.]

(g) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

#### LEG. REF.

<sup>1</sup> These paragraphs were substituted for the first paragraph of S. 74 by S. 4, Act VI of 1899.

<sup>2</sup> These words were substituted for the words "Government of India" by A.O., 1937.

<sup>3</sup> These words were substituted for the words "Local Government" by *ibid*.

<sup>4</sup> Illustrations (d) and (e) were inserted by S. 4 (2), Act VI of 1899.

result of a 'genuine pre-estimate of damages'. They do not include a sum fixed in *terrorem* covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. 1941 O.A. 618=1941 P.C. 101 (P.C.). S. 74 applies to cases in which there is a breach of contract and is inapplicable to a case of breach of warranty. 1930 L. 843. Section does not apply to covenants in a lease of which the breach involves forfeiture. 43 M. 654. An agreement that the pledge should become irredeemable if not redeemed after a certain period, although it may be an unfair agreement, would not in itself constitute an agreement by way of penalty unless the value of the thing pledged is so very much larger than the amount of

the loan that it would become obvious that the clause is really inserted as a means of bringing pressure upon the pledgor to repay the loan within the contracted time. 1939 Rang. 413. As to the commencement of the operation of the amended section, 25 M. 343; 26 M. 445; 25 A. 169 (Conflict of rulings). S. 74 is as much applicable to contracts in consent decrees as to contracts in decrees passed by the Court after hearing the parties. The executing Court can go into the question whether the term or condition in a consent decree is penal or not and can grant relief. Such relief, being an equitable relief, will not be granted by a Court when there is laches or delay on the part of the party seeking its assistance. 222 I.C. 628. S. 74 applies also to a consent decree just as it applies to any other contract. There is nothing in the section to limit its application to any particular form of contract, and a consent decree does not become less a contract between the parties because it is impressed with the seal of the Court. A decree embodying a compromise does not make the compromise any the less the contract of the parties. I. L.R. (1943) Kar. 245=A.I.R. 1943 Sind 247. A consent decree is more or less a sort of contract incorporated in the form of a decree and the Courts have power under S. 74, to relieve the judgment-debtor of the



effect of a penal clause in the decree if it is considered equitable to do so. Then the question of concession does not arise. S. 74, allows the Court to come to the help of the person against whom a penal clause operates on the happening of a particular event. 206 I.C. 625=A.I.R. 1943 Pesh. 33. The doctrine of penalties is not applicable to stipulations contained in a decree. 1925 P. H.C.C. 353. The section does apply to a compromise decree and it is open to a Court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. 1933 A.L.J. 132=1933 A. 252 (F.B.); 1925 M. 264. The test to decide whether a default clause in a compromise decree is a penalty is to see whether it is a liability imposed on the defendant to pay the decree-holder something more than he would be entitled to under the decree. 44 L.W. 832=1937 M. 234. See also 1937 Nag. 413; 1941 O.A. 865=1941 O.W.N. 1138. Payment of larger amount in default of conditions provided in a compromise decree depends on determination of the question whether the larger amount was actually due or whether an amount not actually due is sought to be recovered. 103 I.C. 805=1927 L. 659; 1927 M. 965=53 M. L.J. 562; *B* occupied some premises owned by *M* at the rate of Rs. 55 per mensem under a lease terminable by a month's notice. Subsequently *B* obtained some additional premises at an additional rent of Rs. 25 per mensem. There was a rise in rentals in the neighbourhood in which the premises stood. On 24th August, 1931, *M* sent a notice to *B* giving him the alternative of quitting the premises by 27th September, 1931, or, if he failed to give up possession, of continuing his occupation at a rental of Rs. 125 per mensem for both premises, "as rents had risen very high." *B* sent a reply on 20th October, 1931, to the effect that he would leave the premises on 1st November, 1931, but he made no reference to the proposal to increase the rent. *B* actually vacated the place on 25th December, 1931. *B* sued in January, 1932, for arrears of rent for three months at Rs. 125. *Held*, that S. 74, Contract Act, was not applicable as *B* did not break a contract, and his liability therefore was not one for damages for breach of contract. As *B* refused to vacate and remained in possession he must be held to have acted by implication to hold over and to have accepted the proposal to pay rent at the enhanced rate proposed by the landlord in his notice and therefore *M* could claim the rent at Rs. 125. 1934 A.L.J. 421=1934 A. 715. Where the promise of marriage is broken a suit is maintainable for the return of the bridal gifts made to the woman and her parents. But the provisions of the *Dharmashastras* as to payment of double value by way of compensation are archaic and obsolete and should not be enforced. Even

if in such a case the parent had promised to return double the value, the Court should apply S. 74 of the Contract Act and grant reasonable compensation and not the penalty stipulated for. 11 R. 143=146 I.C. 724=1933 R. 198 (1). When a party to a contract commits an anticipatory breach, the injured party has an option of rescinding it or of electing to treat it as continuing and then bring on the due date for such damages as then accrue. An election once made cannot be avoided. Damages for the breach are to be assessed not from the date of breach but from the date on which the other side elects to rescind. There can be no claim for damages with respect to a contract which is still in being, and it is clear the contract cannot be determined by one side alone except by performance. Unless and until the other side chooses to rescind, the contract remains alive for all purposes. It is difficult to see why the wrongdoer should be entitled to take advantage of his own wrong. 171 I.C. 553=1937 Nag. 289.

**PENALTY.**—Where a condition in a contract carries with it an element of punishment, it is in the nature of a penalty. 144 I.C. 756=10 O.W.N. 759=1933 O. 291. See also I.L.R. (1937) 1 C. 300=41 C.W.N. 751=1937 Cal. 654. When a contract contains a term which, not being an integral part of the contract, is introduced only for the purpose of securing the performance of the contract, that term is penal and equity interferes to relieve a party to the contract against it. A penalty is a term which is extraneous and collateral to the actual contract. The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty. 1937 Nag. 413. Where the parties themselves contemplate at the time of the transaction that there might be delays in payment and provide for the payment of compound interest from the date of default at the same rate at which simple interest was payable before, it is not a penalty. The word "penalty" is used in S. 74 in the sense of a secondary stipulation which provides for the payment of an additional burden on default. 1934 M. 31 (2)=148 I.C. 467 (F.B.). A penalty under the section will only follow a breach of a contract or an obligation. Where there is no obligation at all there is no question of penalty. 1925 P. 122=7 P.L.T. 299. Where the contract is for the payment of a larger sum with a concession enabling a smaller sum to be paid in a particular way in full satisfaction, the law relating to penalties and S. 74 of the Contract Act have no application, and terms must be carried out according to intention of the parties. 58 B. 610=152 I.C. 575=36 Bom.L.R. 798=1934 B. 370. See also I.L.R. (1941) Kar. 389; I.L.R. (1943) Kar. 245=1943 Sind 247;

1943 Pesh. 33. It cannot be said the terms of a chit-fund contract cannot be penal. 102 I.C. 14. *See also* 1927 M.W.N. 527. The provision in a Kuri (Chit-fund) to the effect that the winner of the prize should pay his future instalments regularly and on default in the payment of any one instalment, the stake-holder was to be entitled to recover all the remaining instalments in one lump sum is not penal in its nature and is enforceable. 1933 M. 252 = 65 M.L.J. 29; 38 L.W. 344 = 1933 M. 725. *See also* 65 M.L.J. 302 = 146 I.C. 1026. Penalty—Liquidated damages—Difficulty of ascertaining amount of damages. *See* 6 L.L.J. 554 = 84 I.C. 865 = 1925 L. 284. Regarding return of earnest money in case of breach, *see* 101 I.C. 841 (2) = 1927 Sind 205; 100 I.C. 860 = 1927 N. 168; 101 I.C. 686; 102 I.C. 766. It is forfeited when the transaction falls through by reason of the fault of the vendee. 94 I.C. 782 = 1926 P.C. 1 = 50 M.L.J. 629 (P.C.); 1938 Lah. 62. *See also* 39 Bom.L.R. 835; 15 Mys. L.J. 339; 1937 Rang. 357. Regarding recovery of entire amount due under instalment bond in cases of failure to pay instalments, *see* 1927 M.W.N. 527; 157 I.C. 200 = 1935 L. 873; 49 L.W. 534 = 1939 Mad. 491 = (1939) 1 M.L.J. 491; 103 I.C. 148 = 1927 N. 284; 26 L.W. 351 = 104 I.C. 827. The amount which was found due under a decree was Rs. 5,600. This included a sum of Rs. 850 compound and penal interest provided for in the original document as penalty. The decree provided that if the amount less the penalty was paid in certain instalments the debtor would be allowed a rebate of this amount of penalty imposed in the original document between the parties. In default of the payment of instalments the defendant would be liable to pay the whole sum of Rs. 5,600. *Held*, that there was clearly a penal clause. *Held, further*, that the executing Court as a Court of equity had the power to relieve against the penalty, even if the decree was one on award. 177 I.C. 926 = 1938 Sind 185. A stipulation in a maintenance deed for possession of land in case of default of payment would amount to penalty. 27 N.L.R. 24 = 1931 N. 60. Rules of a benefit fund providing for loans at a low rate of interest to shareholders—The whole loan becoming repayable at an enhanced rate of interest on the death of a shareholder and the failure of his legal representative to apply to continue as shareholder—The provision does not amount to a penalty. 95 I.C. 610 = 1926 M. 735 = 50 M.L.J. 595. Under a compromise decree plaintiff agreed to accept a smaller sum than what he claimed and it was to be paid in two instalments on dates fixed. If default were made in payment on the due date, the full amount claimed in the plaint was payable. *Held*, the provision was not penal. 91 I.C. 790 (2) = 24 A.L.

J. 210 = 1926 A. 278. *See also* 1935 R. 341; 132 I.C. 580 = 1931 L. 696. Even in the case of *consent decrees*, the Court can relieve a party from provisions which are of a penal character. But the provisions in a compromise of a mortgage suit allowing the decree-holders the right to sell the mortgaged property in case of default in payment of any instalment is not a provision of such character. 9 Luck. 387 = 147 I.C. 559 = 148 I.C. 251 = 1934 O. 44; 1935 R. 341. *See also* 44 L.W. 838 = 1937 Mad. 234; 1938 Sind 185; 1943 Sind 247 = I.L.R. (1943) Kur. 245. The question whether a default has or has not taken place is one of fact to be decided on the facts of each case. Similarly it depends on the facts, if time was of the essence of the contract, if as a result of the default, the judgment-debtor has to pay a larger amount, but where the decree-holder is merely withdrawing a concession and the amount claimed by him does not exceed what was due to him, there is no equitable ground for treating the sum as a penalty and refusing to enforce its payment. 132 I.C. 580 = 1931 L. 696; 1933 L. 523. *See also* 8 Mys.L.J. 433; 1938 Sind 185. The undertaking by a mortgagor to pay a larger sum than the principal at the time of redemption is enforceable. 3 O.W.N. 610 = 96 I.C. 538 = 1926 O 502. The fact that the parties have termed the amount paid as earnest is not conclusive and it is necessary for the Court to consider whether or not the payment although so termed is in reality earnest money. Where Rs. 530 out of Rs. 720 fixed as price have been paid the stipulation that the sum of Rs. 530 should be forfeited on default is of the nature of the penalty and the vendor is entitled to only reasonable compensation. 143 I.C. 192 = 1933 N. 23. It is a well-understood principle of English law that where under a contract of sale of land a sum of money is paid as deposit the vendor is entitled to retain the same if the contract goes off by default of the purchaser, the basis of the rule being that the sum paid as deposit is a guarantee for the performance of the contract. This principle also applies to India. 46 L.W. 839 = 1937 Mad. 681. The provisions of S. 74 of the Contract Act do not apply to a deposit of money made to secure or guarantee the performance of contract. Such a deposit can therefore be forfeited upon the failure of the depositor to perform the contract within time if the amount is not unreasonable although no damage is proved. The fact that a party has not paid the security deposit required by the contract does not affect the question of his liability to forfeit the amount required to be deposited as he cannot be in a better position by reason of his own default than if he had fulfilled his obligation. 46 C.W.N. 522 = A.I.R. 1942 Cal. 382.

INTEREST AMOUNTING TO PENALTY.—Question as to stipulation being by way of penalty

is to be decided from circumstances of each case. 1925 M. 84=47 M.L.J. 605. *See also* 195 I.C. 477; I.L.R. (1937) 1 C. 399. If an agreement provides for a certain rate of interest in case of single default and an enhanced rate of interest in the event of consecutive defaults, the provision for enhanced interest in the event of consecutive defaults is a stipulation by way of penalty in view of the explanation to S. 74, 1934 P. 16. *See also* 56 L.W. 661. Where the bond stipulates that the loan will carry no interest for a period but in default of payment during that period interest is to be charged then (1) if the interest is to be charged from the date of the bond, whatever the rate may be the stipulation is in the nature of the penalty; (2) if interest is to be charged from the date of default at the usual ordinary contract rate, the stipulation is not in the nature of penalty; (3) if the loan includes the sum advanced and further compensation or past interest due, the stipulation for payment of interest at any rate from the date of default is penal; (4) if the rate of interest is exorbitant the stipulation is penal. 35 C.W.N. 1224. Where interest on a mortgage is payable at 12 per cent. merely because compound interest is payable on default to pay interest regularly, rate of interest should not be held to be excessive or exorbitant, unless it is proved that the rate is unconscionable or extortionate. 56 A. 496=1934 A.L.J. 371=1934 A. 152. *See also* 56 L.W. 661. When a mortgage deed provides for interest on interest, it is part of the contract itself; and the mere fact that under S. 74, Contract Act, the Court is given power to reduce the rate does not make the reduced rate any the less a claim under the Contract Act. No doubt, the word "penalty" is used in S. 74 when speaking of "enhanced" interest, but it is not in the sense of a claim *de hors* the contract. The security created by the document is also available in respect of the enhanced rate of interest allowed by the Court. 1934 M. 695=67 M.L.J. 653. Agreement for hire—Payment of amount stipulated for non-return of hired animal whether amounts to penalty. 46 C.L.J. 262. As to when stipulations for interest are penal, on the question of penalty, [*see* Law of Interest, M.L.J. Edn.] Where reasonable compensation for breach is provided, there is no penalty, but where it is in *terrorem* it is a penalty. 47 M.L.J. 833=1925 M. 177. *See also* 1928 Mad. 304. A stipulation charging enhanced interest from the date of the bond on failure of payment on the fixed date is penal and cannot be enforced. 89 I.C. 896. *See also* 89 I.C. 119; 83 I.C. 773=1923 L. 452; 106 I.C. 38; 11 C. 635=1931 L. 120. Stipulation to pay compound interest on default is not penal. 47 M.L.J. 109=85 I.C. 391. *See also* 103 I.C. 496; 101 I.C. 759=1927 A. 538 (1); I.L.R. (1938) Nag. 91=20 N.L.J. 285=1938 Nag. 113; 1939 P.W.N. 319=1939 Pat. 743;

1940 Sind 68; 20 Pat.L.T. 348=1939 P.W. N. 256=1939 Pat. 360; 20 Pat.L.T. 743=1939 Pat. 457. Where compound interest at 25 per cent. is claimed a Court of equity is justified in cutting it down to 6 per cent. simple interest. 86 I.C. 176=1925 L. 450. *See also* 145 I.C. 188=10 O.W.N. 193=1933 O. 190; 1933 M.W.N. 597; 1937 A.M. L.J. 97 Kabuliyaat—Provision for 6 1/4 per cent. interest per mensem in case of even *net* defaults—Power of Court to relieve against—B. T. Act, S. 179—If bars powers of Court to reduce rate of interest. *See* 1939 P.W.N. 220. Where there have been distinct laches on the part of the borrower and, owing to such laches and delay the amount has swelled to a great extent, there is no good reason for reducing interest. 1931 N. 91. Rate of Re. 1-3-3 per cent. per mensem compound interest was held as not penal. 7 L.L.J. 417=1925 L. 580. *See also* 1925 S. 164; 21 L.W. 54=85 I.C. 261; 87 I.C. 129=1924 B. 264; 100 I.C. 269=27 P.L.R. 807=1927 L. 113; 92 I.C. 593 (1)=1926 C. 690. Provision in the mortgage document for compound interest at a higher rate on default—Penal. *See* 85 I. C. 392=1925 M. 302; 28 N.L.B. 149. *See also* 36 P.L.R. 178=1934 L. 321. Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. [34 C. 150 (P.C.) Rel. on.] 164 I.C. 27=44 L.W. 414=1936 P.C. 283 (P.C.). *See also* 18 N.L.J. 267; 1935 M. 385=41 L.W. 376=69 M.L.J. 283. In a suit for arrears of rent in terms of a kabuliyaat which provided for interest at 7 1/2 per cent. per annum, *held*, that in the absence of anything to show that there was undue influence, the rate of interest cannot be treated as penal or unconscionable, *merely* because it was high. 151 I.C. 155=38 C.W.N. 182=1934 C. 511. Compound interest is said to be penal only when the rate increases in default. 100 I.C. 679=1937 A. 315; 104 I.C. 191=1927 N. 358; 104 I.C. 817=26 L.W. 351; 50 M. 614=1927 M. 620=103 I.C. 394=52 M.L.J. 612. Stipulation to pay compound interest at 1 1/2 per cent. per mensem on default to pay simple interest at 2 per cent. per mensem was held a penalty and rate was reduced to 1 per cent. compound interest. 1925 A. 78. An agreement to pay compound interest at 25 per cent. from the date of default, the original rate being 25 per cent. simple, can be given effect to. The fact that the security is ample is no ground for refusing to enforce the contract. 1933 M.W.N. 408. Stipulation for interest at 144 per cent. per annum is by way of penalty. 1934 P. 16. Where the evidence is that from 8 annas to 2 per cent. is the usual rate the Court cannot hold that 2 per cent. compoundable every six

Party rightfully rescinding contract entitled to compensation.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

months is also a fair rate 1931 A.L.J. 29=1931 A. 203. Stipulation to pay interest from the date of bond on failure to repay a loan by a certain date is penal. 1925 O. 72. Stipulation to pay enhanced interest, when penal. 84 I.C. 677=1925 P. 64; 9 Lah.L.J. 301. The question whether a stipulation for enhanced interest contained in a mortgaged-deed is or is not penal in any particular case must depend on the facts and circumstances of the case. 9 O.W.N. 1081=1933 O. 81. Stipulation to take no interest up to a certain date. 37½ per cent. afterwards is penal. 28 O.C. 51=83 I.C. 92=1925 O. 231. It is not right to hold that in every case where there is a stipulation for payment of interest on non-payment of rent within a certain date it must be taken to be penal. 41 C.L.J. 453=1925 C. 722. Agreement among pattadars for payment of quota of kist due by each under irrigation scheme—Clause providing for payment of double the amount in default of payment within time is penal—But reasonable compensation is recoverable. 1943 Mad. 598=56 L.W. 302=(1943) 1 M.L.J. 297. Provision for damages at 25 per cent. in case of default and in addition to rent with interest was not a penalty and even if it were so the Court should give effect to the terms of the agreement. 132 I.C. 912=53 C. L.J. 516=1931 C. 772 (1). Where there is no undue influence or unconscionable bargain, high rate of interest is not penal. 30 C.W.N. 83=1925 C. 1193. When interest in a pro-note was fixed at 12 per cent. but a less rate was provided in case of monthly payment, the higher rate is no penalty. 105 I.C. 592=5 R. 573. 21 per cent. rate on mortgage security held not excessive. 55 L.A. 107=1928 P.C. 80=50 M.L.J. 32 (P.C.). If the Court thinks the stipulated rate of interest to be penal, the Court should award some compensation for default at a reasonable rate. The Court ought to give reasons for refusing to award compensation on default of payment on the proper date. 33 L. W. 540=1931 M. 137; 158 I.C. 358=37 P. L.R. 156=1935 L. 456; 42 L.W. 802=1935 M. 1072=69 M.L.J. 841.

DAMAGE.—ASSESSMENT OF.—In the case of a breach of warranty as to the petrol consumption of a motorcar, the mode of assessing damage at the extra running costs on the supposed life of the car as 200,000 miles is quite unreasonable (damages were reduced from Rs. 3,000 to Rs. 2,000). 1934 All. 392. Where the contract is made at O for ready delivery and the plaintiff produces no evidence to show what was the market rate on or about the date of the breach of contract at O, the plaintiff has failed to show that he was entitled to any damages. 149 T.C. 1119=1934 L. 59. Where defendant

agreed that it plaintiff was required to pay certain money with 6 per cent. interest which defendant was being to pay, defendant would pay it along with damages for any contingency. *Held*, that plaintiff could not recover interest at 24 per cent. simply because he had to borrow at 24 per cent. 1954 A.L.J. 682=1934 A. 525. *See also* 1937 Nag. 205. Contract—Breach—Remedy—Suit for damages—Express term in contract providing for damages on breach is not essential. 23 Pat.L.T. 11=1942 Pat. 269.

DAMAGES.—BURDEN OF PROOF.—Under S. 74, Contract Act, where liquidated damages are entered in a contract itself as payable in the event of breach, then damages payable when a breach occurs are to be assessed in the ordinary way subject to that fixed amount as a maximum; and it is for the plaintiff to prove the exact amount of damages which he suffered and that amount only could be awarded. The gain derived by defendant by breach should be taken to be loss suffered by plaintiff. 1935 Pesh. 57=156 I.C. 146. *See also* 149 I.C. 1119=1934 L. 59. Under S. 74, the plaintiff must prove his damage in a general sense. The contract made by the parties estimating their damages is in itself evidence and if there is no other evidence of damage, this evidence alone will be considered sufficient. The sum named, however, is not conclusive evidence; and if there is other evidence or circumstances showing that it was excessive or unreasonable, the Court will not consider itself bound by it. The plaintiff will have to prove his damages irrespective of the figure. (1929 P.C. 179 and 11 C. 545, Cons.), 60 C. 1379=1934 C. 285. *See also* 56 L.W. 302=1943 Mad. 589=(1943) 1 M. L.J. 297.

CONTRACT WITH GOVERNMENT.—Forest contract — Breach — Rescissions—Penalty—Damages, right to—Forest Act, S. 84—Effect of. *See* 49 B. 194=27 Bom.L.R. 66.

HINDU LAW.—PARTITION.—Annuity granted to one of the members in lieu of share—Provision for resumption of share in default of payment of annuity—Penalty, relief against. 1925 M. 84.

SECOND APPEAL.—S. 74 empowers the Court to award reasonable compensation and what is reasonable must depend on the circumstances of each case. It is a question of fact and not of law; and the decision of the Courts of fact with regard to the amount of compensation is not open to be challenged in second appeal. 1934 P. 16.

EXCEPTION.—Court not bound to exact the whole amount. 95 I.C. 614=1926 N. 435. *See* I.L.R. (1938) Nag. 31=1937 Nag. 289.

SEC. 75.—A marriage was arranged between the plaintiff's son M, and A, the second

*Illustration.*

*A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

(CHAPTER VII—Sections 76—123, Sale of Goods.)

Repealed. Act III of 1930, S. 65.

## CHAPTER VIII.

## OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

defendant: none of the first defendant. The negotiations were conducted by the plaintiff on behalf of his son and by the 1st defendant, on behalf of his niece. After the negotiations were concluded with the usual *pan rusum* ceremony for which the plaintiff spent some amounts, the plaintiff discovered that the prospective bride suffered from epileptic fits during her childhood and so broke off the engagement. He then sued for the money, spent by him for *pan rusum* ceremony, alleging that he would not have consented to the engagement if he had known of the girl's disease and that the first defendant, who was under a duty to disclose it, having failed to disclose it, was liable for the plaintiff's claim. Held, (1) that the contract of marriage came under the category of contracts *uberrimae fidei*, and that the first defendant who was in possession of the facts had the duty to disclose the fact of his niece having had epileptic fits; but that the 1st defendant was guilty only of a mere passive disclosure and not of any false representation; (2) that the plaintiff though justified in rescinding the contract of marriage was not entitled to obtain the damages claimed as the same did not arise through non-fulfilment of the contract; (3) that when any contract is avoided for breach, it remained operative as to the past and so claims for restitution in respect of acts of performance prior to the rescission are precluded. I.L.R. (1937) Nag. 299=1937 Nag. 270.

SEC. 124.—*Sec* 41 P.L.R. 569=1939 Lab. 509. Contract Act is not exhaustive of the law of indemnity and guarantee, *see* 40 Bom.L.R. 989; 1938 Mad. 895; and of *agener* 176 I.C. 675=1938 Nag. 254; (1940) 2 M.L.J. 726=1941 Mad. 6; 44 Bom.L.R. 703=1942 Bom. 302.

INDEMNITY-HOLDER—RIGHT OF ACTION—SUIT BEFORE ACTUAL LOSS IS SUFFERED.—S. 124 only deals with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those

classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier. S. 125 only deals with the indemnity-holder in the event of his being sued and is by no means exhaustive of the rights of the indemnity-holder. There is no justification or authority for holding that in no case can an indemnity-holder maintain an action against an indemnifier unless he has suffered actual loss. If the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off. I.L.R. (1942) Bom. 670=44 Bom.L.R. 703=A.I.R. 1942 Bom. 302. *See also* 1944 Pat. 185=22 Pat. 655; 1926 Mad. 587. It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. The liability is said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. 65 I.A. 286=I.L.R. (1938) Bom. 502=42 C.W.N. 957=1938 P.C. 191=(1938) 2 M.L.J. 169 (P.C.). Unlike the case of a contract of guarantee, there is no direct right of action on the original contract to the person who indemnifies, against the person whose conduct has caused loss—He can sue only in the name of the promisee. 49 M. 156=95 I.C. 154=1926 M. 544. *See also* 43 Bom.L.R. 550=1940 Bom. 315=I. L. R. (1940) Bom. 522. Covenant against loss—Breach—Suit for damages when person indemnified had not paid money. 41 A. 395=51 I.C. 158. Contract of indemnity—Decree against defendant—Third party notice—Claim should be confined only to

*Illustrations.*

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

amount decreed. 59 I.C. 16. As to indemnifying surety, *see also* 63 I.C. 108. Where the vendor contracts to indemnify the vendee against the costs of litigation the vendee can claim pleader's fee unless they are unreasonable. 43 M 898=39 M.L.J. 316. When an assignee of a debt whom the assignor had agreed to indemnify against loss sues on the debt and his suit is dismissed after a fair trial, he is entitled to be indemnified. 1917 M.W.N. 868. A stipulation in a contract of sale to discharge an existing encumbrance on the property sold is in the nature of an indemnity. 38 I.C. 188=5 L.W. 228. Forbearance to sue principal at the surety's request is sufficient consideration for promise by a surety to pay the amount himself. 12 I.C. 126=(1911) 2 M.W.N. 145. Suretyship and indemnity—Distinction 3 Pat.L.J. 296=46 I.C. 27. An undertaking by a second mortgagee to pay off a prior mortgage cannot be held to be a contract of indemnity in the absence of an express provision in the deed of mortgage to the second mortgagee to indemnify the mortgagor; a suit for damages based on the breach of the undertaking to pay off the first mortgage is governed by Art. 116 of the Limitation Act, when the contract is registered. Limitation commences to run from the time the contract is broken and not from the time at which any damage arising therefrom is sustained by the plaintiff. 17 Pat. 338=19 Pat.L.T. 198=1938 Pat. 275. *See also* 1938 A.L.J. 455.

Indemnity implied by law—Benamidar—Request of one of the true owners without receiving money—Person passing receipt compelled to pay share of other real owner—Right to be indemnified of benamidar—When a benamidar pays the amount to one of the joint real owners it does not necessarily mean that he was acting in fraud of the other real owners. (Principles of English Law as to implied indemnity discussed). (1946) 1 M.L.J. 383.

IMPLIED CONTRACT OF INDEMNITY—SALE OF PROPERTY SUBJECT TO CHARGE.—Where property is sold subject to encumbrances, the purchaser impliedly agrees to indemnify the vendor against the encumbrances. This implied right of indemnity arises not only in cases of purchase of the equity of redemption but also to sale of property subject to a "charge". 1933 M.W.N. 486=38 L.W. 818. *See also* 156 I.C. 94=1935 N. 147.

SECS. 124, 125 AND 126.—Reading Ss. 124 and 125, Contract Act and Art. 83 of the

Limitation Act, it is clear that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered; and a suit brought before the actual loss had accrued must be thrown out as premature. 42 Bom. L.R. 175=1940 Bom. 161. *See also* 1935 Lah. 974.

CONTRACT OF GUARANTEE AND CONTRACT OF INDEMNITY—DISTINCTION—BROKER AND SUB-BROKER.—A contract of guarantee as defined by S. 126 involves three parties, the creditor, the surety and the principal debtor; and it involves a contract to which those parties are privy. The contract need not be embodied in a single document, but there must be a contract or contracts to which the three parties are privy. There must be a contract, first of all, between the principal debtor and the creditor. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible to work out the rights and liabilities of the surety under the Contract Act. It is impossible to imply a promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. An agreement between a broker and a sub-broker by which the latter agrees to save the former from any loss which he would suffer by reason of his effecting transactions at the request of the sub-broker for the constituents introduced by the sub-broker, the constituents being unascertained at the time and knowing nothing of the guarantee, is a contract of indemnity under S. 124 and is not a contract of guarantee falling under S. 126. I.L.B. (1910) Bom. 522=42 Bom.L.R. 550=1940 Bom. 315 *See also* 49 Mad. 156.

SEC. 125.—S. 125 must be read along with Art. 83, Limitation Act. 1935 L. 974. *See also* 1940 Bom. 161. May be compelled to pay—Meaning of. 1935 L. 974. Suit for damages lies for breach of contract of indemnity for loss of possession when the title is impaired and not necessarily when possession is actually lost. 31 M.L.J. 556=35 I.C. 789. Suit by surety



(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety," "principal debtor" and "creditor." the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor,"

on a contract of indemnity before he has paid the money is premature. 50 I.C. 611=15 N.L.R. 78. "To indemnify" does not merely mean to reimburse in respect of moneys paid but to save from loss in respect of the liability against which indemnity has been given. Where a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf, such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him. The words "may be compelled to pay" in Cl. (1) of S. 125 of the Contract Act cannot be construed as signifying that indemnity cannot be claimed unless and until damages have already been paid. There is no justification for putting such a narrow construction upon the words. 22 Pat. 655=213 I.C. 385=10 B.R. 606=A. I.R. 1944 Pat. 185. When the injury becomes imminent, the indemnity-holder can come to Court and ask that he be protected, and the Court must decide whether or not the claim of the third party against the indemnity-holder is well-founded; if it so decides, it must grant relief to him and not postpone the indemnity-holder until a decree has been passed against him. He may sue *quia timet*. S. 125 is not exhaustive and does not set out all the relief which an indemnity-holder who has been sued may get. It leaves untouched certain equitable reliefs which he may get. I.L.R. (1942) 2 Cal. 318. See also 1942 Bom. 302. "Payment" means payment in money or its equivalent and not by the execution of a fresh bond. Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified should never be called upon to pay. Where property subject to a charge is sold in execution and the purchaser neglects to satisfy the charge, the owner of the property is entitled to have his right of indemnity declared and enforced, if necessary, by the sale of the properties and adjustment of the equities even though he has not actually paid off the charge himself. (51 M.L.J. 203, Foll.) 1933 M.W. N. 486=38 L.W. 818. But see also 60 C.

761, *infra*. Where a purchaser of property agrees to release the property from an existing mortgage and further agrees to indemnify the vendor, a suit by the vendor when he has not paid anything to the mortgagee is not in the nature of a suit to enforce a trust and is premature. 60 C. 761=146 I.C. 863=1933 C. 641. Where, on a sale of land, a portion of the purchase-money is left with the vendee to pay certain debts of the vendor and the vendee also agrees to compensate the vendor in case of his default in paying the amounts, the vendor can sue the vendee on a breach of the covenant without proof of actual loss sustained by him (vendor) by such breach. 35 M.L.J. 692=49 I.C. 313. The amount recoverable is the amount which has been paid whether under a consent decree or under *bona fide* compromise. 50 I.C. 611=15 N.L.R. 78. Decree against promisee—If can be impeached by promisor—Recovery of costs. 22 N.L.R. 49=1926 N. 109. As to liability of surety, see also 7 B. 76; 6 Bom. H.C.R. 241; 30 M. 235; 88 I.C. 699; non-liability for time-barred debt. 19 B. 697. Limitation against surety. See 44 C. 978 and 34 A. 429=14 I.C. 245. See also (1944) 2 M.L.J. 371=1944 M.W.N. 692 (Madras Agriculturists Relief Act reducing liability for debt—Effect on indemnity clause of contract).

SEC. 125 (3).—Scope—Indemnity bond—Assignment—Enforcement by assignee against indemnifier and his assignee—Proof of claim against indemnified—If conclusive against indemnifier—Pleas open to indemnifier. I.L.R. (1944) Mad. 867=(1944) 1 M.L.J. 237=57 L.W. 182. Indemnity bond in respect of sale of minor's property—Undertaking to refund sale price and mesne profits in case of dispossession of purchaser and payment of mesne profits by him in suit by minor—Purchaser dispossessed and made liable for mesne profits in suit by minor—Liability of indemnifier for costs of suit incurred by purchaser in suit is implied term of contract. See (1943) 2 M.L.J. 645.

SEC. 126: CONTRACT OF SURETYSHIP—REQUIREMENTS.—No doubt for a contract of



and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

suretyship there should be concurrence of the principal debtor, the creditor and the surety. But this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. An implied request will be quite sufficient to satisfy this requirement. 12 Luck. 484=1937 O. 19. As to continuation of contract of guarantee *See* (1937) 1 M.L.J. 143; (1939) 1 M.L.J. 897; 1940 Bom. 315. *See also* I.L.R. (1937) 3 Cal. 698. In the case of a surety bond executed in favour of a Court for the benefit of a creditor, the Court cannot be brought within the definition of a creditor in S. 126. 46 P.L.R. 240=A.I.R. 1944 Lah. 428. Where *A* tells *B* that he may safely do business with *C*, as he was helping them with finance and taking goods from him, that falls far short of a guarantee. I.L.R. (1939) Mad. 282=1939 Mad. 520=(1939) 1 M.L.J. 509. *See also* 1937 Sind 50. Mere recommendation does not constitute guarantee. 1927 M. 620; 24 M.L.J. 249. A contract of guarantee need not necessarily be in writing; it may be expressed by word of mouth or it may be tacit or implied and may be inferred from the course of conduct of the parties concerned. Chapter VIII of the Act is not exhaustive on the subject. 1930 A.L.J. 1217=1930 A. 848; 42 A. 70=52 I.C. 684; 188 I.C. 222=1938 Sind 50. A contract of guarantee as specified in S. 126 presupposes the existence of a 'principal debtor' and no such contract can be made before a sale has taken place, when there is no principal debtor in existence in respect of whose default the guarantee can be given. 30 N.L.R. 205=1934 N. 163. In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee. Therefore creditor must satisfy that the conditions of the bond are fulfilled and that he is seeking the very liability which has been undertaken by the guarantor under the bond. 47 L.W. 84=1938 Mad. 422. Contracts of guarantee have to be interpreted having due regard to the relative position of the contracting parties and to the circumstances surrounding the contract. It is important that a condition contained in general terms is subject to retractions which follow from the nature and character of the principal's engagement. The extent of the condition of an indemnity bond might be restrained by the recitals. 1930 A.L.J. 1217. *See also* 45 L.W. 605=1937 Mad. 360=(1937) 1 M.L.J. 143; 1937 Sind 50. Where a person promises to pay an extra rate of interest in consideration of the creditor giving more time to the debtor without any liability on the part of the debtor towards the creditor for such an

extra rate, the position of that person with regard to the payment of this excess of interest is not that of surety, but he makes himself personally liable for the amount. 1930 A.L.J. 1181=1930 A. 543. Where, without any contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being as between the two that of *one of those persons only, and not equally of both*, the other, if he should be compelled to discharge the liability due to the creditor, though not a surety strictly so called, has nevertheless been in equity allowed to be subrogated to the rights of the creditor. But if the debt was borrowed by two persons jointly and severally bound as principals and shared by them—so that the debt was one equally of both—one of them is not, on payment even of the entire debt, entitled to the benefit of the security held by the creditor, in the absence of a contract with the creditor. 55 M. 949=139 I.C. 562=63 M.L.J. 615. The Court in granting relief to a person in the position of a surety is not confined to contracts of guarantee within the meaning of S. 126, and is free to apply the principles of equity unless the position is governed by some positive provision of law. Where in a mortgage deed executed by a Hindu father over his separate properties in respect of amounts borrowed by him for his own purposes, his son is made a party at the request of the mortgagee, and is made liable for the repayment of the debt, though not as a mortgagor, and the son after the death of his father pays off the mortgage out of his own moneys, he falls within the category of cases in which without any contract of suretyship there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. The son therefore would be entitled to the benefit of the security held by the mortgagee whom he has paid off, although he cannot be regarded as a surety within the meaning of S. 126 of the Contract Act. I.L.R. (1942) Mad. 851=55 L.W. 417=A.I.R. 1942 Mad. 628=(1942) 2 M.L.J. 406. As to enforcement of surety bond, *see* 57 M. 688=1934 186=66 M.L.J. 248. As to deposit of Government promissory notes as accounts, *see* 1938 Cal. 649.

SECS. 126 AND 127.—Contract of guarantee—necessity for strict proof. *See* 156 I.C. 200=1935 P. 376. *See also* on the section, 138 I.C. 879=1932 N. 62. Where a decree-holder has attached his judgment-debtor's property and *A* offers a cheque to

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to be surety for giving the guarantee.

*Illustrations.*

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year and promises that if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

**Surety's liability.**

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

the decree-holder in satisfaction of his claim against the judgment-debtor, *A* is not surety for the judgment-debtor and if *A* stops payment of cheque the decree-holder has independent cause of action against *A* and *A* cannot take advantage of S. 134. 193 I.C. 51=1941 Pesh. 6.

SECS. 126 AND 123.—The provisions of the Contract Act with regard to contracts of guarantee do not apply in the case of security bonds given to a Court under the Civil Procedure Code, it is only the general principles which underlie them that have to be applied to determine the nature and extent of the liability of a surety under such a bond. 57 L.W. 180=A.I.R. 1944 Mad. 396=(1944) 1 M.L.J. 234.

SEO. 127.—Consideration between the principal debtor and the creditor is good consideration for guarantee given by surety. 112 I.C. 843=1939 L. 203. See also 112 I.C. 740. A mere recommendation by one person to another to lend money to a third person does not render the first person, a surety or liable for the loan, if given. 27 M.L.J. 249=25 I.C. 726. See also 97 I.C. 866; 1927 M. 620=52 M.L.J. 612. As to effect of acknowledgment by newly admitted partner. See 1943 P.C. 147. As to what is good consideration for surety for giving guarantee, and as how surety is discharged, see 23 C.W.N. 545=50 I.C. 651 (P.C.). Under S. 127 it is not necessary that the thing done or the promise made for the benefit of the principal debtor should be at the desire of the surety. The section has implied in it some such expression as 'notwithstanding anything contained in S. 2 (d) of the Act'. The word 'done' in S. 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. 1940 O.W.N. 486=15 Luck. 656=1940 Oudh 346. Under S. 127 anything done for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. The release of a certificate-debtor from arrest under the Public Demands Recovery Act, on a security bond being executed by a surety in favour of the certificate officer, is a sufficient consideration for the bond. I.L.R.

(1937) 2 Cal. 698=66 C.L.J. 373. A contract of guarantee cannot be enforced unless there was some consideration for the guarantee. 33 I.C. 723. On this section, see also 31 C. 242; 1 A. 487.

SEO. 128.—'Liability' under Ss. 126 and 128 means a liability enforceable at law and if such liability does not exist, there cannot be a contract of guarantee. 42 B. 444=46 I.C. 122. A payment by principal is not binding on the surety. 44 C. 978=21 C. W.N. 482. S. 128 is directed to defining the liability of a surety upon the terms of a guarantee, not intended to affect the statute of limitation. 44 C. 978, *supra*. Applicability of section to surety under S. 145, Cr.P. Code. 29 I.C. 149=19 C.W.N. 961. There need not be privity between a principal debtor and a surety. All debtors whose debt the surety promises to pay are his principal debtors, though they are not the objects of his benevolent intention. 40 M.L.J. 529=62 I.C. 706. Principal and surety—Liability of—Limitation for suit against surety—Starting point. 53 I.C. 999. See also 1940 All. 116=1939 A.L.J. 1187. A letter of guarantee for the re-payment of money advanced on a promissory note payable on demand with interest stated that the guarantee would remain in force until the debt due was fully and finally adjusted and would not be affected by any forbearance or arrangement for giving time or other facilities to the principal debtor. The creditor accepted small payments of interests by the debtor from time to time and thus enlarged the period of limitation. *Held*, that in view of the terms of the guarantee the period of liability of the surety was also extended by the payments made by the debtor and that the surety remained liable so long as the principal debtor remained liable. I. L. R. (1942) 1 Cal. 11. Where a claim is barred against principal debtor but not against surety, by virtue of payments and endorsements made by him, the creditor can get a decree against the surety only. 10 R. 398=1932 R. 88. See also under S. 134. Surety must pay interest until satisfaction. 9 S.L.R. 237=1925 S. 164. This section does not refer to the nature of the principal's obligation but only

*Illustration.*

*A* guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

to the extent of the surety's liability. 2 L. 204=22 Cr.L.J. 662=63 I.C. 454. The liability of the surety being co-extensive with that of the principal debtor is joint and several with the latter and, therefore, it is at the option of the creditor, in the absence of a clear intention to the contrary, to decide whether he shall proceed against the surety or the principal debtor. 118 I.C. 443=1929 L. 393. *See also* 132 I.C. 590=1931 L. 691. Where sureties joined in execution of a mortgage though having no interest in the mortgaged property a personal decree can be passed against them under O. 34, R. 6. 132 I.C. 561=1931 A. 631. Where a person undertakes that if the mortgagee's money is not realised from the property the mortgagee may realise his mortgage money from him, the surety, the intention is clear that the mortgagee was first to proceed against the mortgaged property and take every step to realise his money, and the time begins to run against the surety only when the mortgagee fails to realise the whole amount due to him from the mortgaged property and not from the date when the mortgage money becomes due under the mortgage-deed. 187 I.C. 152=1940 A. 116=1939 A.L.J. 1137. *See also* 1941 Lah. 16. Sureties for a guardian of property are liable only to the amount of their bond for any defalcation which may be found to have occurred during the period of guardianship. 1929 P., 626=11 Pat. L. T. 561. Letter guaranteeing payment of pro-note debt—Breach by surety—Suit against principal and surety—Covenant as to assignment of pro-note to surety—Effect—Failure to do so whether non-suits plaintiff. 1928 M. 1262=113 I.C. 337. So long as the notice has not been given to the debtor (or to the surety for the debtor) as to the appropriation of any amount to any particular account it is open to the creditor to alter it and make re-appropriation. 1930 M. 874=59 M.L.J. 513. Surety's liability can be limited by special contract or made contingent upon some event other than the principal debtor. 95 I.C. 707 (2)=1926 N. 449; 57 C. 764. The words "if the aforesaid persons fail to pay the amount, I will pay it" do not limit the liability of the surety. 138 I.C. 879=1932 N. 62. *See also* 35 C. W.N. 986=1931 P.C. 224=61 M.L.J. 191 (P.C.). (On a construction of the contract of guarantee of a mortgage loan, sureties held liable in the first instance and not merely in the event of a deficiency remaining after realising the security). A creditor may sue the surety though he does not sue the insolvent principal debtor. In a suit by the creditor against the surety, principal debtor need not be a party. 50 I.C. 312.

*See also* 1940 All. 116=1939 A.L.J. 1137. A suit may be maintained against the surety though the principal has not been sued. 48 I.C. 424=91 P.R. 1918. *See also* 10 Mys. L.J. 175; 59 I.C. 312; 52 I.C. 870 (8); (1944) 1 M.L.J. 234=1944 Mad. 396 (Surety not made party to proceedings is not bound by decree against principal debtor). A decree against a debtor in a proceeding to which the sureties could not be parties shall not deprive the creditor of his remedy against the sureties. 147 I.C. 702 (2)=1934 P. 52 (2). When, on appeal by the principal debtor only, against a decree both against him and surety, the decree is reversed the surety is not thereby discharged from his liability. 14 P.W.R. 1911=9 I.C. 742. The liability of a surety is co-extensive with that of the principal debtor, and the liability ceases when the principal's debt has been extinguished by the merger of the estate of the creditor and the debtor. 44 M.L.J. 171=72 I.C. 194=1923 M. 340. *See also* 1934 A.L.J. 682=148 I.C. 639=3 A.W.R. 697=1934 A. 525; 157 I.C. 979=42 L.W. 291=1935 M. 748; 171 I.C. 527=1937 Rang. 197. Surety's contract of guarantee provided "If you fail to realise the price thereof (goods supplied) I and my property will be responsible for that amount". *Held*, that it was impossible to read into the words of the contract of guarantee that the creditor would be entitled to proceed against the surety only if all remedies known to law were first exhausted against the principal debtor. It was an ordinary contract of guarantee and therefore the liability of the surety was co-extensive with that of the principal debtor. I.L.R. (1941) Lah. 323=1941 Lah. 16. *See also* 1940 All. 116. Where the cause of action is separate, the liability of the surety is also separate with respect to each of the promissory notes, although he became surety for the consolidated amount. 40 I.C. 347=5 L.W. 721. A creditor can proceed against the surety and compel him to pay before exhausting his remedies against the principal debtor. 37 I.C. 401=5 L.W. 161; 157 I.C. 979=42 L.W. 291=1935 M. 748. As to the liability of surety under a limited guarantee, *see* 57 C. 764. Guarantee for advances made by bank—Extent of liability of surety. *See* 1930 P.C. 272=128 I.C. 657 (P.C.). Principal debtor discharged from liability for part of debt under Madras Agriculturists' Relief Act—Surety not agriculturist—If also discharged *pro tanto*. *See* (1941) 2 M.L.J. 751. Decree against principal and surety—Effect—Release of principal debtor before the Debt Conciliation Board—Surety cannot claim to be absolved also. 1939 N. L.J. 402. Where a surety promised to

**"Continuing guarantee."**

129. A guarantee which extends to a series of transactions is called a "continuing guarantee."

make good any discrepancies of the principal debtor in his dealings with A to the extent of Rs. 1,000 and wrote a letter subsequently to entrust the principal debtor with further business referring to the guarantee already given, his liability does not thereby become unlimited. 21 I.C. 322=14 M.L.T. 249. A surety becomes liable only on the contract of suretyship and not by the mere fact of the loan. He is liable for each loan as soon as it is made. 9 I.C. 204=21 M.L.J. 457. A surety is not liable in respect of a separate obligation entered into by the principal debtor apart from the surety bond and without the knowledge of the surety. 134 I.C. 1100=1931 O. 430. Where the contract is invalid for want of registration but only the equities arising in favour of the parties out of the subsequent acts of the parties can be enforced under the doctrine of part performance the liability of the surety under the contract cannot be enforced. 95 I.C. 824=1926 N. 466. If the contract entered into by the principal debtor is void or voidable the creditor can fall back on the contract of indemnity and enforce the liability of the surety. 22 O.C. 109=52 I.C. 88. Under this section the death of the principal debtor does not discharge the surety from his obligation. 69 I.C. 557=1923 L. 145. Under S. 128 of the Contract Act, if a person guarantees the payment of a promissory note without qualification he would be, equally with the principal debtor, liable for the interest. It is, however, open to the guarantor to limit by contract his liability to the principal amount of the note. 44 C.W.N. 511. Surety—Rights and liabilities of. See 27 I.C. 309=8 S.L.R. 112.

**LIABILITY OF SURETY UNDER C.P. CODE, S. 145.**—S. 145, C.P. Code, must be read with S. 128, Contract Act, which makes the liability of the security co-extensive with that of the principal debtor. After the judgment-debtor fails to pay the decretal amount the decree-holder is entitled to proceed against the surety as if he was his judgment-debtor. 1933 N. 287. See also 57 M. 688=66 M.L.J. 248=1934 M. 186. Under S. 128 the liability of a surety is co-extensive with that of the principal debtor only when it is not otherwise provided for in the contract. Where the vendee executed a security bond for the due discharge of a decree debt but failed to act accordingly and the vendor sued to recover the amount as well as interest thereon as agreed in the security bond. *Held*, that the vendee was liable for interest alone. 1934 A.L.J. 682=148 I.C. 639=1934 A. 525. Where a surety undertakes to pay the creditor the amount which may become due to him under the letter of guarantee "after attempts have been made by the creditor to realise the same

from the principal debtor," there is a special contract between the creditor and the guarantor that the creditor should not be entitled to recover from the guarantor until he has first attempted and failed to obtain satisfaction by proceedings against the principal debtor. The creditor's right to recover from the guarantor does not accrue until the creditor has taken steps to recover the debt by proceeding against the principal debtor. It is not enough for the creditor to merely demand payment from the principal debtor, as that would not amount to an attempt to realise the debt from the assets of the principal debtor. 1937 A.L.J. 1265.

**SEC. 129.—Continuing guarantee must refer to a series of transactions some of which were unknown at the time.** 1925 N. 7=22 N.L.R. 158. Whether or not the transaction is a continuing guarantee is to be determined by the terms of the instrument. It is mainly a question of construction. The document should be interpreted as a whole and is not to be confined merely to the operative part. If there is any ambiguity, it is permissible to press into consideration the nature and character of business, the relative position of parties and surrounding circumstances. 1930 A. 730. Licence to sell liquor for 3 years granted on the faith of the guarantee—It was not a continuing guarantee. 96 I.C. 248=28 Bom.L.R. 662=1926 B. 465. A security contained the following clause "our heirs and legal representatives shall be bound by the terms of this surety bond in the same way in which we are bound by them". *Held*, that it amounted to a continuing guarantee. 55 C. 154. Surety bond for the production of the judgment-debtor in Court on each occasion when his attendance is called for, is a continuing guarantee. 52 A. 1014=1931 A. 243. Where a suit is instituted by a company on a continuing guarantee by certain persons for the due performance of his duties by an employee in the service of the company, the burden is upon the company of proving that the employee was guilty of such lack of diligence and faithfulness as caused a loss to the company. If the losses were the direct result of the company's own bad system and the employee was plainly unfitted for the work entrusted to him by reason of deficiency in education and experience he cannot be held guilty of lack of diligence and faithfulness, so as to make his guarantors liable under the agreement of guarantee. 167 I.C. 292=1937 R. 37.

**SEC. 129, ILL. (a).—Illustration (a), to S. 129 is wrong as a statement of law.** 1930 R. 173.

**SECS. 129 AND 130.—A guarantee in the nature of a surety for the servant's fidelity cannot be held to be a continuing guarantee**

*Illustrations.*

(a) *A*, in consideration that *B* will employ *C* in collecting the rent of *B*'s Zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to above the value of £100, and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

*Illustrations.*

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

revocable under S. 130. Still in such a case of fidelity guarantee, once exact information reaches the surety that the person for whom he has remained surety has been guilty of misconduct, the surety is entitled to recall the guarantee as against the creditor or the obligee in the bond. But this is an equitable relief and such a relief must be very strictly administered. The misconduct must be clearly proved at the time of revocation. 1930 R. 173. A person who becomes a surety under S. 55 (4) of the C.P. Code cannot claim to be released from his obligation at his pleasure. There is no analogy between a security bond executed under S. 55 (4), C.P. Code, and a continuing guarantee under S. 129 and S. 130 of the Contract Act and its principle cannot apply to a surety under S. 55 (4), C.P. Code. The surety under S. 55 (4) cannot be discharged from his obligation at any stage before he has fully carried out his undertaking to the Court. 1941 M.W.N. 793= (1941) 2 M.L.J. 650. Where a person executes a security bond for the period of the theka, for the payment of one year's theka money in case the thekadar fails to pay it and the theka is for five years and on the death of the thekadar the theka is continued in the name of his widow who commits default in the payment of the theka money, the surety is liable inasmuch as the guarantee was given for period of the theka it must be regarded as being also a guarantee on behalf of the heirs and successors of the thekadar in the absence of any contrary intention in the security bond. 1942 O.W.N. 198=17 Luck. 712=A.I.R. 1942 Oudh 325.

Sec. 130.—A continuing guarantee enables surety to withdraw as to future transactions but a guarantee covering definite case does not enable a surety to nullify the security by withdrawal by means of a mere

notice to creditor. 37 I.C. 919. See also 56 B. 101, cited under S. 133. It is not competent to the surety for a receiver appointed by Court, to discharge himself merely by notice to the decree-holder or other person at whose instance or for whose benefit the receiver was appointed. 30 C. W.N. 266=1926 P.C. 32 (P.C.). A contract of suretyship under O. 41, R. 6, C.P. Code, is not a continuing guarantee within S. 130. 32 I.C. 807. A surety for the production of a judgment-debtor in Court can revoke the guarantee even on the day prior to the date fixed for appearance. It is not necessary that there should be a special reservation as to the right to revoke. 52 A. 1014=1931 A. 243. Where a surety for the appearance of the judgment-debtor who was arrested in execution of a decree, produces the judgment-debtor in Court and requests to be absolved from further liability under the surety bond, the Court should not refuse to grant the prayer. It is open to the decree-holder to apply to the Court for the arrest of the judgment-debtor until he furnishes a fresh security. 151 I.C. 154=1934 Lah. 962. Where the surety deposited certain securities as security for faithful discharge of duty by his son, his death does not determine the guarantee. 42 I.C. 900. This section does not apply to special contract of suretyship by surety to administration bond, irrespective of the grant of Letters of Administration. 36 I. C. 1000=10 Bur.L.T. 237. Surety to administration bond, discharge of. See 5 Mys. L.J. 105; 5 A. 293=140 I.C. 127=1932 A. 262. Where a member of a club guaranteed payment of rent by the club for premises leased to it, it is a continuing guarantee and can be revoked by a notice. 129 I. C. 897=1930 Sind 316.

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as revocation of a continuing guarantee, so far as regards future transactions.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them, shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

#### Illustration.

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

133. Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor]<sup>1</sup> and the creditor, discharges the surety as to transactions subsequent to the variance.

#### Illustrations.

(a) A becomes surety to C for B's conduct as a manager in C's band. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

#### LEG. REF.

<sup>1</sup> This word was inserted by S. 2 and Sch. I of Act XXIV of 1917.

Seco. 131.—Continuing guarantee—Does not terminate on death of guarantor. 43 A. 132=61 I.C. 138; 47 I.A. 164 (P.C.); 55 C. 154; see also 42 I.C. 900.

Sec. 132.—See 3 C. 184 (Liability of acceptor and drawer of bill of exchange).

Secs. 133 to 141.—Applicability—Surety bonds in favour of Court. Although Ss. 133 to 141 are not in terms applicable to surety bonds executed in favour of courts under C.P. Code, the principles upon which they are based are applicable to them. Consequently the liability of a surety who has executed a bond in favour of a Court comes to an end if the creditor for whose benefit the bond was given is found without the surety's knowledge to have entered into a contract with the debtor which would be hit by the provisions contained in Ss. 133 to 141 of the Contract Act. 46 P.L.R. 240= A.I.R. 1944 Lah. 428.

SEC. 133: DISCHARGE OF SURETY—PRINCIPLES.—The principle of the law on the discharge of sureties is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound,

for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. S. 133 cannot operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor to his promise and while by S. 128 the liability of the surety is co-extensive with that of the principal debtor, it only extends to this liability on the contract guaranteed and not on something different. Accordingly where the guaranteed transaction is an advance of a certain amount on the security of four properties but the transaction carried out is an advance of a less amount on security of three properties, the sureties cannot be held liable in respect of this performance which is not what they contracted to guarantee. 153 I.C. 700=1935 P.O. 21=68 M. L.J. 339 (P.C.). Discharge of surety—Rescission of contract. 58 I.C. 272=22 Bom.L.R. 711. See also 91 I.C. 772=1925 L. 552. Principal and surety—Variation in contract with principal, effect of. 45 B. 157=58 I.C. 184; 73 I.C. 353=1924 L. 211; 71 I.C. 783 (2); 112 I.C. 843=1929 L. 203. See also 56 B. 101=34 Bom.L.R. 167=1932 B. 168. [S. 133 not being applicable to a guarantee for a single transaction, English Law applied]. 134 I.C. 1097=1931 O. 426. [On a construction of the surety bond, gua-



(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the 1st of March.

ranteeing a clerk's fidelity, the terms of the bond held to apply to any office to which the principal might be appointed in future.] So long as an account with the Bank is unbroken, a surety should not, without his consent express or implied, be prejudiced by any departure from the rule of appropriation of items in order of date. 33 I.C. 34=20 C. W.N. 562. A surety cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract when in fact the contract was not avoided. 229 I.C. 712. A slight alteration in the course of business does not amount to an alteration in the main contract such as would affect the liability of the surety. 21 I.C. 322=14 M.L.T. 249. Security bond—Bond to Court pending appeal—Alteration in judgment—Debtor's position by act of third party—Liability of surety. 1936 L. 470. A surety giving security under O. 38, R. 5, C.P. Code, for the value of property sought to be attached before judgment continues to be liable though the suit is decreed not by the Court but by an award of arbitrators. Reference to arbitration is an ordinary incident of the suit. 45 I.C. 429=11 S.L.R. 122. Equitable principles underlying the section—Application—Surety bond executed in pending suit—Parties entering into compromise—Surety if discharged. See 31 Bom. L.R. 1442. Stay of execution—Surety not discharged by agreement between judgment-debtor and decree-holder increasing rate of interest and extending time for payment. 91 I.C. 772=1925 L. 552. The rule that a surety is discharged if any alteration is made in the contract without reference to the surety applies to a surety who is under no personal liability but has merely deposited documents. 55 B. 677=33 Bom.L.R. 709=1931 B. 347. See also 152 I.C. 874=1934 S. 152. It is well-established that a guarantor is *prima facie* entitled to have the debt proved against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the proceedings in which the judgment or award was

given, or was party to the admission of the principal debtor. The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, he is entitled to require the debt to be proved as against him. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself. I.L.R. (1941) Bom. 273=43 Bom.L.R. 53=1941 Bom. 108. Where the business in respect of which a surety had guaranteed losses was one the capital of which was limited to a certain amount, and by the partnership deed it was stipulated that when losses occurred the partnership was to be dissolved forthwith, the continuation of the business, after losses were incurred by amalgamation with another concern and the addition of new dealings to the business constitute not only breaches but also variations of the terms of the contract and exonerate the surety. 41 P.L.B. 47=1939 Lah. 193. Surety for tax-collector of municipal committee—Son of tax-collector allowed to collect taxes without notice to surety—Defalcation by some—Surety not liable. 177 I.C. 75=1938 R. 126. *A* executed a surety bond for the appearance and production of accused in Court at *X*. The case was transferred to the Court at *Y* where another surety bond was executed by another person in respect of the same accused. The case was re-transferred to the Court at *X* where the surety of *A* was forfeited. On a reference to the High Court, *held*, that the bond executed by *A* was in the nature of a contract and that the transfer of the case from *X* to *Y* amounted to the substitution of a different agreement without *A*'s knowledge or consent and would suffice to discharge him and that the transfer back to *X* was a second variation which did not revive the original contract. 152 I.C. 874=1934 S. 152. The provisions of the Contract Act cannot



134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of surety by release or discharge of principal debtor.

be deemed to be exhaustive. S. 133 of the Act cannot, in any view, operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor liable. If the contract with the principal debtor is varied without the consent of the surety, the latter who is not a consenting party to the variation is discharged from liability, although the principal debtor who is entitled to cancel and does cancel the contract, subsequently withdraws the cancellation and submits to the claim of the creditor. If the consideration for the original contract with the principal debtor fails, the latter is relieved of all liability, and necessarily the surety also ceases to be liable as surety. The fact that the principal debtor withdraws his defence to an action by the creditor and allows judgment to be given against him cannot affect the position of the surety. 1938 M.W.N. 325=1938 Mad. 585. Surety for appearance of defendant arrested before judgment—Return of plaintiff for presentation to Court having jurisdiction—Surety is discharged—Plaint represented in proper Court—Surety bond does not cover new suit. *See* (1939) 2 M.L.J. 816=50 L.W. 426=1939 Mad. 933.

SECS. 133, 135 AND 139.—Applicability—Surety bond to Court pending suit—Decree—Execution against surety not proceeded with—Appeal from decree—Application for stay of execution—Offer and acceptance of fresh surety in appeal—Effect—Former surety is discharged. 40 Bom.L.R. 939. *See also* 1944 Lah. 428=40 P.L.R. 240. Having regard to the definitions in S. 126 of the Contract Act, Ss. 133, 135 and 139 of the Act cannot in terms apply to a surety who executes a surety bond to a Court; there is in such a case no creditor within the meaning of S. 126. 1935 N. 258. But there is no reason why the principles underlying those sections should not be applied *mutatis mutandis*, though the question whether a surety is discharged from the undertaking he has given to the Court depends on the construction of the surety bond. (*Ibid.*) *See also* 40 Bom.L.R. 989.

SEC. 134.—If a creditor allows his remedy against the principal debtor to become time barred, the surety is deemed to have been discharged. *See* 25 A.L.J. 937; 1930 A.L.J. 1084; 1932 A. 610. But *see* 100 I.C. 922=1927 L. 396; 138 I.C. 305=1933 L. 419; 10 R. 398=1932 R. 88. (There is a conflict of ruling between the several High Courts on this point.—*Vide* the following rulings.) The omission of a Creditor to sue the principal debtor, within the period of limitation prescribed for a suit against the debtor, does not discharge the surety under S. 134. 25 N.L.

R. 74=116 I.C. 421=1929 N. 145. S. 134, has no application to a case where by a contract between the creditor and the surety the principal debtor is discharged and the surety assumes the whole burden of the liability of the original principal debtor. 1943 A.L.W. 87. Where the creditor filed the suit against the principal and the surety but he gave up the former and expressly reserved his remedy against the surety, *held*, that the surety was not discharged and that S. 134 of the Act had no application. 31 Punj.L.R. 329. *See also* 38 M.L.J. 131=54 I.C. 758; 10 Mys.L.J. 175; 1935 A.W.B. 492. Where the creditor allows his suit against the principal debtor to abate, on account of his omission to bring the legal representative on record, the surety is discharged. 106 I.C. 481 (2)=29 P.L.R. 68; 138 I.C. 305=1932 L. 419. *See also* 54 I.C. 105. Omission to proceed against principal in time owing to difficulty in service—Striking off his name—Rights of surety. If surety is discharged, *see* 39 B. 52=27 I.C. 165. *See also* 5 B. 647; 13 C. 330; 33 M. 308; 14 B. 267; 7 B. 146. Failure to obtain permission of the Insolvency Court before suing the debtor who had been adjudicated insolvent, does not release the sureties from the debt. 1939 A.M.L.J. 84. Principal and surety—Decree against surety—Appeal—Cross appeal by creditor—Principal not made party—Appeal. 16 I.C. 387 (2). A surety is discharged if a consent decree is passed without his knowledge and consent. 30 C.W.N. 540=95 I.C. 409=1926 O. 818. Change in relationship between debtor and creditor—Discharge of surety. 71 I.C. 783 (2)=1924 L. 194. Plaintiff withdrawing his suit against principal debtor—Suit against the surety must also be dismissed. 40 I.C. 400. *See also* 1925 S. 164. The surety of an agreement originally void is not discharged if the creditor withdraws his claim against the principal or his legal representatives and he impliedly assents to it. 54 P.R. 1916=35 I.C. 537. Where one of two co-sureties discharges the principal debt without the knowledge of the other by the execution of a fresh promissory note to the original creditor's transferee he is not entitled to contribution as against the co-surety on his discharging the latter note. 15 L.W. 143=70 I.C. 355. By telling the principal debtor that he would not be called upon to pay and that the amount would be recovered from the surety, who may sue him if he likes, the creditor has not done or omitted to do any act, the legal consequence of which would be to discharge the principal debtor. 96 I.C. 248=23 Bom.L.R. 662=1926 B. 465. The principle of the English law that discharge

*Illustrations.*

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his surety.

of principal debtor will not affect right of suit against sureties where there is a reservation to proceed against them is applicable in India. 38 M.L.J. 131=54 I.C. 758. That the creditor cannot proceed with his suit against principal debtor owing to disappearance of the latter, and demands relief against surety only, does not amount to discharge of the surety. 17 I.C. 893=8 N. L.R. 188. A foreign judgment dismissing a suit of the creditor against the principal debtor for default is not a judgment *inter partes* on the merits of the case and cannot be availed of by the surety to resist his liability to the creditor. 37 P.L.R. 92=1935 L. 729. As to discharge of obligation on continuing guarantee, see 151 I.C. 981=1934 A.L.J. 763=1934 P.C. 210 (P.C.). See also 1930 L. 812=31 P.L.R. 329. Suit dismissed as against principal—Surety if discharged. 44 I.C. 693. Surety, discharge of—Waiver of claim against principal debtor—Waiver and forbearance—Distinction—*Locus penitentiae*. 20 I.C. 189=6 Bur.L.T. 62. A suit is maintainable against the surety, although no suit is filed against the principal debtor. 52 I.C. 870=13 S.L.R. 92; 48 I.C. 424; 59 I.C. 312. When once a decree is passed both against the principal debtor and the surety, the surety becomes a judgment-debtor. His debt becomes a debt of record. The original contract has merged in the decree. Hence when a creditor releases a principal debtor and retains his rights as against the surety judgment-debtor, in proceedings before Debt Conciliation Board, the surety cannot thereby claim that he is also absolved from his liability. S. 134 of the Contract Act has no application to such a case. 1939 N.L.J. 402. See also (1941) 2 M.L.J. 751; 1938 Nag. 413.

**SURETY BOND EXECUTED IN FAVOUR OF COURT.**—S. 134 presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. Hence where there are no contracts between the sureties and creditor and security bonds are executed by the sureties at the instance of the debtor and in pursuance of the orders of the Court granting stay, the creditors are not a party to the contract of guarantee though empo-

wered under the security bond to enforce and hence S. 134 does not apply to this case. 1936 A.L.J. 860=1936 A. 549.

**SECS. 134 AND 137: CONSTRUCTION.**—The mere fact that an execution against the principal judgment-debtor has been allowed to be barred by lapse of time is no ground for the release of discharge of the surety. 40 C.W.N. 465. A surety is discharged when at the date of the suit against him the creditor's remedy against the principal debtor has become barred by time. 1939 A. M.L.J. 66. A creditor does not lose his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal debtor. 1941 O. W.N. 473=193 I.C. 344; 41 C. W. N. 1361. Mere entering into a compromise decree by the parties would not necessarily discharge the surety. But where a complicated arrangement is entered into which could not have been within the contemplation of the surety and new terms are imported quite outside the reasonable requirements of a settlement by consent, the surety will be discharged. 1937 Rang. 499.

**SECS. 134, 137 AND 139.**—See 154 I.C. 814=1935 O. 260=1935 O.W.N. 274. A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it, to sue the principal in the name of the creditor, is interfered with. Ss. 134 and 139 of the Contract Act are merely declaratory of what the law of England was and is. S. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired. Under S. 134 the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor. 66 I.A. 198=43 C.W.N. 641=1939 P.C. 110=(1939) 2 M.L.J. 253 (P.C.). A creditor while enforcing his contract may elect to have recourse to the surety rather than to the principal debtor; but he must not in so doing release the latter in such a way as to render the contract unenforceable against him and therefore void. If he does this, the surety can have no recourse to the principal

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

debtor for repayment and both by virtue of Ss 134 and 139 the surety is discharged. (1920 Mad. 216, Diss.) Thus if the creditor chooses to have recourse to the surety the principal debtor remains liable to the latter, but if the creditor after having instituted a suit against both the principal debtor and his surety, extinguishes his remedy against the principal debtor by withdrawing a suit against him without the permission of the Court under O. 23, R. 1 (3), C.P. Code, then his act discharges both the principal debtor and by virtue of Ss. 134 and 139, Contract Act, the surety in addition. (1 L.B.R. 150, Foll.) The test is not whether the creditor has for the time being confined his attention to the surety rather than to the principal debtor, but whether he has irrevocably abandoned his rights against the principal debtor by releasing or discharging him from the contract or has impaired the remedy of the surety against the principal debtor. 171 I.C. 291=1937 Bang. 302.

#### SECS. 134 AND 139: DISCHARGE OF SURETY.

—The mere filing beyond time by the creditor of an application for restoration of his suit against the principal debtor which had been dismissed for default, will not be legally sufficient to absolve the surety from liability either under S. 134 or S. 139 of the Contract Act. 1935 L. 729=37 P.L.R. 92. The position of the surety is twofold: on the one hand he is liable to pay the debt, on the other hand when he pays the debt, he stands in the shoes of the creditor. If the liability of the surety is so co-extensive with that of the principal debtor, his right is not less co-extensive with that of the creditor after he satisfied his debt. To enable the surety to enforce his right against the principal debtor, there are two essential conditions (i) that the debt itself must subsist, (ii) that his remedy against the principal must remain unimpaired. The creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. 176 I.C. 686=1938 Nag. 413. Creditor excluding debt guaranteed by surety from settlement by the Debt Conciliation Board—Surety discharged. 176 I.C. 686=1938 Nag. 413.

SECS. 134 AND 145.—The effect of the creditor waiving his claim against the principal debtor in a suit brought against the principal debtor and the surety is the barring of the remedy by suit against the debtor, and is not the extinction of the debt. The remedy of the surety under S. 145 of the Contract Act against the debtor remains open and unimpaired to the surety, and therefore the surety is not discharged. 14

R. 594=1937 R. 72. See also 1935 L. 906.

SEC. 135.—[See also notes under S. 133.] As to the principal of this section, see 4 C. 132; 14 M.L.T. 249. S. 135 has no application to the case of a surety under O. 38, R. 3, C.P. Code. 37 M.L.J. 435=53 I.C. 367. See also 1936 A.M.L.J. 1. A person cannot take advantage of the provisions of S. 135 and cannot plead that he is a surety, unless he comes under the definition of the word in S. 126 of the Act and must be a party to a contract of guarantee. 55 L.W. 664=1942 M.W.N. 623=(1942) 2 M.L.J. 532=1943 Mad. 216. A surety's liability does not come to an end if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter. 24 I.C. 864 (22 A. 351, Dist.). Striking of balance in account book does not confer any benefit upon the principal debtor, and therefore does not discharge the surety from liability. 133 I.C. 652=1931 L. 627. See also 45 Bom.L.R. 438. Where a creditor extends time for the payment of debt, without surety's consent the surety is discharged. 30 I.C. 637=8 Bur. L.T. 114. See also 120 I.C. 552 (1); 122 I.C. 602 (2); 1929 A. 664=27 A.L.J. 1137. But a surety executing a bond under S. 55 (4), C.P. Code, which is in favour of the Court, although the ultimate beneficiary may be the decree-holder, is not discharged by decree-holder, granting time to judgment-debtor. 100 I.C. 762=1927 L. 336. See also 120 I.C. 58=59 M.L.J. 89=1929 P.C. 273 (P.C.). Compromise with the principal debtor discharges surety. 11 P. 590=140 I.C. 564=1932 P. 313; 31 Bom.L.R. 1442. The effect of a compromise on the liability of the surety is a question of fact in each case. Where surety undertook liability for the restoration of the property and payment of mesne profits in case the decree of the trial Court was reversed on appeal and his liability was not in terms excluded in case of a compromise, the surety is bound by the terms of a compromise between the parties although entered into without his knowledge. But if the compromise provides for postponed payment or for the amount being paid in instalments, the surety is discharged from his obligations. 56 M. 625=1933 M. 309=64 M.L.J. 386. The appellant was the surety for the judgment-debtor. He undertook to 'fulfil the terms of the decree or order that may be passed in the suit by the trial or the appellate Court.' The suit was *bona fide* compromised. It was held that on the terms of the bond, the surety's liability was not discharged by the compromise. 55 B. 97=32 Bom.L.R. 1394=1931

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

*Illustration.*

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

*Illustration.*

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

138. Where there are co-sureties, a release by the creditor of one of them does

B. 55. Liability of the surety for the appearance of the judgment-debtor ceases if the latter appears and is allowed to pay the decree amount in instalments. 56 O.L.J. 586=1933 C. 337=143 I.C. 322. If a creditor agrees to discharge the principal debtor but reserves his rights against the surety, the agreement though entered into behind the back of surety only operates as a covenant not to sue between the creditor and the debtor and does not discharge the surety, as the surety's right of recourse against the debtor is not extinguished. 1933 M. 309=64 M.L.J. 386=56 M. 625. The opening of a second account in favour of the principal debtor does not discharge the guarantee. 23 C.L.J. 256=20 C.W.N. 562. See also 3 O. 177; 119 I.C. 749=1929 R. 187.

"GIVES TIME"—MEANING OF—ACCEPTANCE AS ADDITIONAL SECURITY.—By giving time is meant not merely forbearance to sue but entering into a binding agreement by which the creditor precludes himself from suing within a certain time. The third defendant had given a guarantee to the plaintiff in respect of advances to the first defendant for trade purposes. The plaintiff who had accordingly advanced about Rs. 13,000 demanded payment. The first defendant asked for time and gave the plaintiff bills payable at a future date as security. The bills were presented in due course for payment and dishonoured. In a suit by the plaintiff, held, that by taking bills payable at a future date, the plaintiff had put it out of his power to sue for the amounts till the date of maturity and the surety was therefore discharged. 65 M.L.J. 458. The calculation of interest on the amounts due up to the date of maturity and the acceptance of interest in advance would amount to giving of time. 146 I.C. 608=1933 M. 756=65 M.L.J. 458. In view of 55 M.L.J. 1 (P.C.), it is doubtful whether the rule laid down in 22 A. 351, that a mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety, and that in order to have such effect, an agreement to give time to the principal debtor must amount, to a contract, that is,

there must be consideration, therefore, is good law. 1933 S. 311. Where in an execution case, the auction-purchaser who had deposited the sale price in Court was allowed to withdraw it on furnishing security to re-deposit when asked to do so, and on so being asked he wanted a month's time to deposit the amount which was granted by the Court and was not objected to by the counsel for the decree-holder, but on subsequent date the Court being aware of the surety bond ordered the surety to deposit the amount and modified the previous orders. Held, that the surety was not absolved under S. 135. The bond was in favour of the Court and the Court had discretion to order the auction-purchaser to deposit the amount at any date it liked and the consent of the counsel for the decree-holder was immaterial. 40 P.L.R. 755=1938 Lah. 472. Under S. 135 a surety who undertakes to pay the decretal amount due if the judgment-debtor does not satisfy the decree by a certain date is not discharged from his liability by the executing Court granting further time to the judgment-debtor for making the payment. 1944 N.L.J. 271=A.I. R. 1944 Nag. 277.

SECS. 135, 136 AND 139.—See 15 Mys. L.J. 56.

SEC. 137.—A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. 55 I.C. 610=1 L. 262. See also 161 I.C. 244=1936 Pesh. 80. The words "mere forbearance" in S. 137 mean forbearance of the creditor from suing the debtor within the period of limitation. The simple reason for this interpretation is that a person can only forbear to do a thing as long as he has got a right to do it. Directly the suit of the creditor becomes time-barred he loses his power to enforce his claim. (24 A. 504 foll.) 160 I.C. 1005=1936 Pesh. 20. See also 40 C.W.N. 465. On this section, see 11 A. 310; 24 A. 504; 22 A. 351; 12 C. 330; 8 A. 259; 1933 M.W.N. 1281; 1935 O. 260=1935 O.W.N. 274.

SEC. 138.—See S. 44, *supra*.

Release of one co-surety does not discharge others.

not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

#### Illustrations.

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C* without the knowledge of *A*, prepaids to *B* the last two instalments. *A* is discharged by this prepayment.

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

140. Where a guaranteed debt has become due, or default of the principal

Rights of surety on payment or performance.

debtor, to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the

creditor had against the principal debtor.

SEC. 139.—Bank deposits—Security for—Liquidation—Creditors applying for dividends is not inconsistent with rights of surety. 4 L.L.J. 183=1922 L. 89. Surety is discharged from liability to the extent that he was deprived from recovering from the principal debtor the amount claimed by the creditor. 58 P.L.R. 1912=15 I.C. 469. *See also* 149 I.C. 168=1934 A. 616. Where a person stands surety for several defendants but the plaintiff proceeds against one defendant only, the exoneration of the remaining defendant discharges the surety. 60 I.C. 144. Discharge of surety—Conduct of creditor—Negligence. 38 M.L.J. 402=58 I.C. 648. *See also* 1937 Rang. L. R. 405 (neglect by obligee to observe rules as to supervision and checking). On a continuing guarantee for the honesty of a servant if the master discovers that the servant has been guilty of dishonesty in the course of the service, and chooses to continue him in his employ without the knowledge and consent of the surety he cannot afterwards have recourse to the surety make good any loss which may arise from the dishonesty of the servant during the subsequent service. It is the duty of the master, if he proposes to continue the servant in his service, to inform the surety of the misconduct of the servant. The failure to inform the surety of the continuance of the employment of the servant after his misconduct discharges the surety from further liability. 46 P.L.R. 236=A. I.R. 1944 Lah. 424. As to the effect of withdrawal of suit against the principal debtor, *see* 38 M.L.J. 131; 25 A.L.J. 937; 1927 L. 396 cited under S. 134. As to the effect of the creditor allowing his suit against

the principal debtor to abate, *see* 106 I.C. 481 (Punj.) and 1932 L. 419 cited under S. 134. Suit against debtor dismissed for default—Creditor applying for its restoration beyond time—Surety not discharged. 16 L. 757=1935 L. 729. Surety undertaking obligation liability in respect of amount decreed against the defendants—Suit dismissed against one defendant—Compromise decree passed against another defendant—Effect is the discharge of the surety. 47 L.W. 84=1938 Mad. 422.

SECS. 140 AND 141: SCOPE OF.—When a surety has paid all the debts he was liable for, on the language of S. 140, he is entitled to demand all the securities held by the creditor at the time of payment whether they had been received simultaneously with the loan advanced or subsequently. S. 141, only means that a surety cannot complain if, before payment, the creditor loses or parts with a security obtained by him after the contract of surety was entered into. S. 141 does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid or in any other way to detract from the rights of the creditor as declared by S. 140. S. 141 only gives him liberty of action in respect of securities not held by him at the time of the contract of suretyship provided he exercises it before payment. But Ss. 140 and 141, *prima facie* have reference to the simple case of a surety for a single debt for which the creditor holds a security or securities. 1943 M.W.N. 684=I.L.B. (1943) Mad. 340=(1944) 1 M.L. J. 1=1944 Mad. 195.

SEC. 140: "INVESTED"—MEANING OF.—27

141. A surety is entitled to the benefit of every security which the creditor

Surety's right to benefit of creditor's securities.

has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not ; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

*Illustrations.*

(a) C advances to B, his tenant, 2000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

142. Any guarantee which has been obtained by means of misrepresentation

Guarantee obtained by misrepresentation invalid.

made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by concealment invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Bom.L.R. 1168=1925 B. 457. A surety upon payment of the debt to the creditor becomes clothed with all the rights of the creditor against the principal debtor as also persons claiming under the principal debtor. 99 I.C. 676=25 L.W. 190=1927 M. 421. The word 'invested' dispenses with necessity of assignment. 27 Bom.L.R. 1168=94 I.C. 575=1925 B. 547. As to what rights are acquired by a surety who pays part only of the debt due, see 49 A. 640=101 I.C. 513=1927 A. 538. A surety's right stands on a higher footing than a right for contribution. He is bound to discharge the liability of the person for whom he stands surety but he is not liable jointly and severally to pay the decree debt along with all the judgment-debtors. 40 M.L.J. 529=62 I.C. 706. As to rights of a transferee of surety's estate paying a debt due by his transferor as surety for another, see 1932 A.L.J. 868=1932 A. 610. Under S. 140 as also under the English law, the surety's right to the benefit of the security held by the creditor vests in him the moment he pays the guaranteed amount. The creditor cannot afterwards make an appropriation to the prejudice of the rights of the surety which have accrued to him. Indeed he cannot do so even before as the surety is entitled to the benefit of every security held by the creditor at the time when the contract of suretyship was entered into. The security held by the creditor as cover for a debt attaches to every rupee of the debt and if he chooses to accept the guarantee with respect to part only of the debt the surety on payment of that part, is by force of law entitled to a proportionate part of the security. A surety for a part only of a debt is, on payment of that part, entitled *pro tanto* to the security held by the creditor as cover for the debt as a whole. S. 92, T.P. Act, under

which the right of subrogation is not available until the mortgage is redeemed in full, is wholly inapplicable to the case of a surety who guarantees to pay a debt. 1943 M.W. N. 684=(1944) 1 M.L.J. 1.

SEC. 141.—See 7 B.H.C. 118. See also 1930 A.L.J. 1181=1930 A. 543 cited under S. 126. One of the joint promisors paying the entire debt is not entitled to the benefit of the security held by the creditor in the absence of special contract. 55 M. 949=139 I.C. 562=63 M.L.J. 615. S. 141 does not cover the case where the creditor and debtor agree between themselves to vary their original contract by reducing the amount to be advanced and the number of properties to be given as security. There is, in such a case, no *parting* with security. 56 B. 101=34 Bom.L.R. 167=1932 B. 168. See also 152 I.C. 571=59 C.L.J. 503=1934 O. 699. In a suit on a mortgage bond against the mortgagee and his surety, the plaintiff mortgagee claimed only a money decree and stated in the plaint that he had "given up only the mortgage right and filed the suit as on a simple bond." The surety pleaded that he was exonerated from liability by the reason of the plaintiff having given up his rights under the mortgage bond. *Held*, that notwithstanding this statement in the plaint, the plaintiff could still sue, under O. 34, R. 14, C. P. Code, for sale, and there was nothing to preclude him from assigning the mortgage right to the surety or to preclude the surety from enforcing the mortgage right by reason of the provisions of S. 141, Contract Act, and that the surety was not discharged. 45 L.W. 602=(1937) 1 M.L.J. 469=1937 Mad. 501.

SEC. 141, ILL. (b).—See 149 I.C. 168=1934 A. 616.

SEC. 143.—On this section, see also 15 B.



*Illustrations.*

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A* in consequence calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *S* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is

Implied promise to indemnify surety.

entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but

not sums which he has paid wrongfully.

585=33 C. 713; 6 M. 406. S. 143 is not applicable to cases of mere non-disclosure, because mere non-disclosure, as distinguished from intentional concealment cannot amount to keeping silence under the section. There is no general obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness, for this is a matter on which the surety has to inform himself. I.L.R. (1940) Mad. 757=1940 Mad. 437=(1940) 1 M. L. J. 424. See also 1930 Mad. 874, *infra*. Where a person stands surety for another as regards an advance to be made by a Bank, the Bank is under no obligation to disclose any past indebtedness existing at the date of the contract of suretyship. It is a matter on which the person standing as surety has to inform himself. If, of course, he wanted the information and the Bank gave him wrong information it might vitiate the contract of suretyship. There is difference in this respect, between fiduciary guarantees, *e.g.*, guarantees for the fidelity of servants, assurances upon ships and lives, etc., and guarantees by persons in favour of Banks. In the latter case, the surety is not entitled to receive without inquiry from the party to whom he is about to bind himself, a full disclosure of all circumstances of the dealings between the principal and the party. If he wants to know any particular matter he must make in the subject of a distinct enquiry. 1930 M. 874=59 M.L.J. 513. A contract of guarantee for the honesty of a servant who is already in the employment of the master and has been guilty of acts of dishonesty is invalid, if the master says nothing about them and allows the surety to enter into the contract in ignorance of the true state of affairs. The past conduct of the servant is not only a material but a vital circumstance and a contract induced by the silence of the master upon this vital question is invalid under S. 143, and the surety is not liable under it. 46 P.L.R. 236=A.I.R. 1944 Lah. 424.

Sec. 145.—See 14 R. 595=1937 R. 72. The rights of a surety under the section is

not limited to the rights of a creditor against the principal debtor. 1932 A.L.J. 868=1932 A. 610. "Rightfully paid," meaning of. See 26 M. 332; 49 B. 202=27 Bom. L.R. 178=86 I.C. 883=1925 B. 244. A payment by surety to creditor made after the suit against the principal debtor had been instituted and with the object of assisting that suit to reach a successful termination might be held to be a wrongful payment, while a payment made before the institution of such suit might be held to be a rightful payment. 1930 L. 812=31 P.L.R. 329. "Wrongfully" meaning of. See 1936 A.M.L.J. 41. The liability of the principal debtor to pay the surety cannot arise from a mere implied promise to indemnify contained in S. 145 but must be the result of a contract between the surety and the creditor to which the debtor is a party. The implied rights possessed by a surety are available when the suretyship has been undertaken at the request, actual or constructive of the principal debtor but not otherwise. 39 M. 965=30 M.L.J. 369. Where a person stands surety for another, there is always an implied warranty by the latter that he would indemnify such person in case he is damnified owing to a default made by him in the performance of any of the conditions imposed upon him under the security bond. A person giving security for the payment of the decretal amount who is made to pay the decretal amount on the ground that a default has been made in the performance of the conditions of the security bond by the judgment-debtor is entitled to a decree for the decretal amount against the original judgment-debtor. 123 I.C. 126=1930 L. 399. Surety for the appearance of another cannot be permitted to claim the money forfeited as it would be opposed to public policy. 1932 L. 23=32 P.L.R. 739. S. 145 of the Act does not debar a surety from making a claim against the principal debtor in cases where he has not made the payment under the guarantee but has become liable only *in praesenti* to do so. In the absence of a provision in the statute restrict-



*Illustrations.*

(a) *B* is indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the Bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

146. Where two or more persons are co-sureties for the same debt or duty,

Co-sureties liable to contribute equally. either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

*Illustrations.*

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B* and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *B* 250 rupees and *C* 500 rupees.

147. Co-sureties who are bound in different sums  
Liability of co-sureties bound in different sums. are liable to pay equally as far as the limits of their respective obligations permit.

*Illustrations.*

(a) *A*, *B* and *C* are sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A*, *B* and *C* are each liable to pay 10,000 rupees.

(b) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

(c) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A*, *B* and *C* have to pay each the full penalty of his bond.

ing the claim of a surety against principal debtor to cases where the surety has already paid the amount the Court would be at liberty to apply the principle of the English decisions which hold that as soon as the obligation to pay becomes absolute, a surety has a right in equity to be exonerated by his principal. 32 Bom.L.R. 207=1930 B. 331. Execution of mortgage by a surety is payment and suit would lie to recover it from the debtor. 58 I.C. 123. The payment which gives the surety a right of action against the principal debtor must be a payment of money or money's worth. Where the surety has not paid the amount due by the principal

debtor to the creditor but merely executes a bond for its future payment, a suit by the surety for recovery of the amount due by the principal debtor to the creditor is premature and he has no cause of action until he pays the amount due under the bond. 14 R. 511=163 I.C. 668=1936 R. 235. "Payment" means payment in money or property as money equivalent and not merely in the shape of a bond or a promissory note or acknowledgment of liability. 50 I.C. 611=15 N.L.R. 78. See also 89 I.C. 65=1925 N. 392; 14 Rang. 594=1937 Rang. 72.

SEC. 148.—See S. 43, *supra*. See 26 A. 407; 4 B. 321.

## CHAPTER IX.

## OF BAILMENT.

148. \* A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

*Explanation.*—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

Delivery to bailee how made.

SEC. 148.—"For some purposes", meaning of. See 18 N.L.J. 97. Use of property bailed by bailee not necessary to constitute bailment. 18 N.L.J. 97. It is the pawnor and not an assignee from him that can give directions to the pawnee as regards the delivery or disposal of the pledged property. The directions must be definite and reasonable in order to be binding on the pledgee. 65 I.C. 65=1922 N. 127. Where A lent some ornaments to B to be used by the latter in a religious procession the transaction is a bailment. In such a case there is an implied contract for return of the articles in a reasonable time. 126 I.C. 682=1930 O. 395. Liability of goldsmith. 15 I.C. 431=5 Bur. L.T. 106. In case of deposit of money there is no bailment. 13 B. 338; 32 M. 68. The relationship is that of borrower and lender. (*Ibid.*) On this section, see also 1939 Cal. 746.

BAILMENT.—Meaning of. 23 S.L.R. 13. As to essentials of bailment, see 16 Mys.L. J. 368. Bailment distinguished from sale or exchange. See 2 A. 756. Delivery of goods for safe custody creates bailment not agency. See 1937 All. 255, cited under S. 237, *infra*.

SEC. 148, EXPL.—A bailment is made when one person delivers goods to another for some purpose under an agreement that they shall be returned after the purpose is accomplished. A seller of goods cannot be regarded as a bailee of the goods sold, unless there is a contract to that effect for the buyer does not deliver the goods to the seller for some purpose under an agreement for their return. So also under the Explanation to S. 148, the seller can become a bailee only if he contracts to hold them as bailee. 11 O.W.N. 958=1934 O. 380. After the Court had passed a re-delivery order the relation of bailor and bailee is established between the judgment-debtor and the decree-holder by virtue of ex-

planation to S. 148. 1929 L. 386.

SECS. 148 AND 149: BAILMENT OF GOODS—ESSENTIALS.—It is an essential element of Ss. 148 and 149 that there must be the putting into possession of the bailee or his agent of the goods in question. Where all that was done was that the bank received a document of title to the goods and the bank received the document in order that the document might be handed to the consignee by the bank and the consignee would pay a sum of money to the bank. *Held*, that there was no bailment of goods. 148 I.C. 644=1934 A. 568. See also 1937 M.W.N. 1042.

SECS. 148 AND 151.—See 18 Lah. 380=39 P.L.R. 845=1937 Lah. 572 (Stolen property recovered from the accused and kept with a person in charge of Court records and property—Such person embezzling such property—Secretary of State not liable.) Where silver entrusted to another is not to be returned *in specie* but has to be returned in the shape of a finished article, the intention of the parties is that the same silver would be used for the purpose, and the transaction is one of bailment. The bailee is absolved from liability for the loss of such silver by theft, if he is not guilty of carelessness or negligence. 1936 O.W.N. 334=1936 O. 264.

SEC. 149.—By law the duty of a Railway Company is that of a common carrier and the Railway Company cannot refuse carriage of goods. Liability of railway is that of bailee. Rules restricting liability imposed by Railways Act are invalid. 20 A.L.J. 31=44 A. 218. The mere fact that the loading clerk of a railway filled up what is called the serial number in the forwarding note without doing anything further would not amount to the delivery of goods to the railway by the consignor. 45 A. 235=21 A.L.J. 474.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially

Bailor's duty to disclose faults in goods bailed. interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

*Illustrations.*

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence

Care to be taken by bailee. would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods

bailed.

SEC. 151: LIABILITY OF BAILER—EXTENT.—S. 151 makes no reference to the distinction recognised in *English Law* between a *gratuitous bailee* and a bailee for hire and omitting all reference to skill lays down for both one standard, *viz.*, as much care as a man of ordinary prudence would take of his own goods in similar circumstances. Bailees are liable for negligence on the part of their agents or servants committed in the course of their employment about the use and custody of the thing bailed but not on account of an unauthorised act done outside the course of their employment. 1934 C. 151 = 37 C.W.N. 1109. Where a bank merely takes possession of a document of title the responsibility of the bank is for the safe custody of the document of title and not for the safe custody of the goods. The deposit of such a document with the bank will give the bank certain rights in regard to that document but it does not produce the legal effect that the bank becomes in possession of the immovable property. 148 I.C. 644 = 1934 A. 568. The liability of a *hotel-keeper* to his guests is governed by S. 151 and his liability is that of a bailee. 20 A.L.J. 728 = 44 A. 735. The English Common Law does not regulate the liability of hotel-keepers in this country. 44 A. 735. As to the standard of care required of a bailee under Ss. 151 and 152, *see* 1933 A. 158. Pressure of work or unavoidable accident cannot help to avoid liability. 85 I.C. 786 = 1925 C. 737. Whether it can be inferred from the facts found that ordinary prudence has been exercised, is a question of law and justifies an interference in second appeal. 25 I.C. 939. The position of a *Railway Company* is that of a bailee and is governed by S. 151. 38 I.C. 143. Where four hens put in a crate were consigned to a Railway Company and were put in a closed van by the Railway Company on account of which they died. *Held*, Railway Company was liable. 38 I.C. 143. As to liability of Railway Company, *see also* 37 B. 1; 17

B. 417; 30 C. 252; 39 B. 191; 39 A. 418; 23 O.C. 96 = 56 I.C. 714. *Burden of proving* that loss or destruction of goods entrusted to a Railway Company is not due to the negligence of the Railway Company lies on the Company. 91 I.C. 963 = 1926 L. 217. Common carrier—Liability for goods for carriage—*Demurrage charges*—When leviable. 41 I.C. 387 = 22 O.W.N. 310. A consignee is liable for *demurrage charges* and has no right to the price of the goods if he unjustifiably refuses to take delivery of goods. But demurrage cannot be charged for the period subsequent to a notice to the consignee that the goods will be sold away at auction in case he fails to remove them. 41 I.C. 387 = 22 O.W.N. 310. A carrier by sea cannot contract out of liability for the negligence of himself or of his servants. The English Common Law is applicable: the law as it stood before the Carriers Act, 1830, must be applied. 52 I.C. 296 = 12 Bur.L.T. 173. Bill of lading—Liability for loss of goods contracted out—Legality. *See* 29 Bom.L.R. 1551. Licensee of a ferry is a common carrier. The responsibility of a common carrier is not within the Contract Act but he is regulated by the Carriers Act and the English Law. 50 I.C. 562; 133 I.C. 77 = 1931 S. 124. As to liability of common carriers, *see* 34 A. 656; 18 C. 620; 38 C. 28; 28 M. 700; 6 C. 227. The liability of a Railway Company for loss of goods consigned for carriage is governed by the test laid in the sections. The Railway Company is not in the position of insurers as common carriers. 38 I.C. 702 = 25 C.L.J. 77. *See also* 39 C. 311; 16 C.W.N. 329 = 12 I.C. 596 = 14 C.L.J. 472 (Damage to goods). Railway Company—Goods destroyed by fire—Liability. 39 B. 191 = 25 I.C. 241. Mere happening of accident is not proof of negligence. 3 A. 398. Railway—Liability as carrier—Exemption—Risk note Form B. 2 P. 442 = 73 I.C. 440. The onus is upon the bailee to show that he is exone-

152. The bailee, in the absence of any special contract, is not responsible

Bailee when not liable for loss, etc., of thing bailed.

for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

rated from liability for loss by means of a special risk-note relieving him from such liability. 2 P. 442. A bailee is responsible for proper care of goods entrusted to him. The burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was duly exercised by him. 74 I.C. 18=1923 B. 74 (2). Money deposited for safe custody in Bank—Failure of Bank—Liability of depositors. 36 I.C. 31. Bailment—Suit against bailee for damages—Negligence, proof of—Onus on plaintiff—Duty of defendant. 20 Bom.L.R. 735=27 C.L.J. 615 (P.C.). The obligation of a bailee includes not only the duty of taking all reasonable precautions to obviate these risks but also the duty of taking all proper measures for the protection of the goods when such risks had already occurred. 14 Bom.L.R. 165=14 I.C. 793 (2)=37 B. 1. Degree of care varies with the quality of goods. 27 C.W.N. 1017=80 I.C. 279=1924 C. 92. In a case of highly perishable articles he should take special precautions. 9 I.C. 470=4 Bur.L.T. 26.

**LIMITATION.**—The defendant borrowed from the plaintiff his car for private use and while it was in his use it met with an accident which resulted in considerable damage to the car. The plaintiff sued to recover the repair charges and interest by way of damages. *Held*, that the case was one of bailment and that the claim for damages was governed by Art. 115 and not Art. 36, Limitation Act. 145 I.C. 1001=1933 O. 512.

**SECS. 151 AND 152: BAILLEE—STANDARD OF CARE.**—The standard of diligence required of a bailee under Ss. 151 and 152, is that of the average prudent man; where the bailor has taken the same care of the property entrusted to him as a reasonably careful man may be expected to take of his own goods of the same bulk, quality and volume as the goods bailed, he is not responsible for the loss, destruction or deterioration to the thing bailed. No cast-iron standard can be laid down for the measure of the care due from him. Where there is an unprecedented flood in the town, as a result of which part of the goods bailed is deteriorated, other things being equal, the bailee is not responsible for such loss. 142 I.C. 691=1933 A. 158. It is open to a bailee to contract himself out of the obligations imposed by S. 151 of the Contract Act. The Act does not prohibit contracting out of S. 151. There is no

reason why a man should not be at liberty to agree to keep property belonging to another on the terms that such property is to be entirely at the risk of the owner. The only liability of a bailee is for negligence under S. 151, and therefore any words absolving him from risk must cover the consequences of negligence. But where the contract is that the bailee is to keep or hold the property for a reasonable time as an ordinary bailee, it is not open to the latter to alter that contract until a reasonable period has expired and to add a new term to the contract by providing that he is not to be under the ordinary liability attaching to a bailee and that the property is kept at the owner's risk. 41 Bom.L.R. 6=1939 Bom. 101. On these sections, *see also* 159 I.C. 591=1935 S. 218; 1937 Sind 207; 1937 A.M.L.J. 56.

**SECS. 151 AND 167.**—Rival claims to goods bailed—Remedy of bailee—Bailee aware of passing of title in goods bailed to third person—Subsequent delivery to bailor—Bailee is liable to the third person. 1940 Rang.L.R. 361=1940 Rang. 249.

**Sec. 152.**—A bailee for hire is bound to return the article hired at the end of the period for which it is hired. But there is an implied warranty that the thing is fit for the purpose for which it is hired and if there is a breach of this warranty, the bailee is not bound to pay the hire and return the articles but can give notice of the same to the bailor. 45 B. 1017=61 I.C. 570. Where a pawnbroker issued a pawn ticket on certain jewellery being deposited with him, and the pawn ticket contained a clause exempting the pawnbroker from all liability in case of destruction of property under certain circumstances, on a suit being brought by the owner for the recovery of price, *held*, that a bailee can contract himself out of liability. It is not clearly deductible from the terms of S. 152 that a bailee may only make a special contract increasing his responsibility and that he cannot make a special contract reducing it. 7 B. 339=1929 R. 145. 'Loss'—Meaning of. *See* 10 L. 460=112 I.C. 736. The owner of a lighter carrying goods is liable for the loss of and damage to goods as bailee under S. 152 if in using the lighter he did not take the amount of care prescribed in S. 151. 42 I.C. 636. On this section, *see also* 29 Bom.L.R. 1551.

**Sec. 153.**—*See* 19 C. 332; 5 Luck. 220.

*Illustration.*

*A* lets to *B*, for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

*Illustrations.*

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

Effect of mixture, with bailor's consent, of his goods with bailee's.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture, without bailor's consent, when the goods can be separated.

*Illustration.*

*A* bails 100 bales of cotton marked with a particular mark to *B*. *B*, without *A*'s consent, mixes the 100 bales with other bales of his own, bearing a different mark: *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

*Illustration.*

*A* bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Re-payment by bailor of necessary expenses.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Restoration of goods lent gratuitously.

SEC. 154: CAR ENTRUSTED FOR SAFE CUSTODY—BAILEES LIABILITY FOR UNAUTHORISED USE.—Where a car entrusted for safe custody is used by the bailee for his private purposes in contravention of the agreement, the bailee is liable for the damage arising from such use under S. 154. 35 P.L.R. 705.

BAILEE—RIGHT TO SUE THIRD PARTY FOR DAMAGES FOR NEGLIGENCE.—A bailee is not the agent of the bailor and can sue to recover full damages from a third party who does not claim under the bailor for loss due to negligence of the person. 35 Bom.L.R. 1007 =1933 B. 465. On this section, see also 5 Luck. 220.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Return of goods bailed on expiration of time or accomplishment of purpose.

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Bailee's responsibility when goods are not duly returned.

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

SEC. 160.—A bailee who has given up possession of goods bailed with the consent of the bailor cannot thereafter maintain a suit for recovery of the goods bailed. 19 Cr.L.J. 220=43 I.C. 796. Under S. 160 it is the duty of the Railway Company to deliver the goods in accordance with the directions of the consignor, provided those directions are reasonable. When the consignor enters on the railway receipt that another person is to be the consignee, this section will be applicable to directions for delivery given by the consignee. 27 A.L.J. 1169=1929 A. 960=52 A. 126. Receipt from consignee of goods is good evidence of complete delivery. 39 C. 311. Bailment—Conversion of goods—Measure of damages. 34 I.C. 297; 9 Bur. L.T. 224. See also 83 I.C. 151=1924 C. 1056; 7 Mys.L.J. 86.

SECS. 160 AND 148.—When a Government Promissory note is deposited with the Collector of Excise by a company to secure duty in respect of dutiable liquors imported by them, the Government becomes the bailee of the note within the meaning of S. 148. Under S. 160, the Government are under a duty to return it without demand on the cancellation of the company's excise licence, although the note had not been endorsed to the company at the time of the deposit. The Government being bailees, are not at liberty to refuse to return it pleading the interest of the person in whose name the endorsement stands. I.L.R. (1939) 2 Cal. 52=1939 Cal. 746.

SECS. 160 AND 161: BAILLEE'S RESPONSIBILITY FOR WRONGFUL DETENTION.—Where a car is entrusted for safe custody, it is the duty of the bailee under S. 160 to return or deliver the car according to the bailor's directions without demand as soon as the time for which it is bailed expires. Where the bailee creates obstacles, based on flimsy grounds to deprive the bailor of the use of the car, wrongful detention is proved and under S. 161, the bailee is responsible for any loss or deterioration of the car from the time he does not return or deliver it when demanded. 35 P.L.R. 705.

SEC. 161.—[See also notes under S. 160.] The responsibility of a railway administration in India is no less than it would be in

England, and as regards delivery, the liability of a Railway Company is expressly governed by S. 161. Refusal to grant delivery except upon an unjust or unreasonable condition amounts to a default within the meaning of that section, and the Railway Company would be liable. 1931 N. 29. The moment the default of the bailee is established and the responsibility falls to be determined under S. 161, the burden shifts to him to prove that the loss, occurred prior to the commencement of default on his part. When the goods are solely under the control of the bailee the fact as to when loss, destruction or deterioration occurred is a matter specially within his knowledge and the burden of proving that the loss occurred at a particular time must be on him. 1932 A.L.J. 788=1932 A. 584. In the absence of evidence as to the execution of risk-note Form A, the railway is liable for delay in delivery. 65 I. C. 471=20 A.L.J. 114. Contract Act is not a complete Code with reference to the law of bailments. Bailments are of two kinds voluntary and involuntary. Where a depository dies and the subject of the deposit passes into the hands of his heir, the latter becomes an involuntary bailee. A depository is a bailee within Chapter IX of the Act. 69 I.C. 900=26 C.W.N. 772. Contract between Railway Company and owner of goods containing conditions as to the route to be adopted for transit—Breach of conditions—Liability of Railway Company as bailee. See 8 Pat.L.T. 651. As to measure of damages, see 7 Mys.L.J. 86. The responsibility of the commissioners of the Rangoon Port for the goods in their possession was held to be that of a bailee as defined by Ss. 151, 152 and 161 of the Contract Act. 1931 R. 95. Elephant—Hire for term of one year—Death in the hands of bailee before term—Liability for damages—Negligence of bailee—Onus of proof. See 45 L.W. 153=1937 Mad. 411=(1937) 2 M.L.J. 329.

SEC. 162.—The liability does not come to an end with the death of the bailee and can be enforced against his estate. The provisions of the Contract Act embodied in Chapter IX relating to bailment are not exhaustive; and the object of S. 162 is

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any goods bailed. Bailor entitled to increase or profit from goods bailed. increase or profit which may have accrued from the goods bailed.

*Illustration.*

*A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.*

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them. Bailor's responsibility to bailee.

165. If several joint owners of goods bail them the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary. Bailment by several joint owners.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery. Bailee not responsible on re-delivery to bailor without title.

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods. Right of third person claiming goods bailed.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it. Right of finder of goods; may sue for specific reward offered.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder in respect of the thing found, amount to two-thirds of its value.

simply to bring out the general principle of law that the heir of a bailee, when the bailment is gratuitous, does not occupy on the death of such bailee the character of a bailee. The section does not do away with the principle of law that such an heir occupies the character of a constructive trustee in regard to the subject-matter of the bailment. 5 L. 220.

SEC. 163.—*See* 49 B. 253=27 Bom.L.R. 455=48 M.L.J. 648 (P.C.).

SEC. 165.—*See* 20 M.L.J. 709.

SEC. 166.—To a suit by the real owner of goods for their delivery, the fact that the pledgee (defendant) has parted with the goods pledged to or to the order of the person by whom they were deposited without notice of any claim by any other person is a complete defence. 37 B. 122=40 I.A. 1=24 M.L.J. 176 (P.C.). *See also* 1923 Bom.

155.

SEC. 167.—The remedy of a bailee, from whom the goods bailed are demanded by rival claimants, is to file an inter-pleader suit against the claimants and protect himself. But if he fails to do that and retains the goods for the bailor or delivers it to him, he must stand or fall by the bailor's title. Where paddy was sent to a mill for milling and the mill owner was informed that the rice had been sold to a third person but later on the bailor sent a notice to the bailee asking him not to deliver the rice to the third person and the bailee delivers the rice belonging to the third person to the bailor, it is clearly a conversion and the bailee is responsible to the third person for damages. 1940 Rang.L.R. 361=1940 Rang. 249. As to wrong delivery in good faith, *see* 24 Bom.L.R. 513=67 I.C. 761=1923 Bom. 155.



170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour

Bailee's particular lien. or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

*Illustrations.*

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to

General lien of bankers, factors, wharfingers, attorneys, and policy brokers.

that effect.

SEC. 170: APPLICABILITY.—S. 170 only applies to cases in which goods have been given to a bailee for some purpose in relation to which the bailee has to use special skill. The case of a seller of goods who keeps the things sold because the price has not been paid does not come within the purview of S. 170. 151 I.C. 117 = 11 O.W.N. 958 = 1934 O. 380. Though according to S. 170, the bailee has a right to retain goods until he receives due remuneration for the services he has rendered in respect of them, there is nothing in the section which enables him to sell the goods and recover his dues. Hence a person entrusted with cattle for grazing cannot sell them for the recovery of the grazing charges due. 1940 N.L.J. 412 = 1940 Nag. 273. On this section, see 6 A. 139; 8 C. 312; 13 B. 314.

SEC. 171.—Distinction between the General Lien of a Bailee (Banker, etc.) and the Rights of a Creditor, who advances money to accommodate his customers to buy goods and deposit them with him on what is called the godown system is that one is a mere right of retention and in the other special property in the chattel is created. 8 L. 373 = 1927 L. 408. See also 1945 N.L.J. 468.

A *Nattukottai Chetty* is a 'banker' within S. 171 and is therefore entitled to banker's lien on goods bailed to him. 43 M. 747 = 39 M.L.J. 135.

LIEN OF BANKERS.—See 33 M. 53; 19 M. 234. Money can be the subject of a banker's lien but not the money held by the bank under a special contract. 95 I.C. 358 = 1926 S. 225 = 21 S.L.R. 385. When moneys are held in one account, and the payer in respect of those moneys owes debts to the banks on another account, the banker's lien gives the bank a charge on all the moneys their hands belonging to this particular customer so that they can be transferred into whatever account they choose to

set off or liquidate the debt which is in existence. But money in a trustee account at a bank cannot be used to set off debts on a private account in the trustee's name. 151 I.C. 1018 = 1934 Rang. 66. *Factor*, who is. See 1 Luck. 133 = 92 I.C. 744 = 1926 O. 202; 1945 N.L.J. 468.

ATTORNEYS' LIEN.—KINDS OF PASSIVE LIEN.—The rights of an attorney in India are the same as the rights of a solicitor in England, except in so far as the latter have been diminished or increased by statute. A solicitor in England is entitled to three kinds of lien to protect his right to recover his costs from his client, namely: (i) a passive or retaining lien; (ii) a common law lien on property recovered or preserved by his efforts; (iii) a statutory lien enforceable by a charging order. Indian statutory law contains no provision for the last mentioned lien but the other two kinds of lien are available in India. The lien on property recovered or preserved by the efforts of the solicitor is a particular lien and not a general lien and it is not available for the general balance of account between the attorney and his client but extends only to the costs of recovering or preserving the property in suit. The *passive or retaining lien* is not affected or curtailed by S. 171. This lien enures in favour of the solicitor in respect of all deeds papers or other personal chattels which come into his possession in the course of his professional employment. This is a general lien but with reference to moneys recovered by the solicitor for his client, he has no such general lien. Whether he obtains possession of the money which is the fruit of his exertion or whether it is still in deposit in Court, in either case, his lien or right to be paid out of those funds is confined to the costs incurred in respect of those funds, subject only to this, that he has the ordinary rights of set off which one

*Bailments of Pledges.*

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is called the "pawnee," defined.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the Pawnee's right of retainer. interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

174. The pawnee shall not, in the absence of a

creditor has against another. 60 C. 1442 =149 I.C. 331=1934 C. 341.

LIEN OF WHARFINGERS.—See 8 C. 312; 1930 L. 576. Equitable lien of barrister and attorney on money paid into Court. 29 I. C. 870=8 L.B.R. 70. See also 4 B. 353; 6 C. 7. A factor is an agent entrusted with the possession of goods for sale. 29 I.C. 462=1915 M.W.N. 519. Factor—Agent for sale of goods making advances against goods—Agreement to recoup advances from sale proceeds—Suit by agent for refund of advances before actual sale. 56 I.C. 671=11 L.W. 1.

RIGHT OF SALE.—A bailee has no right to sell the goods bailed, unless such right is conferred upon him by agreement of the parties or by any special statute; on the other hand, a sale of the goods bailed to him in the exercise of his right of lien over the goods causes the loss of the lien. 122 I.C. 388=1930 S. 36.

Sec. 172.—The method provided by S. 172 of the Contract Act for the hypothecation of chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security and if there was intention to create security, equity gives effect to it. 44 I.C. 211=22 C.W.N. 758. See also 59 C. 667; 10 Mys.L.J. 16. A hypothecation not merely of movables existing on the premises at the time but also in respect of movables which might be subsequently acquired and brought there is valid, though it is not governed by the T. P. Act or by the Contract Act. 59 C. 1372. An oral or written hypothecation is permitted under the law in India. 9 R. 182 =1931 R. 201. In a pledge the property should be actually or constructively delivered to the pawnee. Title deeds of property are not goods that may be pledged within the meaning of S. 172. 33 I.C. 891=22 C.W.N. 297. The delivery which is necessary for a pledge need not be simultaneous with the lending of the money. It may be actual or manual, symbolical or constructive, simultaneous or subsequent. 59 C. 667=36 C.W.N. 263. As to pledge of shares or negotiable securities, see 12 Bom.L.R. 300. Profits accruing from immovable pro-

perty cannot be pledged. See 1939 Lah. 15=41 P.L.R. 239. As to pledge of goods retained in the godowns of the pledgor who agreed not to remove them or encumber them without the consent of the pledgee, see 50 B. 547=96 I.C. 417=1926 B. 427. A pledge or pawn according to S. 172 lies midway between a loan and a mortgage which wholly passes the property in the thing conveyed. 33 I.C. 891=22 C. W.N. 297. Hypothecation of animals—Enforceability against third parties—Offspring of animals—Accession. 10 P.R. 1915=28 I.C. 230. Neither the T.P. Act nor the Contract Act recognizes the non-possessory hypothecation of movables. And the rights and remedies of the parties must be regulated by the Courts according to general law of contract. 10 I.C. 869=7 N.L.R. 72. A *bona fide* incumbrancer without notice in possession of movable property will be preferred to the prior incumbrancer. A person alleging notice must prove it. 28 I.C. 462=7 L.B.R. 336. As to distinction between pledge and mortgage, see 59 C. 667.

SECS. 172 AND 176.—The rights of a creditor who accommodates his customers by storing goods for the purchase of which he has advanced money are higher than those of an ordinary bailee who has a general lien under S. 171 of the Act in so far that in the former case there is an implication that the security shall if necessary be made effectual to discharge the obligation. The position of the creditor is analogous to that of a pledgee. (8 L. 373, Ref.) 31 P.L.R. 365=1930 L. 576.

SECS. 172 AND 178.—A deposit of share certificates would be enough to create a valid pledge. But if no deed of transfer is taken at the time of the pledge, pledgee cannot enforce his security except through the Court. I.L.R. (1941) Mad. 419=1941 Mad. 394 = (1941) 1 M.L.J. 178.

Sec. 174.—Rights of creditor in case of pledge. See 120 I.C. 834=53 B. 819. Pledge—Unlawful withholding of goods—Refusal to deliver—Action. 41 A. 643=55 I.C. 45. Subsequent advances on pledge of other articles—Lien against article ordinarily pledged—Subsequent conduct of parties, if material. See 115 I.C. 839. When there was a mortgage of certain shop goods

Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

Pawnee's right as to extraordinary expenses incurred.

contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain

Pawnee's right where pawnor makes default.

the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

then lying on the premises and the mortgagor undertook to keep on the premises stock to the extent of the debt replacing sold goods by new goods, it is not a mere licence but an equitable mortgage of the substituted goods and there is complete assignment of after-acquired property. It is not necessary that an equitable assignment should be enforced by a suit for specific performance. 17 I.C. 31=6 S.L.R. 97. The only condition is that the goods on coming into existence should be capable of identification as to things assigned. (*Ibid.*)

Sec. 176.—Conditions necessary for exercise of pawnee's right of sale. See 8 L. 373=101 I.C. 725=1927 L. 408. As to rights of pawnee, see 104 I.C. 641. Though S. 176 defines what may be described as the personal rights of the pledgee of goods arising out of his special property in them conferred by the pledge it cannot be said that it implies that the Act, by defining his personal rights, cuts down in any way any remedy he may have through Courts. The proper view to take is that the Court always has an inherent jurisdiction to administer, by sale or otherwise, the property of which it has seized in any suit which is in effect an administration suit and a suit on a mortgage or pledge is in its essence only a kind of administration suit. I.L.R. (1945) All. 373=1945 A.L.J. 144=A.I.R. 1945 All. 299. Notice of sale—Reasonableness of. 40 A. 522=45 I.C. 462=16 A.L.J. 390. See also 59 C. 667=36 C.W.N. 263. The rights of a pledgee under this section either to sue on the debt or sell the property pledged are concurrent rights. 33 I.C. 891=22 C.W.N. 297. See also 32 C. 27; 27 M. 528; 22 C. 21. In the case of a pledge the creditor has two rights which are concurrent, the right to proceed against the property not being merely accessory to the right to proceed against the debtor personally. 31 Bom.L.R. 988=1929 B. 471. A pledgee is not entitled to sell the goods before the amount of the loan becomes due and before effecting a sale he must give reasonable notice to the pledgor.

39 I.C. 169 (6 W.R. 81 Ref.). See also 114 I.C. 820; 1929 M.W.N. 167; 1944 Pat. 135. A notice to be valid under S. 176 must be a reasonable notice, and it must refer to the debt for which the goods were pledged and for recovering which the pledged goods are to be sold. Otherwise it will not be a proper notice. 38 Bom.L.R. 982. When there is an improper or wrongful sale by the pawnee, without a proper notice of sale as required by S. 176 the pawnee becomes liable in damages for conversion to the pawnor, but the sale is not avoided thereby or liable to be set aside. The correct measure of the damages to which the pawnor is entitled in such cases is the loss which he has actually sustained, taking into account the pawnee's interests in the goods sold at the time of the conversion. Account sales are *prima facie* evidence of the amount realised by the sale of the goods in foreign markets, in the absence of proof that the account sales are incorrect. A mere objection that they are not correct is not enough. Mere offers to purchase the goods made by others are also not conclusive as to the rates of prices. 38 Bom.L.R. 982. Certain jewels were deposited as collateral security with the creditor for two promissory notes. The promisee sold the jewels without proper notice to the debtor and filed a suit on the promissory notes. *Held*, that as the sale was without justification, the debtor was entitled to claim deduction from the amount due on the promissory notes of a reasonable value of the jewels deposited, which should be taken to be the value at the date of suit. 146 I.C. 422=1933 R. 76. If pledgee sells through Court, he can purchase at Court-sale. 19 C. 322. After the expiry of the period fixed for redemption a sale by a pledgee to himself of securities pledged is void; but it does not put an end to the pledge, so as to entitle the pledgor to recover them without payment of the amount thereby secured; nor does it entitle him to damages. Further the pledgor is bound by re-sales duly effected by the pledgee to third

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay in addition, any expenses which have arisen from his default.

<sup>1</sup>[178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

#### LEG. REF.

<sup>1</sup>Ss. 178 and 178-A were substituted by S. 2 of Act IV of 1930.

persons after such abortive sales to himself; but where the pledgee has erroneously represented to the pledgor before such re-sales that the securities have been sold, they can no longer be regarded as pledged, and he becomes on such re-sales liable for the value thereof as for a conversion and the liability is only of a civil nature. 45 Cr.L.J. 633 = A.I.R. 1944 Pat. 135. This section requires a notice only when the pawnee wishes to exercise his opinion of selling the pledged goods. If he chooses to bring a suit upon the debts no notice is apparently required by that section. 48 I.C. 970; 146 I.C. 194=1933 L. 536. When no period is fixed for the redemption of the articles pawned the debtor is not in default until notice is given by the creditor that he requires payment on a certain day and that day is past. The debtor is then in default in the same way as where a day for repayment is fixed in the original contract. When the date fixed in the notice for payment has passed without the pawned articles being redeemed, then under S. 176, Contract Act, the pawnee is entitled to sell the ornaments pledged by giving a reasonable notice of the sale to the pawnor. 45 Cr.L.J. 633 = A.I.R. 1944 Pat. 135. See also I.L.R. (1943) Nag. 234=1943 N.L.J. 71=1943 Nag. 162.

SEC. 177.—A pledgor cannot compel the pledgee to exercise the power of sale as a means of satisfying or discharging a decree which the latter has obtained against him. Rights of pledgor enumerated. 30 L.W. 898=122 I.C. 37=1930 M. 364. If a pledgor brings a suit for redemption without first tendering the money to the pledgee and it turns out that the suit was unnecessary because the pledgee was always ready and willing to deliver up the property

pledged without suit if the debt had been paid the plaintiff will no doubt be made to pay the costs of the defendant, but his suit cannot be dismissed. But if it turns out that in the circumstances which preceded the suit it would have been perfectly useless to tender the money to the pledgee as for instance where the pledgee declares in advance his inability to return the pledged property if the pledgee was at fault in putting it beyond his power to return the goods, the pledgor cannot be defeated on account of his not going through a useless ceremony of tender. 1930 M. 364.

SEC. 178.—Scope and application of section. See 40 M. 678=34 I.C. 751=30 M. L.J. 587; 30 Bom.L.R. 470=1928 B. 225; 159 I.C. 662=1935 C. 769. S. 178 contemplates documents which have a lawful owner other than the pledgor. 56 C. 367=119 I. C. 23=1929 C. 497. S. 178 has been enacted in order to protect those persons who in good faith deal with persons whom they know to be mercantile agents, but of the details of whose agency they are not aware. It is relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent. The agent referred to is an agent such as the pledgee might well suppose had power to pledge, but if the pledgee did not know him to be an agent at all he cannot have any reason to suppose that he had power to pledge. If he takes goods from a person of whom he knows nothing whatsoever and if it turns out that the person's pledging of the goods with him was a criminal offence and that the pledgor was a mercantile agent, then he can have no claim to retain the property. 176 I.C. 703=1938 Rang. 243. The words 'good faith' in S. 178, Contract Act, before its amendment bear the same meaning as is given in sub-S. (20) of S. 3 of General Clauses Act, though in terms that sub-section may not apply to any Act earlier in date than the General Clauses Act. The

**Explanation.**—In this section, the expressions “mercantile agent” and ‘documents of title’ shall have the meanings assigned to them in the Indian Sales of Goods Act, 1930.

general rule of English law is also to the same effect. 182 I.C. 25=1938 Mad. 545. A Railway receipt for goods consigned is a document of title to goods. 40 B. 630=31 M.L.J. 541=43 I.A. 164 (P.C.). See also 30 I.C. 950=38 M. 664; 56 M. 177=143 I.C. 641=1933 M. 207=64 M.L.J. 320. Under S. 178, a pledgee may get a better title to the goods or documents pledged than the pledgor had himself provided the circumstances set out in the section are satisfied. The burden of proving the existence of those circumstances is upon the party setting up the pledge. 67 C. L.J. 276. In interpreting S. 178 the Courts always drew a distinction between juridical possession and mere custody. In the new S. 178 the pledgee is only protected when the pledge is made by a mercantile agent. 1937 A.M.L.J. 73. If a person has authority to sell goods owned by another, he is a mercantile agent of that other and once it is proved that he has the consent of the owner to sell the goods, it is immaterial whether he has obtained that consent by fraud or not, and if he pledges the goods to a third party, the pledge under S. 178 is valid, and the right of the pledgee to hold the goods pledged to him is secure even though the mercantile agent is convicted under S. 420, Penal Code, for cheating. 1937 R. 146. A pledge of the documents, e.g., railway receipts, amounts to a pledge of the goods. The pledge is not affected by the handing over of the railway receipts by the pledgee to the pledgor for the limited purpose of obtaining delivery of the goods. It is only for that purpose that the pledgor has the temporary possession, or rather custody, of the railway receipts, and the goods are in the possession, order and disposition of the pledgee. 152 I.C. 730=1934 P.C. 246=68 M.L.J. 260 (P.C.). The railway receipts are documents of title within S. 178 of the Act and the pledging of the railway receipts has the same effect as a pledging of the goods represented by them. Even if the documents of title (railway receipts) are regarded as merely tokens of an authority to receive possession, their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts. 1934 P.C. 246=58 M. 181=68 M.L.J. 260 (P.C.). A pledge of the railway receipt operates as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. The pledgee does not lose his right of property

as pledge by parting with the custody of the railway receipts or by entrusting them to the pledgor or his agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the pledgee's godowns. Such a procedure is the usual course of business and is either necessary or at least convenient for the conduct of the business. 65 I.A. 75=I.L.R. (1938) Mad. 360=42 C.W.N. 321=1938 P.C. 52=(1939) 1 M.L.J. 268 (P.C.). Insolvents depositing with Bank Railway receipts with letter of hypothecation—Creation of equitable charge. 152 I.C. 730=11 O.W.N. 1511=1934 P.C. 246. See also 64 M.L.J. 320. “Goods” include shares in joint stock companies. 8 I.C. 183=12 Bom.L.R. 870. See also 80 A. 165. But see 37 I.C. 707; 24 C.L.J. 835. There is no valid reason for giving the word “goods” in S. 178 a different meaning from that which it has in the Sale of Goods Act. “Goods” would include shares in a joint stock company and there can be a valid pledge of the shares. When a person delivers a share certificate to another to be held by him as security, there is under the law of India a pledge which he can enforce, but unless the pledgee at the time of the deposit secures a deed of transfer which he can use in case of necessity or obtains one from his debtor at a later stage, he must have recourse to the Court when he wishes to enforce his security. There is nothing to prevent the pledgee suing on the debt and asking the Court to sell the goods for him. If the goods happen to be shares, the Court can confer a full title on the buyer by following the procedure laid down in O. 21, R. 80, C.P. Code. A.I.R. 1943 Mad. 74=(1942) 2 M.L.J. 120=I.L.R. (1943) Mad. 115. As to pledge of share certificates obtained by misrepresentation, see 92 I.C. 9=1925 B. 314. See also 7 B. 556=1929 R. 320; 9 B. 183=1931 R. 201. Wife delivering shares to husband for safe custody—Pledge of shares by husband with bank—Bank has no right to enforce charge against shares. See 1937 All. 225=1937 A.L.J. 150. Pledge by manager of firm—Conditions of validity, see 1931 L. 526. The word “person” is not restricted to mercantile agents. It includes the owner. 56 M. 177=1933 M. 207=64 M.L.J. 320; 58 M. 181=1934 P.C. 246 (P.C.). A broker in jewellery who is given the jewelries by their owners for sale is a mercantile agent. The fact that they were given to broker because of false representation is immaterial. Such broker can make a valid pledge provided the pawnee acts in good faith and had not at the time of the pledge notice that the pawnor had no authority to

pledge. 151 I.C. 413=1934 R. 198. The unqualified words "*a person who is in possession of any goods or of any bill of lading, etc.*" are wide enough to cover the owner as well as any mercantile agent. 58 M. 181=68 M.L.J. 260=1934 P.C. 246 (P.C.). The words "*a person who is in possession*" as used in S. 178, before its amendment includes an owner as well as a mercantile agent and are not limited either to the latter or to persons other than the actual owner of the goods. 67 C.L.J. 276 (Case before amending Act of 1930). A pledgee of goods who without notice of the title of the real owner delivers goods to or to the order of depositor is not guilty of a conversion. 37 B. 122=40 I.A. 1=24 M.L.J. 176 (P.C.). Shipping—Issue of Bill of Lading to shipper named in Mate's receipts—Same done contrary to course of business—Liability of shipping company for damages for conversion. 53 C.L.J. 111=1931 C. 373. S. 179 does not limit the scope of S. 178 but saves a pledgee at least to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to S. 178. 43 B. 205=40 I.O. 148. A party is bound by pledge of his goods by another who is in possession of them, where he not only approves the other's conduct but urges the other to pledge them. (*Ibid.*) Consignment of goods—Pledging receipt. Pledgee, if he acquires title—Fraud. 54 I.C. 224=23 C.W.N. 907. Fraud, meaning of. See 27 Bom.L.R. 514=1925 B. 314; 1938 Mad. 545; 1937 Sind 33. Pledge of goods—Pawnor being in possession—Third party's fraud—Right of prior hypothecatee. 60 C. 262. 'Possession' means "*judicial possession*". 1 R. 199=2 Bur.L.J. 241; 1923 S. 54; 50 I.C. 476=23 C.W.N. 352. See also 12 L. 304 and 33 Bom.L.R. 848=1937 A.M.L.J. 73. The word '*possession*' as used in this section does not include the possession by a gratuitous bailee and so a pledge by him of the thing is invalid. The pledgee must return the thing so pledged, to the original depositor. 61 I.C. 305; 14 S.L.R. 175. What is contemplated in S. 178 is juridical possession as distinguished from bare custody. A gratuitous bailee who merely took the jewel from the owner merely for inspection and return, cannot be deemed to have been in possession of it within the meaning of S. 178 to enable him to make a valid pledge of it. Where therefore the jewel is obtained from the lawful owner by means of the offence of cheating, and the subsequent consent of the lawful owner to the pledgor's retention of the jewel as per the contract of sale on credit is also obtained by means of fraud amounting to cheating, the condition mentioned in proviso 2 to S. 178 not being satisfied, the pledge in favour of the pledgee is invalid. 1934 M. 132=66 M.L.J. 361. It is impossible even if it were permissible or desira-

ble, to limit or restrict the natural meaning of the word '*possession*' in Ss. 178 and 108 in any way which would be consistent with other sections of the Act, or could be based upon any clear, consistent and comprehensive principles. The extent of the sections should be limited only by giving to the word '*possession*' its fullest and widest meaning, both natural or ordinary and technical or artificial, and including both actual possession and possession in law, subject to the provisos therein contained. Where there was a contract of sale of ready ascertained goods upon credit, and both the property in the goods and the right to possession passed to the buyers at the date of the contract but the goods, part of which were paid for, remained in the possession of the sellers who pledged some of them to a third party, the pledgee having no notice of the buyer's interest in the goods. *Held*, that the pledge and even if there was a sale, the sale came within the scope of Ss. 178 and 108 respectively and as such passed a good title to the third party. 56 C. 367=1929 C. 497. See also 31 Bom.L.R. 414=118 I.C. 796; 1 R. 199. The assignment of the railway receipts has the effect of a pledge of the goods themselves; the effect of a pledge of the railway receipt as a document is to give to the pledgee as against either the insolvent or the Official Assignee the right to receive the goods from the carrier. 56 M. 177=1933 M. 207=64 M.L.J. 320. A pledgee from a hire purchaser acquires no good title to the goods pledged. 50 I.C. 476=23 C.W.N. 352. (12 B.L.R. 42, Foll.; 34 P.R. 1902, Dist.) Government securities cannot be pledged except by endorsement by the owner. 33 I.C. 891=22 C.W.N. 297. Agent disposing of sewing machine—Assistance of Criminal Court not to be given. 1 Bur.L.J. 45=1923 R. 68 (1). Requirements of the section—Juridical possession—Pledgee in possession—Suit by rightful owner—Limitation, 40 M. 678=30 M.L.J. 587. As to burden of proving circumstances making the pledge valid being on the person asserting them, see 67 C.L.J. 276. Fraudulent representation of pledgor—Pledgee induced to part with the articles in order to find purchaser—Articles used to effect fresh pledge—Rights of first pledgee not affected. 120 I.C. 911=7 R. 556=1929 R. 320. See also 60 C. 262=1933 C. 366; 1937 S. 33. Where, by way of security for the repayment of a debt, the goodwill and stock-in-trade of a business were mortgaged with power to the mortgagee to realise his dues by sale of the mortgaged properties and the mortgagee not having exercised his power of sale, the movables forming part of the stock-in-trade were again pledged with another person who secured possession, the pledge is valid and entitled to priority over the mortgage. 36 C.W.N. 263. A mortgage deed is not a document of title contemplated in



178-A. When the pawnor has obtained possession of the goods pledged by

Pledge by person in possession under voidable contract.

him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.]

Pledge where pawnor has only a limited interest.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

S. 178 which is capable of being pledged. A mortgagee borrowed a sum of money from a third person assuring him that he would collect the money due under his mortgage from the mortgagor and pay it over to his creditor in satisfaction of the loan. In order that the arrangement should be worked out and that the mortgagee (debtor) should not evade it the custody of the mortgage deed was made over to the creditor. In a suit on the mortgage deed by the assignee thereof the creditor of the mortgagee (assignor) who was also impleaded as a party to the suit pleaded that he was a pledgee of the deed and that the plaintiff should first redeem his pledge before he could recover anything on the mortgage deed. *Held*, that the deposit of the mortgage deed with the creditor gave him no rights at all and he could not therefore claim a right to be redeemed by the plaintiff before he could sue to enforce it. 49 Mys.H.C.R. 160=22 Mys.L.J. 13.

SECS. 178 AND 178-A.—The reason for the insertion of these new sections has been explained as follows in the Statement of Objects and Reasons:—"The object of this Bill is to give effect to the recommendation of the Special Committee, appointed by the Government of India to examine and draft the Indian Sale of Goods Bill, that S. 178 should be amended so as to make it consistent with the amendment proposed by the Committee in S. 108. Both the sections are cognate and are based on the same principle; and there has been considerable conflict of decisions regarding their scope. The Special Committee has proposed to remove this conflict in S. 108 by restricting its provisions to sales by persons who are in possession of the subject-matter of the sale as mercantile agents only, and the present Bill amends S. 178 on the same lines."—(*Statement of Objects and Reasons*.) The following is the Report of the Select Committee on the Bill:—This Bill is supplementary to the Indian Sale of Goods Bill. On the lines of the amendment made in Cl. 27 of that Bill we have substituted the words "a mercantile agent" for the words "where an agent . . . to security of goods". We have also substituted the words "documents of title to goods" for the words "bill of lading, dock order . . . thereby represented". As the expressions "mercantile agent" and "documents of title" are not defined in the

Indian Contract Act, 1872, in which this section will remain, we have added an Explanation stating that those expressions will have the meanings assigned to them in the Indian Sale of Goods Act, 1930. We have also inserted a new section as S. 178-A to provide for the case of a pledge by a person in possession under a voidable contract."

Jewels entrusted merely for safe custody cannot be subject of a valid pledge by the deposit. 1943 M.W.N. 25=(1942) 1 M.L.J. 44; 1942 Mad. 299=55 L.W. 319. The plaintiff brought a suit for recovery of certain articles or their value, Rs. 90 on the ground that they belonged to her (plaintiff) and that the first defendant got possession of the articles by stealth. It was found that they had been pledged with the first defendant by the second defendant, plaintiff's husband, but that the articles belonged to the plaintiffs. It was not shown that the second defendant had any authority from his wife, the plaintiff, to pledge the articles. Nor was he a mercantile agent. *Held*, that the first defendant could not claim to recover the amount due on the pledge from the plaintiff on the ground that she was a *bona fide* pledgee, and the pledge did not confer any right on her, and the plaintiff was therefore entitled to a decree. 45 Mys.H.C.R. 342=18 Mys.L.J. 457.

SECS. 178 AND 179: RELATIVE SCOPE.—S. 179 is an enabling section and must be read with S. 178. 190 I.C. 790=1940 Sind 177.

SEC. 179.—*See* 42 B. 205. Where there was a contract of sale of goods on credit and the property in goods and rights to possession passed to the vendee but vendor retained possession and pledged the goods to a third party without notice of the vendee's interest in them. *Held*, that the pledgees obtained no right or interest under S. 179 (42 B. 205, not foll.). 56 C. 367=119 I.C. 23=1929 C. 497. *See also* 52 M. 465=30 L.W. 36=116 I.C. 827. Where there is a mortgage of movable property, and the property is allowed to remain in possession of the mortgagor as ostensible owner, and the property is again mortgaged to a third party and sold, the first mortgagee cannot recover from the second mortgagee unless he can show that the second mortgagee had notice of the prior mortgage. S. 179, Contract Act, has no application to such a case. 190 I.C. 790=1940 Sind 177.



*Suits by Bailees or Bailors against Wrongdoers.*

180. If a third person wrongfully deprives the bailee of the use or possession

Suit by bailor or bailee  
against wrongdoer.

of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or  
compensation obtained by  
such suits.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

## CHAPTER X.

## AGENCY.

*Appointment and Authority of Agents.*

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The

"Agent" and "principal"  
defined.

person for whom such act is done, or who is so represented, is called the "principal."

SEC. 180.—Under S. 180 either a bailor or bailee of a chattel may maintain an action in respect of it against a wrongdoer, the latter by virtue of possession, the former by virtue of his property. 43 C. 733=21 C.W.N. 632.

SEC. 182.—The Contract Act does not draw fine distinction between different classes of agents, but the Act is not exhaustive and so far as the law relating to agency is concerned it merely lays down general principles. 176 I.C. 675=1938 Nag. 254. Principal and agent—Relationship of. 63 I.C. 521=13 L. W. 537 (P.C.). Agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. 132 I.C. 43=1931 A.L.J. 225=1931 A. 372. The definition of an agent in S. 182 of the Contract Act does not limit the employment of an agent to one by the principal only. It will include an employment by any authority authorised by law to make the employment. 73 C.L.J. 356=1941 Cal. 643. Definition of agent given in S. 182 is very wide and embraces a servant pure and simple. All the agents therefore cannot be placed in the same category. 176 I.C. 675=1938 Nag. 254. Relationship of principal and agent distinguished from that of sub-contractor. 130 I.C. 54=1930 L. 1062.

'PERSON'—INCLUDES JOINT HINDU FAMILY.—There is no doubt that the word 'person' used in S. 182 and other cognate sections of the Contract Act includes a joint Hindu family and therefore an agent can be employed on behalf of such family. 150 I.C. 151=1934 A.L.J. 453=1934 A. 553.

TESTS OF AGENCY.—See 12 C.W.N. 28. No consideration is required to support agency. 3 C. 300. Benamidar is not agent. 5 B.L.R. 237; nor committee of lunatic. 20 B. 61; nor guardian of minor. 20 B. 61; nor manager of joint Hindu family. 22 A. 307; 26 M. 544. Minor may be agent. 3 Bom.L.R. 624. Every act of an agent in the course of his

employment on behalf of his principal and within the apparent scope of his authority, binds the principal unless the agent in fact is unauthorized to do that act and the person dealing with him has notice of the same. 24 I.C. 209. See also 43 C. 833=34 I.C. 807. The use of the word 'agent' in a general way, loosely without specifying the purpose of the agency does not help to determine whether a person is an agent. 21 I.C. 322=14 M.L.T. 249. Commission agents are agents within S. 182, but are not agents pure and simple. Where a person receives goods from another as a commission agent and then sells them for him, he is an agent up to a certain point that is up to the date of the sale. Thereafter whether he still continues as an agent or the relationship is that of a debtor and creditor depends on whether the commission agent when he sells has authority to sell in his own name and whether he has authority in his own right to pass a valid title. If he has authority to sell and also authority to pass a valid title in his own right he is acting as a principal *vis à vis* the purchasers and not merely as an agent and therefore from that point on, he is debtor of the erstwhile principal and not merely an agent. Whether this is so or not must depend on facts in each particular case. 176 I.C. 675=1938 Nag. 254. Unless authority to act is conferred and accepted, mere settlement of the terms of remuneration does not constitute a contract of agency. A commission agent is not in law, the agent of all persons and firms, whose business he occasionally transacts. 50 I.C. 146; 12 S.L.R. 93. The agency is only with reference to specific sales or purchases made under the directions of the principal. (*Ibid.*) In order to entitle a broker to his commission, he must prove either that the transaction has been completed or that, if it is not, the non-completion was due to default on the part of the principal. See 24 Bom.L.R. 847

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ  
Who may employ agent. an agent.

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority  
Who may be an agent. and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Consideration not necessary. 185. No consideration is necessary to create an agency.

Agent's authority may be expressed or implied. 186. The authority of an agent may be expressed or implied.

=1922 Bom. 433, and cases referred to therein. A broker is the agent of the person for whom he acts. Unlike the factor he is not entrusted with the custody and the apparent ownership of the goods, but he is merely to effect business on commission on the sale resulting from his efforts. 39 A. 81=36 I.C. 371. A broker is the agent of both parties and his contract is one of employment only so long as he adheres strictly to his position as a broker by confining himself to the business of negotiation. 42 C. 1050=19 C.W.N. 623. Broker—Liability of, in principal's contracts—Calcutta jute market—Custom of. 50 C. 12=1923 C. 419. Sub-broker receiving money from constituents and misappropriating—Payment to broker for other transactions—Suit for money. 25 Bom.L.R. 1014=48 B. 20. An Honorary Treasurer of a Subscription Committee is not its agent and not liable for gross negligence in not cashing a cheque passed by a donor. 36 A. 268=23 I.C. 600. The definition of an agent in S. 182, is wide enough and covers a person employed to sell unredeemed articles from a pawn shop on behalf of the employer. Such a person although a servant or a shop assistant, is an agent of the employer in the matter of selling such goods. 176 I.C. 703=39 Cr.L.J. 784=1938 Rang. 243. *Del credere* agents—Certified brokers of the Bombay Native Stocks and Share Brokers' Association are such. 23 Bom.L.R. 1144=46 B. 489. *Pakka adatia*—Position of. 52 I.C. 519=21 Bom.L.R. 783; 19 I.C. 29; 15 Bom.L.R. 85. A *pakka adatia* is a speculative transaction and not a wager. The rights and liabilities of *pakka adatia* are well settled and he has a right to be indemnified by the seller. 42 B. 373=34 M.L.J. 305=45 I.A. 29 (P.C.). Agency *pakka adatia*—Relation which constitutes. 37 B. 347=17 I.C. 152. According to the ordinary practice in Bombay the *pakka adatias* would be entitled to call for margin if the rise or fall in the market justified such a demand. But the onus lies on the *pakka adatia* to establish the circumstances which justify the exercise of such powers. 29 Bom.L.R. 147=1927 B. 125 [28 Bom.L.R. 1488 (P.C.), Rel. on.] Ajahat gumasta collecting fees for Deshmukh of village—Agent not trustee of Deshmukh. See

41 Bom.L.R. 215=I.L.R. (1939) Bom. 154=1939 Bom. 126. A broker can claim commission if he brings about a sale, but he can also claim it if he brings about the transaction to the stage of an agreement to sell and then the transaction fails because the purchaser draws back. 60 I.C. 727. Broker—Contract falling through owing to default of principal—Right to brokerage. 12 Bur.L.T. 68=51 I.C. 582. Broker—Commission—Right to—Completion of transaction—Failure of one of the parties to complete the contract—Effect of. 24 Bom.L.R. 847=1922 B. 433. See also 1935 Pesh. 56; 56 C. 262=33 C. W.N. 179; 1930 A. 545. A partner who does an act for the firm is an agent for the firm, but he is not an agent for the partners. 10 I.C. 250=153 P.L.R. 1911. A person contracting to purchase property and promising damages on default is not an agent of the promisee. 50 I.C. 69=9 L.W. 312. There is nothing in the Contract Act to prevent a servant from being an agent if he is employed as such. 123 I.C. 228=1930 S. 142. Commission—Suit for—Limitation. 39 A. 81=36 I.C. 371; 73 I.C. 143=1923 L. 473. The question of agency is a mixed question of fact and law very largely depending on the evidence in the particular case. 1930 M.W. N. 729.

SEC. 183.—*Cf.* S. 11, *supra*. See 29 C.W. N. 422=86 I.C. 571=1925 C. 609.

SEC. 184.—Under S. 184 a minor can act as an agent of a firm and any contracts entered into by such a minor as an agent are binding on the firm. And they are equally binding on the minor if he did not give notice of the repudiation within a reasonable time after attaining majority. 45 I.C. 17=17 P.L.R. 1918. See also 3 Bom.L.R. 627. A minor agent is not responsible for loss arising from the negligence of his guardian. An infant cannot be made liable for a tort arising out of contract where the contract is not binding upon him. 43 I.C. 923.

SEC. 185.—No consideration is necessary to create an agency. 114 I.C. 321=1929 L. 182.

SEC. 186: SCOPE AND APPLICABILITY OF SEC.—Under S. 186, Contract Act, the authority of an agent may be express or implied.

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case ; and things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case.

*Illustration.*

*A* owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A*'s funds, with *A*'s knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

Where it is not expressed, the question whether the agent had or had not authority to act in a particular matter on behalf of the principal has to be decided according to the circumstances of each case. 11 O.W.N. 880. If an agent, endowed with very wide powers and authorized to buy and sell property, to deal with Government and to pay revenue, contracts a loan on behalf of his principal, which the latter did not repudiate when it came to his knowledge, the principal is bound by the debt and must pay it. 39 I.C. 225=1 Pat.L.W. 346. The binding character of a contract entered into by an agent depends on the measure of the authority that may be implied by the facts and circumstances of the case. It is not enough to show that the agent was generally permitted to carry on the management of the debutter properties on behalf of his mother, the shebait, who never interfered with the acts of her son in whom she had full confidence. Where the question is if a contract to lease debutter properties is binding, it must be shown that the contract is one of a class of acts delegated to the agent or that the particular contract in question was authorized either expressly or impliedly by the shebait. 36 C.W.N. 1108. If a married couple live together and the husband acts alone in dealing with the joint property, he acts as the wife's agent in respect of her interest as well as his own, but the presumption is rebuttable. 10 I.C. 919=4 Bur. L.T. 115. (3 L.B.R. 66, Rel.) What constitutes agency. See 1925 C. 541.

Secs. 186 AND 187.—155 I.C. 180=1935 O. W.N. 490=1935 O. 305.

Sec. 187.—Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority it must be shown on a fair construction of the whole instrument, that the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. 43 C. 527=43 I.A. 48=30 M.L.J. 232 (P.C.) [(1893) A.C. 170, Foll.] See also 24 B. 360; 21 M. 274. The mere fact that the principal did not receive the benefit of the transaction does not rid him of liability. In the case of a Nattukottai Chetti money-lending business an agent who has authority to borrow and to lend to others, has an implied authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to the customers of the firm. 43 C. 527 (P.C.),

*supra*. Husband when liable for wife's debts. 9 A. 147. A toll contractor of a Municipality though he is referred to as a "lessee" of tolls under the Municipal Regulation, collects the tolls for and on behalf of the Municipality under the express authority vested in him by the Municipality and he is an agent of the Municipality within the meaning of S. 182 of the Contract Act. The Municipality can therefore be sued by a person from whom tolls have been wrongfully and unauthorisedly levied and recovered through the contractor. It cannot be contended in such a case that there is no privity of contract between the Municipality and the person from whom the tolls are levied. 15 Mys.L.J. 489. In a suit for the price of goods supplied on credit to the defendant through his servants, the plaintiff must show in the absence of express written authority a course of dealing by which it was a practice for goods to be supplied to him through his servants in the course of their employment. If he shows such a practice, it will be no answer for the defendant to say that particular items of goods did not reach him. 1937 P. W.N. 36=1937 Pat. 526. Where in a communal trouble an agreement was arrived at and it was signed by certain representatives of both the factions and subsequently the members of the community also acted upon the same, *held*, that the representative character of the signatories could be inferred. 27 A. L.J. 1083=1929 A. 519.

Secs. 187 AND 188.—Where the agent's authority is defined in writing, it is doubtful if S. 187 of the Contract Act can be relied upon for where an act purporting to be done under a power of attorney is challenged as being in excess of the authority it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. The limits of necessary implication are indicated by S. 188 of the Contract Act. Where there is no justification for the borrowing by the agent on the ground of necessity or with reference to the usual course of business the principal cannot be held liable on the footing that in borrowing the agent has acted within the limits of his authority. But there is a well-established rule of equity based on the theory of unjust enrichment, namely, where by any wrongful or unauthorized act of the agent the

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of the property. The absence of other funds in the hands of the agent at the time of the borrowing is not a necessary condition of the creditor's right to relief against the principal. This equitable rule is not excluded by the Contract Act. 1938 Mad. 966=(1938) 2 M.L.J. 688. Contract by power of attorney agent in respect of property of principal and for consideration benefiting principal—Deed reciting that it is executed as authorised agent of another—Signature not as agent—No personal liability. 46 L.W. 851.

SEC. 188: AUTHORITY OF AGENT.—Authority of Agent—Construction of. 39 C. 568 =13 I.C. 705=16 C.W.N. 593. (On appeal from 10 I.C. 895). Authority of agent in money-lending business to purchase shares. 1927 M.W.N. 118; to raise loans for purposes of principal's business. 2 Luck. 253=1927 O. 44; to sue on behalf of undisclosed principal. 99 I.C. 687=52 M.L.J. 33 =1927 M. 204. Authority of agent—Power-of-attorney—Construction of—Limitation of authority. 2 P.L.J. 600=41 I.C. 175. See also 7 Bur.L.T. 126=23 I.C. 516. One of the Articles of Association of a Company provided that the Board of Directors could not delegate their power to borrow. Another Article gave extensive powers to the managing agent to conduct and manage the business and affairs of the Company and enter into contracts and do things necessary or desirable in the management of the affairs of the Company. The agent effected a mortgage in order to meet the urgent requirements of the Company. Subsequently the reports of the Directors showed the loan as a secured debt. *Held*, (1) that the articles should be read together and that the power of entering into contracts did not include a power to contract loan, (2) that the managing Agent, had, however, under the general law, the power to contract the loan in question being faced with an emergency, and (3) that the Directors had ratified the loan by means of their report and that the Company could not escape liability on the ground that their managing Agent had no authority to raise the loan. 134 I.C. 244=1931 A.L.J. 1038. Authority of agent—Principal and agent—Acts of agent beyond scope—When principal liable—Third parties. 30 I.C. 968=10 S.L.R. 72. See also 134 I.C. 244=1931 A.L.J.

1038. An agent not authorized to compromise cannot bind his principal by any compromise effected by him. 96 P.R. 1914=24 I.C. 630. An agent authorised by a power-of-attorney only to collect debts has no authority to realize their value, or any part of it by selling them. 35 M.L.J. 581=41 M. 923. If the power-of-attorney does not authorize the agent to carry on a business except with limitations, any act done by him in excess of such power will not bind the principal. 41 I.C. 224=6 L.W. 417. The plaintiff from whom money was borrowed by the defendant's agent without authority, is entitled to receive his amount to the extent of the benefit received by the principal. 32 I.C. 763=1915 M.W.N. 761. An agreement by an agent to pay reasonable interest for goods purchased on credit is binding on principal. 26 I.C. 365. (1 C.L.J. 199, Foll.) An agent who has power to sign for the principal does not necessarily have powers necessary for a disposition of property. 10 M.L.T. 304=12 I.C. 393. Power to enter into forward contracts. See 10 I.C. 895. On appeal, 13 I.C. 705=39 C. 568.

POWER OF ATTORNEY.—A power of attorney given to an agent to collect outstandings includes also a power to collect debts due under decrees before the date of the power. 15 M.L.T. 337=23 I.C. 99. Power-of-attorney should be construed strictly. 23 M.L.J. 595=17 I.C. 139. A power enabling an agent to carry on the business of a firm does not entitle him to sue for dissolution of the firm. A suit so instituted should not be dismissed but should be allowed to be amended by requiring the principal himself to sign the plaint. 25 I.C. 140=7 Bur.L.T. 202.

CONNECTED ACTS.—An agent authorized to receive money for the principal may be presumed to be also authorized to do every lawful and necessary thing connected with it. 37 I.C. 442=3 O.L.J. 623 [43 C. 527 (P.C.) Ref.]. Where a person has been authorised to receive refund of octroi duty from the Municipal Board cannot be deemed to have also the authority to adopt any legal process for recovering the amount. A right to receive is different from a right to recover. 1939 A.L.J. 897=1939 A.W.R. (H.C.) 631 =1939 All. 623.

INSURANCE.—A commission agent purchasing goods insuring them under instructions from the merchant, has an insurable interest in the goods and can recover the money under the policy in case of loss. 36 B. 484 =12 I.C. 897. An agent might make him-

*Illustrations.*

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a ship builder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

*Illustrations.*

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

*Sub-Agents.*

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

"Sub-agent" defined.

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.

Representation of principal by sub-agent properly appointed.

The agent is responsible to the principal for the acts of the sub-agent :

Agent's responsibility for sub-agents.

The sub-agent is responsible for his acts to the agent, but not to the principal, except, in case of fraud or wilful wrong.

Sub-agent's responsibility.

self responsible for loss or damage to goods belonging to his principal. He may be an insurer of goods consigned to his care provided that there is consideration for that insurance outside the terms of the employment at the ordinary rate. 1930 R. 332 (2).

LANDLORD AND AGENT.—Where the agent of a landlord has no authority to create pecuniary liability on his behalf, no personal decree could be passed against the landlord. 16 I. C. 990. The question of the authority of an agent to bind his landlord has to be decided on the facts of each case. 35 I.C. 81.

POST OFFICE.—Where the person entitled to payment, requests the payment by means of a money order, the Post Office is the agent of that person and not of the sender. (Cf.). Postal rules which allow the sender of a money order or other article to recall it before actual delivery. 33 I.C. 723—14 A.L.J. 236.

ILLEGAL OR VOID CONTRACT.—Agent receiving money on principle's behalf under illegal or void contract is liable to account to the principal; also an agent making a profit without making full disclosure to his principal is liable to account to him for the same. 19 I.C. 161—15 O.W.N. 408.

SEC. 189.—Sec. 189 is meant to protect

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the agent, if for the purposes of safeguarding the interests of his principal, the agent does certain acts without any express instructions from the principal. In such a case the agent is exempted from all liability, if his acts are the acts of a man of ordinary prudence and are performed at the time of an emergency. If the goods are perishable or perishing, the agent is entitled to deviate from his instructions as to the time or price at which they are to be sold. If the principal thereafter sues the agent for damages as a result of his selling the goods without the principal's instructions, the agent is protected under Sec. 189 of the Act. 42 P.L.R. 393—1940 Lah. 412.

SEC. 190.—As to appointment of sub-agent, see 1 Bur.L.J. 219—1923 R. 84.

SEC. 192.—Agent liable to the principal for the sub-agent's fraud. 43 I.C. 699—19 Bom.L.R. 948. See also 1930 P.C. 274 (P.C.). A sub-agent is not liable to account to the principal except in case of fraud or wilful wrong. I.L.R. (1937) 2 Cal. 124. There is no privity of contract between the principal and the sub-agent under sec. 192. 26 I.C. 322; 27 N.L.J. 501. Every agent who employs a sub-agent is liable to the

193. Where an agent, without having authority to do so, has appointed a

Agent's responsibility for sub-agent appointed without authority.

person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

194. Where an agent, holding an express or implied authority to name another

Relation between principal and person duly appointed by agent to act in business of agency.

person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

#### Illustrations.

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent, for the conduct of the sale.

(b) *A* authorizes *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C* & Co., *B* instructs *D* a solicitor, to take legal proceedings against *C* & Co. for the recovery of the money. *D* is not a sub-agent but is solicitor for *A*.

195. In selecting such agent for his principal, an agent is bound to exercise

Agent's duty in naming such person.

the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is no responsible to the principal for the acts or negligence of the agent so selected.

#### Illustrations.

(a) *A* instructs *B*, a merchant to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment. [*Mockeray v. Ramsays*, (1843) 9 C. & F. 818 and *Meyerstein v. Eastern Agency Co.*, (1885) 1 T.L.R. 595, Rel. on.] 1930 P.O. 274. See also 1930 S. 247.

Sec. 193.—See 19 Bom.L.R. 948; 17 B. 307.

Sec. 194.—Generally an agent cannot without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to fulfil. But in special circumstances it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Where a banking concern is appointed an agent with very wide powers in the matter of letting out certain buildings in the city, it can well be inferred that the concern had authority to appoint another to act for the principal and the person so appointed is accountable to the principal. 1939 A.L.J. 37= 1939 All. 188. In spite of the existence of sec. 194 of the Contaret Act, branch banks do not recognise nor carry out instructions given by clients of other branches unless they

have been definitely instructed to do so; as an act of courtesy, one branch may try to oblige the client of another branch by making enquiries, etc. For practical purposes and so far as their obligations are concerned the branches do not recognise any liability whatsoever to carry out instructions from the clients of other branches unless these be properly conveyed through the branch bank with which the client deals. This is a universal practice and the Court should take cognisance of it. 102 I.O. 788 = 1927 L. 562 (2). On this section, see also 120 I.C. 284=1929 L. 536; 121 I.C. 636= 1930 C. 10; 14 P. 560.

SECS. 194 AND 195.—Appointment of sub-agent—Principal nominating person and having control—Liability of agent when no discretion is given to him in nominating sub-agent. 1930 C. 10=56 O. 686.

Sec. 195.—Sec. 195 implies the power of revocation in an agent in the case of a substituted agent. It cannot be said that because the agent is responsible to the principal for negligence in the selection of a substituted agent his hands would be tied as soon as he made the nomination and that the principal alone can revoke the nomination. 45 Bom.L.R. 1075=A.I.R. 1944 Bom. 76.



*Ratification.*

Right of person as to acts done for him without his authority. Effect of ratification.

Ratification may be expressed or implied.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

SEC. 196.—Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies. 1930 P.O. 278 (P.C.). Sec. 196 refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden by law. An option of ratification under the section can be held to be capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open or long after the expiry of the period, if any, for which the contract was to relate. I.L.R. (1939) Mad. 928=50 L.W. 440=1939 Mad. 957. The right of a principal to ratify an unauthorized act of his agent under sec. 196 is confined to cases where the agent purports to act on the principal's behalf and not where the agent acts on his own behalf without authority, or contrary to principal's directions and on behalf of the principal. 30 M.L.J. 497=34 I.C. 760. *See also* 68 I.C. 787=1923 L. 100; 33 P.B. 1913=16 I.C. 950; 28 I.C. 135=28 M.L.J. 199 [35 M. 177; (1910) A.C. 230, Foll.] *See also* 6 B. 463; 35 I.A. 48; 3 A. 832; 7 M.I.A. 476; 48 I.C. 959. To constitute a binding adoption of acts *a priori* unauthorized, these conditions must exist; (1) the acts must have been done for and in the name of the supposed principal and (2) there must be a full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were. Ratification relates back to the time of inception of the transaction and has a complete retroactive efficacy. 63 C.L.J. 86=1936 C. 87. Guardian's lease—Ratification, receipt of rent whether amounts to. *See* 46 C.L.J. 441=103 I.C. 522=1927 C. 796. There can be no ratification of a void transaction. 9 M.L.J. 104; 100 I.C. 839=1927 N. 214; 34 C.W.N. 135=1929 C. 612. A mortgage executed by a general agent holding a power-of-attorney, which did not authorise to execute mortgages is operative if acted upon, and ratified by the principal and cannot be treated as being void *ab initio*. 19 A.L.J. 827=44 A. 77. Contracts made by agents of corporations how far binding—Doctrine of part-performance when applies. 23 C.L.J. 26=20 C.W.N. 370=43 C. 790. A principal cannot ratify a transaction in art and repudiate it in part. Before a principal is bound by ratification it

must be proved he had knowledge of all essential facts of the transaction. 25 I.C. 274=19 C.W.N. 56. The question of the gymnastha's power to bind his landlord is one which must be decided on the particular facts of each case. 10 I.C. 456=15 C.W.N. 953. Assignment of decree by agent without authority—Ratification by decree-holder—Validity of assignment. *See* 47 C.W.N. 616 (P.C.). Where the unauthorized act of the agent is ratified by the principal the ratification takes effect retrospectively so as to validate the transaction originally entered into. 8 Mys.L.J. 240.

SEC. 197.—Ratification implies an intention to ratify on the part of the principal; and any act of his can be relied upon as amounting to ratification, only if done after he had full knowledge of the material facts ratified. Thus what the principal says under a mistaken impression cannot amount to ratification. 103 I.C. 561=1927 M. 478; 1930 P.C. 278=60 M.L.J. 149 (P.O.). *See also* 155 I.C. 180=1935 O.W.N. 490=1935 O. 305. Ratification cannot be inferred from a mere omission to repudiate in terms an unauthorized transaction. 52 I.C. 414=10 L. W. 33. *See also* 24 C. 469. As to where principal's ratification may be presumed where the agent exceeds his authority and embarks on unauthorized transactions, *see* 9 L.W. 251=19 I.C. 758. Where an agent contrary to instructions makes advances against security the principal may realize the security and hold the agent liable for the balance and such intermeddling does not amount to ratification. 9 L.W. 251. The application of the principles governing the relationship of English agents to their principals should not be extended to Chetty's agents in India whose position approximates to that of a trustee. 49 I.C. 758=25 M.L. T. 286=1919 M.W.N. 72. Ratification of an act in excess of authority on the agent's part by principal may be inferred from his mere silence or acquiescence. 31 I.C. 216=29 M.L.J. 55; 28 M.L.J. 199. Act of Nattakottai Chetty agent in excess of his authority—Acts of the principal to mitigate the loss—Effect of section. 1927 M.W.N. 118=102 I.C. 561=1927 M. 478. Ratification of an unauthorized act of an agent is complete only when the fact is communicated to the other party to the contract. Till then the principal has an option to withdraw. 28 M. 997=14 M.L.T. 454. Acts relied on inconsistent with denial of liability may give rise to inference of ratification. 43 I.C. 959. A man cannot ratify submission to what has



*Illustrations.*

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account ; *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority lends *B*'s money to *C*. Afterwards *B* accepts interests on the money from *C*. *B*'s conduct implies a ratification of the loan.

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Effect of ratifying unauthorised act forming part of a transaction.

199. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot by ratification, be made to have such effect.

Ratification of unauthorised act cannot injure third person.

*Illustrations.*

(a) *A*, not being authorized thereto by *B*, demands on behalf of *B*, the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

*Revocation of Authority.*

201. An agency is terminated by the principal revoking his authority ; or

by the agent renouncing the business of the agency ; or by the business of the agency being completed ; or

by either the principal or agency dying or becoming of unsound mind ; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

taken place, is no ratification of it. 7 O.L. J. 429=58 I.C. 165.

SEC. 198.—As to the applicability of the doctrine of ratification, *see* 43 C.W.N. 8=1937 P.C. 296; 1938 Nag. 482; 1941 Mad. 6.

SEC. 199.—The principal cannot sue agent on one of his several transactions without adjusting all the rights and liabilities of the parties in others. 40 C. 335=17 C.W.N. 87.

SEC. 200.—The provisions of the Contract Act relating to agency are not meant to be exhaustive. Neither sec. 200 nor the other provisions of the Act relating to ratification affect the principle that the general rule as to ratification would not apply when it would affect the rights of other parties. A ratification does not relate back when persons other than the contracting party have acquired interests prior to ratification. 1941 Mad. 6=51 L.W. 453=(1940) 2 M.L.J. 726. A notice to quit given by one of two joint receivers on behalf of both without the authority of the other is not valid and cannot be rendered so by subsequent ratification by the other Receiver. 34 I.C. 221=23 C.L.J. 453. Where the only objection to the grant of a melchharth is that it was granted without proper authority, it can be subsequently ratified by the person who has power to grant it. 73 I.C. 376; 1924 M. 245. *See also* 27 B. 515.

SEC. 201.—An agency, unless it is for a fixed term, obviously continues and may be terminated at the pleasure of the principal.

By its very nature, it is personal, neither transferable nor assignable and depends entirely on the agreement made with the principal. I.L.R. (1943) Kar. 49=A.I.R.1943 Sind 197. In the case of an employment of an under-broker by broker for a fixed term, if the services of broker are dispensed with in the interval, the dependent contract of under-brokerage is also dissolved and the under-broker is not entitled to sue the broker for damages for wrongful dismissal unless the broker had brought about the termination of the head agency purposely. 47 C. 290=46 I.A. 314=24 C.W.N. 577 (P.C.). There is termination of agency after the death of the principal and a suit against agent for accounts must be brought within 3 years under Art. 89, Limitation Act. 26 C. W.N. 320=65 I.C. 219=1922 O. 53. Principal and Agent—Agent of joint coparceners—Effect of death of one. 41 I.C. 288=21 C.W.N. 620. *See also* 38 I.C. 278=20 C.W. N. 708; 16 I.C. 852=17 C.L.J. 201. Where one of two joint agents dies, the agency terminates, only so far as he is concerned, but continues as regards the surviving agent. 38 I.C. 278=20 C.W.N. 708. *See also* 41 I.C. 288=21 C.W.N. 620; 16 I.C. 852=17 C.L. J. 201. Where an agency has been created by two principals, the death of one of them terminates the agency merely as regards himself but does not necessarily operate as such also as regards his joint principal. The rule, is that in each case the Court must determine the true intention of the parties to the con-

202. Where the agent has himself an interest in the property which forms Termination of agency, the subject-matter of the agency, the agency, cannot, where agent has an interest in in the absence of an express contract, be terminated to subject-matter. the prejudice of such interest.

*Illustrations.*

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

tract from the terms thereof and from the surrounding circumstances. 1937 Nag. 314.

Where there are two or more principals if one of them dies, the agency terminates only as regards the representatives of the deceased principal, but it continues as regards the surviving principal. So the period of limitation for the suit against agent for rendition of accounts does not begin to run as against the surviving principal from the death of the deceased principal. 41 C.W.N. 27=1936 C. 650. Agency terminated by fulfilment of instructions. 79 P.R. 1915=31 I.C. 215. As to what constitutes completion of business, see also 12 A. 541; 26 C. 715; 7 B. 518. Question of termination of agency is one of fact. The usage among money-lending Nattukottai Chetties and the terms of the contract between the parties can be admitted to decide the question. 31 M.L.J. 687=36 I.C. 812. An agency will not terminate on the expiry of the period contracted for between the principal and agent, if the agent is allowed to continue as agent. No fresh agency is created but the old agency is continued. 31 M.L.J. 685=56 I.C. 804. An agency terminates when the agent hands over charge to another in obedience to a telegram from his principal revoking his authority but his liability in respect of acts done as agent continues. 39 M. 376=28 M.L.J. 140. Where there is no revocation of authority or any renunciation of the business of the agency by the agent there is no termination of the agency. 132 I.C. 43=1931 A.L.J. 225=1931 A. 372. On this point, see also 39 M. 693=31 I.C. 583=29 M. L.J. 788. Imperfect partition of village—Lambardar's powers whether affected. 19 I. C. 549=9 N.L.R. 46. Mortgagee put into possession so as to appropriate profits towards interest—Power to resume possession. 12 Bur. L. T. 46=47 I. C. 133=9 L.B.R. 172. On this section, see also 20 M. 97; 5 B. 253. When the Court takes charge of the property in a suit by the appointment of a Receiver or otherwise, rights of management or service which other persons may possess by virtue of any contract with the original owners will cease. But this is not an absolute rule but will depend upon the circumstances, of each case. Where the agent of the original owner is appointed as the receiver and he works as an agent of his master notwithstanding his appointment as receiver, his agency does not cease. 1936 M.W.N. 932=1936 M. 980. Where three persons who are the partners of a firm execute a power-of-attorney in favour of another constituting the latter the agent if the firm and giv-

ing him power to take any legal action or proceeding in connection with the firm and to sign any plaint, etc., on behalf of the firm, the fact that one of the partners subsequently becomes an insolvent does not terminate the agency. J.L.R. (1937) N. 28.

SECS. 201 AND 202.—Hindu reversioners—Document by, in favour of stranger authorising him to file a suit for possession of estate and to conduct it—Provision for division of estate between them and stranger after recovery in suit in case of success—Death of one reversioner—Effect—Suit by stranger on behalf of all not maintainable—Agency not coupled with interest—Right transferred is mere right to suit, which is inoperative and invalid. 47 L.W. 492=1938 Mad. 542=(1938) 1 M.L.J. 610. If a tenant is admitted to the tenancy by an agent of the landholder without his knowledge or authority, then it is open to the landholder to disown it. 1942 O.W.N. 473=1942 O.A. 389=1943 Oudh 174.

In the absence of any reference in the correspondence between the parties as to the duration of an agency of a Life Insurance Company, the agency is one terminable on notice. A notice of 3 1/2 months given by the company is inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expenses incurred by the agents. 50 C.W.N. 73=(1945) 2 M.L.J. 496 (P.C.).

SEC. 202: AGENCY COUPLED WITH INTEREST—WHAT IS—WHEN IRREVOCABLE.—Sec. 202 is wide in its terms; but it makes no departure from the English Law; under sec. 202, as under the English Law, some specific connection must be shown between the authority and the interest, and there must also be an agreement, express or implied whereby the authority is given to secure some benefit which the donee is to obtain by reason of the authority. 45 Bom.L.R. 1075=A.I.R. 1944 Bom. 76.

i. "INTEREST"—MEANING.—An agent who is entrusted with goods for sale and entitled to keep for himself as remuneration an excess of the purchase-money over specified rates has not got such an interest as is contemplated by sec. 202. 136 I.C. 878=1932 N. 84. Agency created by an ordinary power-of-attorney for the management of an endowment can be revoked even though the endowment is made for the spiritual benefit of the person creating the endowment and the members of the family including the agent, for such spiritual benefit cannot amount to an interest within the mean-

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly exercised.

#### Illustrations.

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation by principal, or renunciation by agent.

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Notice of revocation or renunciation.

Revocation and renunciation may be expressed or implied.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

#### Illustration.

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

ing of this section. 121 I.C. 598=1930 M. 231. A junior member of Malabar Tarwad is entitled to be maintained out of Tarwad property and so one interested in the rents due to the Tarwad. If he has been given a power-of-attorney to collect the rents his interest in the property being antecedent to his authority, it is "an authority coupled with interest," the termination of which, to the prejudice of the interest, is illegal. (5 C. 895, Ref.). 34 L.W. 786=61 M.L.J. 852. Agency coupled with interest—Assignment of decree—Power of attorney by assignee to authorising agent to execute decree and to take one half of the fruits of execution as remuneration—Agent to expend money and recoup it out of realizations—Revocability. 58 L.W. 479=(1945) 2 M.L.J. 303. Power-of-attorney executed by pensioner in favour of creditor—Authority to agent to draw out pension and to appropriate part towards debt—Agency one complied with interest not revocable. See 6 Mys.L.J. 101=42 Mys. H.C.R. 715.

SEC. 203.—Principal and agent—Authority conferred by two or more persons jointly—Revocation by one—Legality. 23 I.C. 90=18 C.L.J. 621. On this section, see also 24

SEC. 204.—See 112 I.C. 486.

SEC. 205.—Suit for damages for revocation of agency by principal—Damage. 15 S.L.R. 140=1922 S. 25. See also 5 B. 253. An agreement to serve as an agent may be rescinded like any other agreement and an agent is liable for compensation if he renounces the agency without sufficient cause, within the specified period when the agency is to last for any particular period. 31 I.C. 450=9 S.L.R. 77. On this section, see also 119 I.C. 837=1929 A. 87.

SEC. 206.—When there is no express or implied contract that the agency should continue for any fixed period, reasonable notice must be given of the revocation or renunciation of the agency, etc. 58 C. 1153=35 C.W.N. 361=1931 C. 676. Renunciation of agency occurs, when agent abandons his employment or sets up adverse title. 30 C. 609. See also 15 C. 692. Authority of agent—Revocable or irrevocable—Construction of agency agreement—Insurance company—Appointment of chief agent—Commission on premium after termination of agency—Reasonable notice what is. 46 Bom.L.R. 279=1944 Bom. 166.

SEC. 208.—If the authority of an agent

*Illustrations.*

(a) *A* directs *B* to sell goods for him, and agrees to give *B* five per cent. commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B* after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as to his commission.

(b) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs *B* to send the cotton to Madras. *B*, after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B*, the money, with which *B* absconds. *C*'s payment is good as against *A*.

(c) *A* directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes out probate to his will. *B*, after *A*'s death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub-agent's authority.

*Agent's Duty to Principal.*

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place

Agent's duty in conducting principal's business.

where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it,

before registration, but such revocation is not known either to the grantee of the document or to the registering officer the document is not invalidated, although it is registered by the agent after the revocation of his authority. (30 C. 265, Foll.); 151 I.C. 173=1934 R. 104. Where a Burmese Buddhist wife admits that her husband acted as her agent in the first of a series of transactions it is not open to her to assert, in absence of evidence to the contrary, that he did not act as her agent in subsequent transactions unless his authority was revoked expressly to the knowledge of the other parties to the transaction. 1934 R. 341; 35 B. 302.

Sec. 209.—Even after the death of the principal, the agent can enter into transactions necessary to protect the interest of the heirs of the deceased and such authority continues still it is revoked by the heirs. 60 I. C. 739; 3 L.L.J. 265. As to survivorship of agency, see 30 C. 265; 17 C.L.J. 201.

Sec. 211.—An agent who negligently omits to comply with the instructions of his principal is guilty of gross negligence and whether he acts as gratuitous agent or not he is responsible to the principal for any loss caused by that negligence. 134 I.O. 577=1931 L. 302. Neglect of duty does not cease by repetition to be neglect of duty and if there be any doctrine of lulling to sleep, it must depend upon and can only be another way of expressing estoppel or ratification. 1930 P.O. 278. Principal and agent—Negligence—Claim of principal barred by limita-

tion—Liability of agent. 52 I.C. 71. In the absence of custom of trade or express or implied authority of the principal payment to a broker is no payment to the principal. 40 I.C. 799. Principal and agent—Joint property of brothers—Some managing property—Relationship—Duty of manager. 29 I.O. 905. Where an agent has caused loss to the principal by not carrying out his directions, and by supplying goods contrary to his directions, the agent or his legal representatives are liable for the value. 66 I.O. 445. See also 134 I.C. 577=1931 L. 302. As to when nominal damages are awarded, see 20 B. 633. Commission agent transacting business with himself under fictitious name—English and Indian law compared. 37 I.O. 241=10 S.L. R. 86. When a commission agent's transaction with himself involves no opposition between his own interest and his duty to principal, the transaction becomes binding on the principal, though the agent cannot claim commission in such a case. (*Ibid.*) Even under the Indian Law the usage to be binding requires specific pleading and strict proof. (*Ibid.*) As to effect of agent's infringement of principal's instructions, see 86 I.C. 567=1924 L. 332; 134 I.O. 577=1931 L. 302. Commission agent authorised to sell goods at a particular place has no discretion to take the goods to another place for sale. 1927 M.W.N. 578. Right of principal over secret profit made by the agent—Doctrine of tracing. 1927 M.W.N. 118. On this section,

*Illustrations.*

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B*, the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

*Illustrations.*

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss as e.g., by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B*, on credit, without making the proper and usual enquiries as to the solvency of *B*. *B* at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A*, an insurance-broker, employed by *B* to effect an insurance on a ship, omits to say that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B* having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's account.

213. An agent is bound to render proper accounts to his principal on demand.

see also 1929 L. 591; 1929 L. 666; 112 I.C. 642.

**UNDISCLOSED PRINCIPAL.—RIGHT TO PROCEED AGAINST AGENT FOR DAMAGES.**—Although sec. 231 gives to an undisclosed principal an option to proceed for damages against the party contracting with the agent, there is nothing in that section which can be said to debar him from seeking his remedy against the agent under sec. 211, if he can bring his case within the purview of that section. 61 O. 504=152 I.C. 33=1934 C. 721. Where in the case of a contract entered into by an agent for an undisclosed principal, the other contracting party refuses to perform the contract for the reason that the agent has failed to carry out the conditions of a separate contract made with him, sec. 211 is not applicable, and the proper section under which the principal can proceed is under sec. 231 for damages against the other contracting party. 61 O. 504.

**SUB-AGENT.**—If an agent appoints a sub-agent he is bound to exercise the same amount of discretion as an ordinary prudent man would exercise. 129 I.C. 287.

Sec. 212.—See 18 O. 573; 13 C.W.N. 59; 1925 M. 46=47 M.L.J. 312; 43 O.L.J. 479=97 I.C. 200=1926 C. 988. Agent guilty of negligence must make compensation to principal for direct consequences of neglect. 120 I.C. 529=1929 L. 280. A commission agent

who was authorized to realise amounts on behalf of his principal collected as much as he could from a merchant who had dealings with his principal and gave credit for the balance. The merchant became an insolvent subsequently. *Held*, that under the circumstances the agent was not negligent but that he had acted as prudently and wisely on his principal's behalf as he would have done in his own case. 1933 L. 841=149 I.C. 688.

Sec. 218.—A principal is entitled to a final account between himself and the agent on the termination of the agency and the agent can rely upon casual account settled between themselves as being *prima facie* correct. 13 I.C. 642; 1925 L. 100. Agent must support his accounts by proper vouchers. 6 C. 754; 43 C. 248; 52 C. 766=90 I.C. 944. Agent's duty is analogous to that of trustee. 7 C. 637. Where a person employs an agent to do acts for him at a particular place, the legitimate inference is that the contract is to be performed at that place. Sec. 213 of the Contract Act cannot be read as laying down that the agent should render accounts at the principal's place. The principal has to demand accounts at the agent's place of business. A suit by a principal against his agent for accounts should therefore be instituted at a Court having jurisdiction over the place of business of the agent. 1940 Mad. 588=(1940) 1 M.L.J. 558. The mere fact

Agent's duty to communicate with principal.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. If an agent deals on his own account in the business of the agency,

that the principal wrote the word 'seen' on the account book does not imply that the agent had rendered account and the principal had satisfied himself of the correctness of the entries. 1934 A.L.J. 453=1934 A. 553. There is no corresponding obligation to account on the part of the principal. 7 C. 654; 1925 L. 100. While the principal is under no statutory obligation to render accounts to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract. The right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. (60 P.R. 1899; 1925 L. 100 and 1927 L. 701, Ref.). Where the plaintiffs, insurance agents, were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through them. *Held*, as the plaintiff's cannot know which of these policies have lapsed, matured or been forfeited they are entitled to call on the defendants for rendition of accounts as this is the only relief which will enable the plaintiffs to satisfactorily assert their rights. 144 I.C. 505=1933 L. 483. Accounts, suit for—Legal representative of agent—Liability to account—Onus. 47 I.C. 371=28 C.L.J. 492. The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representative from all liability to the principal. 49 I.C. 371. Rendering an account of his agency and account for money received by him, is not confined merely by rendering of accounts of what has been done with the money, but includes also the payment of any balance which might be found due upon taking accounts. 31 C.W.N. 591=40 I.C. 359=25 C.L.J. 335. The obligation of an agent towards his principal does not terminate merely in submission of account paper. 43 C. 248=19 C.W.N. 1070=15 C.W.N. 930=11 I.C. 161. He is bound to explain those papers and if on accounts taken it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. (*Ibid.*) The liability to render an account cannot be enforced against the legal representatives of an agent. The liability is personal, and the legal representatives need not render account in the same sense in which the agent himself might have been called upon to do. 17 C.W.N. 5=16 I.C. 742=16 C.L.J. 282. See also 47 I.C. 371=28 C.L.J. 492. The remedy of the principal after the death of his agent is to sue the representatives for any loss he may have suffered by the negligence, misconduct, misfeasance or malfeasance of his agent. 17 C.W.N. 5=16 I.C. 742. Agent's heirs—Liability to account. 16 C.W.N. 1042=16 I.

C. 414=16 C.L.J. 288. The audit of a company's accounts does not preclude it from calling upon the agents for rendition, though it closes the account between the shareholders and the directorate in the absence of fraud or mistake in connection with the audit. 42 I. C. 375=86 P.L.R. 1917. Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently the agent must account for the money. 62 I.C. 503=13 L.W. 366. Suit by principal against agent for moneys unaccounted for is maintainable. 44 M. 214=39 M.L.J. 586. An agent is bound to pay interest on the sum of money retained by him and due to the principal from the date of demand therefor by the principal. 33 M.L.J. 468=6 L.W. 520=42 I.C. 219. An agent by retaining money due to the principal cannot be held to have committed a fraud. 33 M.L.J. 468. A secretary of a fraud is only an agent and not a trustee though he himself is a director and recovers amounts due to the fund. 33 M.L.J. 468. Where the defendant has been let into possession of property as agent of the plaintiff, it is not open to the defendant in a suit for accounts against him to challenge the title of the plaintiff (his principal) to receive the moneys which have been realised by the defendant who was appointed as the agent for this purpose by the plaintiff. The mere fact that the defendant is under a suspicion and is working under the supervision of other agents deputed by the principal would not relieve him from liability to account. An agent under suspicion or under supervision is still an agent and must be held liable to account on proof that *prima facie* he has made realisations himself even in the period of suspicion or while subject to supervision. 196 I.C. 641=1941 P.W.N. 565=1942 Pat. 108.

AGENT OF SEVERAL PRINCIPALS—LIABILITY TO ACCOUNT.—When an agent is appointed by more than one principal he is liable to them jointly. He is not bound to account to them separately to any one of them and if he does so, he is not thereby absolved from his liability to others. 145 I.C. 178=1933 L. 93.

SEC. 214.—Principle of section. 105 I.C. 836=4 O.W.N. 1061.

An agent authorized to buy and sell at the best rates cannot defer carrying out the order till communicating the rate of the day to the principal. 50 I.C. 146=12 S.L.R. 93. Commission agent authorized to sell goods at a particular place has no discretion to take them to another place for sale. 1927 M.W.N. 579.

SEC. 215.—Section is only an enabling one see 34 B. 292; 15 M. 889; 43 M.L.J. 444. Section based on principle that no one can have an interest against his duty. 7 Bom. H.C.R. 90; 29 B. 730; 1927 S. 195. An agent stands in a fiduciary relation towards



Right of principal when agent deals on his own account in business of agency without principal's consent.

without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly

concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

#### *Illustrations.*

(a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of the existence of the mine. *A* on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

216. If an agent, without the knowledge of principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

#### *Illustration.*

*A* directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

his principal. He cannot enter into any transaction in which his personal interest conflicts with his duty towards his principal. He cannot make any secret profit for himself while selling his principal's property or making settlement for damages on behalf of his principal. 9 L. 7. When an agent uses his debt due to his principal to obtain property for himself, he realizes that debt on the principal's behalf and is liable to account for the same. 25 I.C. 88=12 A.L.J. 463. Dealing by agent in the business of the agency without the knowledge of the principal—Contract is voidable at the option of principal—English and Indian law. 43 M. L.J. 444; 45 M. 1005=1922 M. 497. See also 42 I.C. 357 (M.); 102 I.C. 366=1927 S. 195; 7 R. 61; 22 S.L.R. 409. Even apart from sec. 215 the dishonest concealment by the plaintiff of the identity of the contracting party constitutes fraud and entitles the defendants to avoid the contract. 43 M. L.J. 444=45 M. 1005. Where the plaintiff's company were managing agents of the defendant's company to which the former supplied goods, the plaintiff's company was held not entitled to make any profits on the goods supplied to their principal, the defendant company. 26 I.C. 478=8 L.B.R. 102. Breach of duty by agent would entail loss of his remuneration. 26 B. 689. As to liability of executor, see 22 O. 14.

AGENT DEALING AS PRINCIPAL.—An agent who, while acting as an agent, himself deals as a principal without the knowledge of the other party is acting contrary to the spirit of secs. 211 and 214. If there be a question upon whom the burden of proof must lie, that burden ought to be laid upon the party who has to justify an apparent deviation from the ordinary rule by which he ought to be

guided. Therefore the burden of proving that the transaction is not disadvantageous to the principal lies upon the agent. A transaction which necessarily puts the agent's duty in conflict with the interest of his principal must be presumed to be disadvantageous to a principal who is not informed of the fact. 1935 S. 38.

SEC. 216: SCOPE.—Sec. 216 in effect imposes a penalty upon an agent, who acts improperly by converting himself into a principal, without making the disclosure, and the operation of the section does not depend upon the principal having suffered any loss. This liability of the agent to account for the profits is not limited to the case where the agent acquires the goods after the date of the agency. The agent is liable even if he acquired the goods in question before the date of the agency. Where the goods dealt with by the agent are goods having a ready value in the market, the profit which the agent makes out of the transaction must be the difference between the price at which he sells the goods to the principal, and the market value at that date. The true principle is that the profit made by the agent is the difference between the price at which he supplies the principal, and the true value of the goods at that date; and where goods have a market value, that market value must be taken as the true value. Where goods had no market value, the price at which the agent had himself brought shortly before the date of the transaction could be taken to represent the value. But the difference between the price at which the agent bought and the price at which he sold to the principal is not the measure of the profit which he makes by selling his own goods since he may have made a legitimate profit on his original purchase



217. An agent may retain out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for

Agent's right of retainer out of sums received on principal's account.

acting as agent.

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

219. In the absence of any special contract, payment for the performance of

When agent's remuneration becomes due.

any act is not due to the agent until the completion of such Act; but an agent may detain moneys received by him on account of goods sold, although the whole

of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

before any question of agency arose. 150 I.C. 467=36 Bom.L.R. 68=1934 B. 86. It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them. He should not place himself in a position in which his interests might be adverse to that of the principal. 41 A. 635=52 I.C. 373. Secret profits made by agent, right of principal over—Doctrine of tracing. See 1927 M.W.N. 118. No broker, unless specially authorized, is entitled to get commission from both sides. 146 I.C. 505=1933 R. 184. A principal can have a decree for an account of profits of property outside British India purchased by an agent in execution of a mortgage decree passed in favour of the principal; but a principal is not entitled to a mandatory injunction directing the agent to execute a reconveyance to the principal. 31 I.C. 216=29 M.L.J. 581. Agent's duty to carry out a sale for a particular sum—Acceptance by agent of secret commission from vendor—Failure to communicate with principal—Effect of. 22 I.C. 597=1 L.W. 181. See also 34 I.C. 760=30 M.L.J. 497. Suit for accounts and suit for damages—Difference between. 38 M.L.T. 256 (H.C.). Agency for sale of sugar—Agent depositing moneys with principal—Insolvency of principal—Right of agent to set-off. 15 L.W. 201 (P.C.). See also 133 I.C. 881=32 P.L.R. 819. Claims and cross-claims—Business of principal—Company transferred to another company—Business conducted as before—Set-off. 24 C.W.N. 1004 (P.C.). Agent is entitled to a lien or retainer upon moneys of his principal which are in his hands, for all expenses properly incurred. In cases of exercise of lien or retainer no question of time-limit arises at all. 1923 R. 84 (39 M. 365, Foll.). Pledger's lien—Entrustment of shares for sale in private capacity—Appropriation for fees—Consent of client. 5 S.L.R. 222=15 I.C. 785=13 Cr.L.J. 513. He stands in fiduciary relation to his client and it is for him to show that the client consented to the appropriation without undue influence on his part. 5 S.L.R. 222=15 I.C. 785=13 Cr.L.J. 513. (32 B. 37 at 44, 45, Ref.).

SEC. 218.—See 30 C. 1011; 25 A. 639; 19 M.L.J. 759; 30 M.L.J. 497; 34 I.C. 760=30 Bom.L.R. 486.

SEC. 219: BROKERAGE—WHEN BECOMES DUE.—The broker's duty is simply to bring the parties together, to arrange a transaction and to get the contract completed. The performance of the contract is a matter between the promisor and promisee. The due fulfilment of conditions is not the *sine qua non* for the earning of the commission. 1935 Pesh. 56=156 I.C. 131. See also 24 Bom.L.R. 847=1922 R. 433. In the absence of a contract, the ordinary rule is broker's commission in respect of a sale of land is payable only on the completion of a deed of conveyance; the broker's duty is to introduce a person willing and able to complete the purchase. Brokerage is not payable immediately; a mere contract of sale is brought about by the broker. I.L.R. (1944) Kar. 42=A.I.R. 1944 Sind 168. Where a contract of agency between an Insurance Company and an insurance agent says that the agent is to place with the Insurance Company "completed business" of specified amounts in order to be entitled to commission, the expression "completed business" being explained in the contract itself as meaning such business as is accepted by the company and on which the first year's premium has been received in full, "completed business" excludes business that might come to nothing from the point of view of the company, and the requirement that the agent is to place with the company "completed business" does not preclude commission in those cases in which such business is substantially due to the work of the agent, though its technical completion such as the signing of the policy and so on may be actually brought by another person and not by the agent. If it be found that the policy was the result of sound canvassing done by the agent, he would be entitled to commission on it, although he may not have brought about the signing, etc., of the policy himself. 201 I.C. 289=23 Pat.L.T. 318. When an agent is employed for commission to sell certain property at a cer-

Agent not entitled to remuneration for business misconducted. 220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

*Illustrations.*

(a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on goods security, but lays out of 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and he must make good the 2,000 rupees to B.

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

221. In the absence of any contract to the contrary, an agent is entitled to

tain price and the agent succeeds in lending a purchaser at that price but the principal declines to sell, the agent is entitled to reasonable remuneration for his work and labour. 14 I.C. 981=15 O.L.J. 312; 56 C. 262=33 C.W.N. 179. See also 1930 A. 545. So also where sale goes of owing to caprice or default of vendor. 8 M.L.T. 40. See also 20 B. 124. Where a person is proved to have acted as a broker, he is entitled to his commission; and even if he fails to prove the rate of commission agreed upon, a reasonable amount ought to be awarded to him as such commission. 146 I.C. 761=34 P.L.R. 1030=1933 L. 784. Broker—Contract to procure loan—Loan procured but on conditions—Agent, if entitled to commission, 11 I.C. 820=15 C.L.J. 40=16 C.W.N. 753. When the contract provides for the agent's commission on payment for the goods by the purchasers, the agent is not entitled to remuneration on cancelled contracts, and the doctrine of *quantum meruit* cannot be invoked. 29 Bom.L.R. 375=1927 B. 225 [(1923) 1 K.B. 110. Foll.]

In contract between a house-owner and a broker for finding a purchaser, the broker is entitled to his fee when the sale has actually taken place in favour of the purchaser, upon his finding the purchaser, though the negotiations or completion of the sale between the buyer and seller may not have taken place through his direct intervention. The test is whether the vendor and the purchaser were brought together by the agent acting in the matter either for one or the other or for both. Applicability of principle of *quantum meruit* considered. 1930 A.L.J. 673=124 I.C. 35=1930 A. 545.

Construction of Agency—Commission agent—Introduction of buyer to seller resulting in contract for sale and purchase—Undertaking to pay commission "after satisfactory expiry and conclusion of the business"—Meaning of—Right to commission—When arises. 1944 Mad. 546=(1944) 2 M.L.J. 122=I. L. R. (1945) Mad. 338. See also 1944 Sind 168.

SEC. 220.—There is no warrant for holding that an agent's claim to remuneration is not affected by his misconduct unless it is also shown that the principal has incurred loss thereby. Nor is it correct to hold that even where loss had been caused to the principal it would be sufficient if the agent is

directed to make good the loss; the fact that the agent makes good the loss would not entitle him to his full remuneration. To so hold would be to ignore the provisions of sec. 220 of the Contract Act. Payment of damages caused by the misconduct of the agent is in addition to the forfeiture of commission or remuneration and the forfeiture of commission is the result of misconduct and not of loss arising from misconduct. A principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission. If the agent does not perform his appropriate duties, or if he is guilty of gross negligence or gross misconduct, or gross unskilfulness in the business of his agency, he would not only become liable to his principal for any damages which he may sustain thereby, but also forfeit all his commissions. 1940 Mad. 299=1939 M.W.N. 1046. It is misconduct on an agent's part to deal on his own account in the business of the agency without obtaining the consent of his principal and acquainting him with all material circumstances. An agent is, therefore, not entitled under sec. 220 to any remuneration in respect of a contract of sale in which he himself is the undisclosed principal although purporting to act as agent. The fact that the principal did not repudiate the contract although he knew before performance that the agent was in fact the buyer is immaterial, as the principal cannot thereby be held to have acknowledged the claims of the agent both as an agent and purchaser. Sec. 63 is inapplicable to such a case as owing to the limitations imposed by sec. 215 on the principal's right to repudiate, there could be no question of his electing to accept a satisfaction from the agent other than the performance of the contract according to its terms. 41 C.W.N. 460=I.L.R. (1937) 1 Cal. 757=169 I.O. 827.

SEC. 221: AGENT'S LIEN.—Property held by an agent for a special purpose cannot be subjected to a lien the existence of which is inconsistent with such purpose. In order that an agent may have a valid lien on property in his hands, the following conditions *inter alia* must be satisfied: (1) there should be no arrangement inconsistent with the retention of such property in the exercise of his lien: (2) the property on which the right to lien is claimed should belong to the

Agent's lien on principal's property.

disbursements and services in respect of the same has been paid or accounted for to him.

*Principal's Duty to Agent.*

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

*Illustrations.*

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Agent to be indemnified against consequences of act done in good faith.

*Illustrations.*

(a) *A*, a decree-holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods,

principal to the knowledge of the agent, (3) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent; and (4) the agent should be holding the property for and on behalf of his principal and not for and on account of any known third party. 1933 S. 235. See 31 M. 123; 89 I.C. 409.

SEC. 222.—Sec. 222 is based on the principle that every agent has a right against his principal founded upon an implied contract to be indemnified against all losses and liabilities and to reimburse all expenses incurred by him in the exercise of his authority. Where an agent by contracting renders himself liable for the price of goods bought on behalf of his principal, the property in the goods as between the principal and agent vests in the agent and does not pass to the principal until he pays for the goods and the agent has the same rights with regard to the disposal of the goods and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. If therefore the principal refuses to pay, the agent is entitled to re-sell the goods and hold the principal liable for any deficiency, which would be the measure of the loss sustained by the agent in the transaction, in respect of which he is entitled to be indemnified and reimbursed. 140 I.C. 624=34 Bom.L.R. 1268=1932 B. 593. Under sec. 222 before an agent can successfully maintain any claim for indemnity against his principal, he must establish the fact that he has actually incurred a loss. 1935 S. 38. In the absence of a stipulation, money spent by a commission agent during a business trip on boarding and

lodging cannot be considered to be incidental to carrying on the business of the principal who is not bound to pay the bill. 19 I.C. 248=206 P.L.R. 1913. See also 31 Bom. L.R. 508. An agent can recover moneys paid out by him on behalf of his principal even on wagering contracts and a set-off or adjustment in accounts of third parties should be treated on the same footing as cash payments. (79 P.R. 1908 and 1923 L. 420, Foll.) 138 I.C. 241=33 P.L.R. 450=1932 L. 356.

Where an agent enters into a contract with another person on behalf of his principal, and being required to pay the amount of the loss arising out of the transaction executes a sargat in favour of the other party, undertaking to make good the loss, he is entitled to recover the said loss from the principal under sec. 222, Contract Act. The execution of sargat by the agent in favour of the other party is as good as a cash payment to him. 31 N.L.R. (Supp.) 154=161 I.C. 787=1936 N. 37 Contract C.I.F.—Contract to ship goods on account and risk of buyer—Outbreak of war—Right of commission agent. 35 M.L.J. 184=41 M. 1060. Agreement to pay single sum for remuneration—Remuneration, if can be split up. 22 I.C. 597=1 L.W. 181.

SEC. 223.—The liability of a principal and agent is not joint but alternative. A person dealing with a principal through his agent may sue either or he may sue both of them alternatively, but he cannot obtain judgment against both jointly. 49 M. 900=97 I.C. 475=1926 M. 1213=51 M.L.J. 311. As to decree to be passed in a suit against both agent and principal, see 1926 O. 41. An

and is used by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

#### Illustrations.

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the Act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

#### Illustration.

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

#### Effect of agency on contract with third persons.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same

Enforcement and consequences of agent's contracts.

manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

agent, on general grounds is entitled to reimbursement and indemnity by his principal but only on the condition that he has acted within the scope of his directions. 59 I.O. 971 = 3 L.L.J. 141; 23 P.R. 1915, *infra*. Suit to enforce that right is governed by Art. 83 of the Limitation Act. 26 I.O. 145 = 23 P.R. 1915. If an agent exercises reasonable skill and diligence, he is not responsible to the principal for an error of judgment which causes loss to the principal. 31 I.O. 450 = 9 S.L.R. 77.

SECS. 223 AND 224.—Money sent by agent for unlawful purposes on authority of principal—Right to recover. 83 I.O. 980; 1926 S. 40 = 20 S.L.R. 100. Act, though unlawful, not criminal, effect of. *See* 20 S.L.R. 100 = 1926 S. 40.

SEC. 226.—Agent acting beyond scope of authority—Principal's liability. 35 I. C. 208 = 14 A.L.J. 601. The plaintiff took a contract from the Military authorities for the supply of mutton, and paid a deposit. The deposit bank became insolvent and the plaintiff sued the Military authorities for recovery of the balance due after deducting dividend. *Held*, that the bank was the agent of the defendants and that the latter was liable. 133 I.C. 881 = 32 P.L.R. 819. *See also* 15 L.W. 201 (P.O.). As a general rule, the agent has no authority to borrow money on account of his principal so as to render latter liable to the lender unless the principal

has given express authority or previous sanction or has subsequently adopted and ratified the loan. 36 I.O. 968 = 10 S.L.R. 72. If an agent is acting in collusion with a third party without the principal's consent and the act is detrimental to the interest of the principal, the latter is not bound. 56 I.O. 631. Payment to an agent is payment to the principal. 13 I.O. 955 = 36 P.L.R. 1912. An agent cannot sue or be sued in respect of a sale to him on behalf of the principal. 20 I.O. 844 = 25 M.L.J. 32. Where an agent signs a pro-note for a business belonging to a minor, the holder must be fixed with notice of the contents of the power-of-attorney under which the agent acts and of the extent of his authority and of the fact that the business belonged to a minor. 21 M.L.J. 620 = 35 M. 692 = 14 I.O. 389. Agent—Power to sell property—Recital of authority unnecessary. 23 O.O. 353 = 59 I.C. 596. One of several joint-debtors cannot be an agent of their creditor so far as joint-debtors are concerned and a payment to that debtor is not a payment to the creditor. 11 I.O. 864 = 4 Bur.L.T. 197. Where an agent fraudulently, in furtherance of his own interest, and contrary to instruction enters into a contract the principal will be bound only if third persons dealing with the agent have acted in good faith. 36 I.O. 968 = 10 S.L.R. 72; 45 I.O. 856. The onus of proving good faith lies on such third persons claiming against the principal. 36 I.O. 968 = 10 S.L.R. 72. (9 Bom.L.R. 388, *Ref.*)

*Illustrations.*

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set-off against that claim a debt due to himself from *B*.

(b) *A*, being *B*'s agent with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

*Illustration.*

*A*, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

*Illustration.*

*A* authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

*Illustration.*

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of this treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of the fact. In spite of the knowledge of his agent, *B* may set-off against price of the goods a debt owing to him from *C*.

230. In the absence of any contract to that effect,

SEC. 227.—Where an agent authorized to stand surety for one person stands surety for two persons in addition, outside the scope of his authority, the unauthorised act of the agent is clearly separable from his act in standing surety for the person authorized and the principal's liability will be restricted to that person only under sec. 277. 1937 Rang. 499. Agent acting in the course of the business—Principal liable to third parties suffering damage. 43 A. 623=19 A.L.J. 654.

SEC. 228.—For expenses of an appeal the authorised agent of the Mahant of a math borrowed Rs. 400 from the plaintiff for which he gave a hand note. The money was utilised for the purpose of the appeal and the Mahant himself took an active part in the prosecution of that litigation. It was found that the litigation had nothing to do with the math but was instituted purely to satisfy the personal grudge of the Mahant. *Held*, that the Mahant was personally liable for the debts incurred by his authorised agent on his behalf; the signature on the hand-note being that of an agent for a disclosed prin-

cipal and the agency having been previously authorised and also subsequently ratified, the agent was not liable on the handnote. 149 I.C. 898=1934 P. 435. On the section, see also 10 B. H. C. R. 319; 8 B.H. C.R. 19.

SEC. 229.—Principle of section. 25 A. 1; 28 I.C. 488=59 P.L.R. 1915; 119 I.C. 754=1929 L. 500. Constructive notice of a fact which the agent knows cannot be imputed to the principal when it was not to the interest of the agent to disclose the fact to the principal and which the agent did not in fact disclose. See 46 I.A. 250=44 B. 139=24 C.W.N. 469=54 I.C. 121 (P.O.). See also 56 C. 367=119 I.C. 23=1929 C. 497; 12 B.H.C.R. 262. Knowledge of agent prior to agency would not bind the principal 89 I.C. 625=1925 N. 398. If the agent, acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge. 26 B. 564=14 I.O. 353.

SEC. 230.—Presumption under the sec-

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

tion, when arises. *See* 25 N.L.R. 81=116 I.C. 669=1929 N. 170. The presumption arising under sec. 230 (1) of the Contract Act that an agent can personally enforce the contract entered into through him on behalf of a foreign principal is one that can be rebutted by evidence or by the circumstances of the case. It is in fact rebutted when the foreign principal is, in writing, made the contracting party and the contract is made directly in his name. 20 Mys.L.J. 194. The question whether an agent, who has made a contract on behalf of his principal, is to be taken to have contracted personally, or merely on behalf of the principal, depends on the intention of the parties, to be deduced from the terms of the particular contract and the surrounding circumstances. 73 C.L.J. 356=1941 Cal. 643. Under sec. 230 of the Contract Act, an agent is not entitled to sue the purchaser personally when the order is not placed (through him, even though he has by a separate contract made with the principal undertaken to pay the principal for all goods supplied by him and not paid for by the purchaser. Nor is the agent entitled to claim the benefit of sec. 69 as he is not a person interested in the payment of the price to the principal. 39 P.L.R. 457=1937 Lah. 607. Agent of foreign state, personal liability of. *See* 113 I.C. 345. Personal liability of agent acting for foreign principal. *See* 32 Bom. L.R. 1336. Where the defendant as manager of the Banaili Raj got some work done by the plaintiff and the name of the Raja was not disclosed, there is no personal liability against the defendant for the work done by him for the Raj. 24 I.C. 415. *See also* 89 I.C. 380=1925 O. 641. The mere fact that a committee is not a registered body and has no independent existence in law, cannot make the servants of the committee personally liable. Although the Association as such cannot be sued, its members will be jointly liable. (14 P.R. 1891, Rel. on.) 145 I.C. 178=1933 L. 93. Evidence of custom or usage incidental to contract. 35 I.C. 3=20 C.W.N. 365. An agent can perform acts on behalf of his principal either disclosing or concealing the fact that he is an agent. There is nothing in sec. 92, Evidence Act, to prevent an agent in a suit for compensation from his principal from proving that contracts entered into by him were on the principal's behalf. The equitable right of the agent to be indemnified cannot however be so exercised as to make a profit out of the indemnity. 26 S.L.R. 85. A broker who gives to the buyer a note in the form "brought" by your order and for your account from our principals" is not more than an intermediary and is not an agent of the undisclosed principal for sale to make him liable under the section. 19 O. W.N. 628=23 C. 1050. Auctioneer is different from an ordinary agent, and can sue

in his name for price of goods sold at auction. 20 S.L.R. 287=92 I.C. 394=1926 S. 6. *See also* 1941 A.W.R. (H.C.) 365. An agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. 73 I.C. 885=1923 L. 296. The presumption in sec. 230 (1) is rebuttable. 67 I.C. 157. The mere fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting party looked to him alone for performance. 67 I.C. 157. *See also* 65 I.C. 473; 32 Bom.L.R. 1336. To make an agent personally liable under a contract it must be clearly established that the agent had not disclosed the name of his principal. 65 I.C. 473. An agent who describes himself as such, may still be contracting in his personal capacity but failure to specify his capacity, as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary. 65 I.C. 468=2 L.L.J. 374. When an agent enters into a contract he may sue thereon in his own name, if he has an interest in the contract. 55 I.C. 992 (24 M. 130, foll.) 27 Bom.L.R. 1168=1925 B. 547. Agent receiving goods on behalf of principal—Agent's liability for price. 39 I.C. 793=143 P.L.R. 1917. *See also* 24 I.C. 1007; 27 M. 315. Ordinarily the words "Pacca Arhtia" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can therefore be no question of the application of sec. 230 of the Contract Act in his case. 177 I.C. 985=1938 Lah. 253. Hindu joint family business—Loan advanced by manager—Suit by manager alone without stating that suit is on behalf of family—Maintainability. *See* (1938) 1 M.L.J. 526. On a contract signed by the agent without disclosing his principal the agent is personally liable. Though an agent has authority to borrow money for the business of the firm, yet if the power-of-attorney expressly prohibits the agent from borrowing money, the principal is not liable. The fact that the money borrowed was applied for the purposes of the firm may give rise to a cause of action between the principal and the agent *inter se* but would not enable the third party to sue the principal on that account because as between them there is no privity of contract. (2 L. 253, Dist.; 14 C.P.L.R. 22, Foll.) 27 N.L.R. 324. *See also* 130 I.C. 548=1931 S. 4. An agent is not entitled to personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract. 52 I.C. 179. *See also* 119 I.C. 781=1929 L. 590. A person contracting with an agent for an undisclosed principal can sue either the agent or the principal or both. 59 I.C. 965; 2



Presumption of contract to  
contrary.

Such a contract shall be presumed to exist in  
the following cases :—

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad ;

(2) where the agent does not disclose the name of his principal ;

(3) where the principal, though disclosed, cannot be sued.

231. If an agent makes a contract with a person who neither knows, nor has

L.L.J. 374=65 I.C. 468; 39 C. 802=18 C. W.N. 263. Where the plaintiff merely discloses a contract between the plaintiffs and the agent of a disclosed principal, the agent cannot be sued. If there is a matter of doubt as to the liability of the agent or the principal in a contract the usual course is to sue both defendants alleging that the principal was the principal and in the alternative suing the agent for breach of the warranty of authority. 150 I.C. 671=1934 P. 269. On this section, see also 30 L.W. 1028=1929 P.C. 254=57 M. L. J. 628 (P. C.). Under sec. 230 of Contract Act, if an agent acts on behalf of his principal, the principal being disclosed, a creditor who lends money to the agent is entitled to sue the principal. But the law under the Negotiable Instruments Act, is an exception to that rule. Sec. 28 of the Negotiable Instruments Act requires that to make the principal liable it must be clearly indicated on the face of the instrument that the agent is acting on behalf of such principal. Where a promissory note is executed by the agent alone, and there is no suggestion of any indication on the face of the note that the principal is the real debtor, the creditor, in order to bind the principal and make him liable, must sue on the loan and not on the instrument. But when the suit is based on the note, and the agent neither alleges nor proves any facts which would entitle him to take advantage of the exception under sec. 28 of the Negotiable Instruments Act, e.g., inducement by the plaintiff to sign the bill on the footing that he (the agent) would not be liable, the agent cannot escape liability. 18 Pat.L. T. 337=1937 P.W.N. 344=1937 Pat. 428, on this section, see also 1939 Lah. 825. Where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name, the agent being in such a case virtually a principal to the extent of his interest in the contract. 1938 Lah. 673. Where a judgment-debtor against whom the decree-holder had obtained six decrees paid some money to the decree-holder's pleader in part payment of the decrees and had the execution stayed for a certain period, but on failure of the judgment-debtor to pay the decretal dues, in full within that period writs of attachment were executed against him resulting in payment of five of the decrees in full, and the pleader thereafter certified in Court the money paid to him as having satisfied the sixth decree in which the judgment-debtor was only one of two judgment-debtors, in a suit by the judgment-debtor against the pleader for the recovery

of the amount paid to him. *Held*, (i) that the money having been paid to the pleader as agent on behalf of the principal, *vis.*, decree-holder, the suit was not maintainable against the pleader alone; (ii) that the money having been paid in part payment of the decrees, the pleader did not act wrongly in appropriating it to the unsatisfied decree. 42 C.W.N. 1263. Where an organising agent of a company is allowed to appoint selling agents and receive deposits from them and appropriate those deposits against the deposits made by him with the company, when he receives such a deposit from a selling agent, he acts as agent of the company and when he informs the company that he has retained this amount as he was entitled to and asks the company to send a receipt for that amount and the company agrees to do so, that is equivalent to an acceptance by the company of the deposit. On the insolvency of the company, the selling agent cannot sue the organising agent for the recovery of the deposit made. 1942 N.L.J. 515. Where the kamdar of an Istimrardar under disability borrowed money on behalf of his principal, it was held that under the Ajmer Taluqdar's Loan Regulation there was no bar to a suit where the object for the advancement of the loan was nowhere mentioned. It was held further that sec. 230 must be held to apply to the time when the liability was incurred and not to the time when the suit was instituted. 1941 A.M.L.J. 126.

SEC. 230 (3): APPLICABILITY—UNREGISTERED UNION.—Where a member of an unregistered union of the employees of a firm signs an agreement for and on behalf of the union, as its agent the union cannot be sued on such agreement or contract, and therefore the member who signs the contract can be proceeded against by virtue of sec. 230 (3). The other members of the union cannot be sued and the procedure under O. 1, r. 8, is not applicable to the case. 56 L.W. 325=A.I.R. 1943 Mad. 530=(1943) 1 M.L.J. 426.

SEC. 231.—Under sec. 231 a principal can, as against the agent claim the full benefit of the contract entered by the agent in his own name, and as against the party contracting with the agent, the principal is bound by the equities arising between the agent and the contracting party. 26 I.C. 832=27 M.L.J. 501 (3 I.C. 801, *Ref. to*). See also 40 C. 335; 10 Bom.L.R. 306 (Partners). Where in the case of a contract entered into by an agent for an undisclosed principal, the contracting party refuses to perform the contract for the reasons that the agent has failed to carry out the conditions of a separate



Rights of parties to a contract made by agent not disclosed.

reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the

agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is

Performance of contract with agent supposed to be principal.

an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between

the agent and the other party to the contract.

*Illustration.*

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

Right of person dealing with agent personally liable.

233. In cases where the agent is personally liable a person dealing with him may hold either him or his principal, or both of them liable.

*Illustration.*

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequences of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer

Liability of pretended agent.

does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

rate contract made with him, sec. 211 of the Contract Act is not applicable, and the proper section under which the principal can proceed is under sec. 231 for damages against the other contracting party. 61 C. 504=152 I.C. 33=1934 C. 721. Although sec. 231 of the Contract Act gives to an undisclosed principal an option to proceed for damages against the party contracting with the agent, there is nothing to debar him from seeking his remedy against the agent under sec. 211, if he can bring his case within the purview of that section. 61 C. 504=152 I.C. 33=1934 C. 721. Where a railway receipt for goods consigned for transit is in the name of an agent, the real owner is entitled to sue for their value, if the goods are lost. 92 I.C. 1007. An agent contracting in his own name without mentioning the agency can sue and be sued upon the contract. 26 I.C. 822=27 M.L.J. 501. See also 35 M. 692=21 M.L.J. 620; 1925 C. 29; 46 C.L.J. 362.

Sec. 232.—See 4 B. 447.

Sec. 233.—Section gives the party who is dealing with an agent who is personally liable a double form of election. He can sue both the principal and agent jointly or sue one of them. If he sues one, a suit

against the other will be barred. 40 I.C. 194=19 Bom.L.R. 370. The liability of a principal and agent is not joint but alternative. A person dealing with a principal through his agent may at his election sue either, or he may sue both of them alternatively in a case where he is not sure against whom his remedy lies but he cannot get judgment against both of them jointly, as that would turn a liability which is mutually exclusive into a joint liability. (51 M.L.J. 311, Foll.) 10 Mys.L.J. 284. See also 39 C.W.N. 461. Sec. 233 enacts substantive law and not adjective law defining procedure by which the liability may be enforced. 40 I.C. 194=19 Bom.L.R. 370. See also 31 M. 45; 18 C. 31; 90 I.C. 487. In cases where the agent is personally liable the law allows a plaintiff to sue both the principal and agent and to get judgment against both of them jointly for the amount sued for. I.L.R. (1939) Mad. 282=49 L.W. 343=1939 Mad. 520=(1939) 1 M. L.J. 509.

Sec. 234.—See 4 B. 477; 6 B. 326; 9 A. 681; 7 M. 392; 2 A. 307.

Sec. 235.—The basis of an action under sec. 235 is the implied warranty by the professing agent that he had the authority to

Person falsely contracting as agent not entitled to performance.

### 237. When an agent

Liability of principal inducing belief that agent's unauthorized acts were authorized.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

#### Illustrations.

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C*, being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

### 238. Misrepresentations made, or frauds committed, by agents acting in the

Effect, on agreement, of misrepresentation or fraud by agent.

same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

act. The measure of damages must accordingly in substance be what benefit the other party would have had from the contract if the representation that he was the authorised agent had been true. 42 C.W.N. 116—I.L.R. (1938) 1 Cal. 463=1938 Cal. 151. Where a Mahomedan son, who is not the authorised agent of his father, by mortgaging his father's land holds himself out to be an agent. Sec. 235 of the Act, and not sec. 230, applies and the limitation for a suit for compensation starts from the date on which the father obtains the decree in a suit for possession of the mortgaged property. 151 I.C. 58=1934 Pesh. 49. Applicability of section. See 49 C.L.J. 191. Schoolmaster appointed by Secretary of School Committee—Services dispensed with—Reasonable notice—Three months' pay in lieu of. See 49 C.L.J. 191.

Agent untruly representing his authority—Acting beyond his scope—Liability of. 13 I.C. 94=34 A. 168. See also 8 M.L.T. 353. Liability of agent when principal repudiates. 1924 O. 184=72 I.C. 1011.

SEC. 236: SCOPE OF SECTION.—Sec. 236 is not restricted to cases where the agent purports to act for a named principal. If a person purports to act an agent for an undisclosed principal and there is no undisclosed principal in fact, sec. 236 applies and he cannot sue on the contract. (34 C. 623, Bel. on.) 1933 S. 207. Sec. 236 does not enact that the contract in circumstances mentioned in that section is void; it provides that the alleged agent cannot require its performance. It follows that it is a voidable contract. So where *B* signed an indent in favour of *A* whom he knew to be only an agent and the indent contained a clause providing reference of disputes to arbitration, in pursuance of which a reference was subsequently made, and an arbitrator was appointed, *held*, that though the contract was voidable at the option of *B*, having treated it as valid and taken the chance of an award in

his favour, he was estopped from avoiding the contract and objecting to the reference. 1933 S. 207. A person with whom a contract is made as an agent when he is not so, cannot sue under sec. 236. 39 C. 802=18 C.W.N. 263. See also 34 C. 628.

SEC. 237.—See 18 Bom.L.R. 317; 6 O.W.N. 229. Sec. 237 has no application unless the relationship of principal and agent is proved to exist between the parties. If illus. (b) to that section should come into operation, the person handling over the negotiable instrument must be a principal and the person who receives it must be an agent. Where a wife hands over certain shares to her husband for safe custody, the husband can in no sense be said to be the agent of the wife, and if the husband pledges them with a bank, without having any authority to do so, sec. 237 cannot avail the bank in order to entitle the bank to enforce its charge against the shares. A custodian of goods for safe custody is a bailee of the goods and not an agent of the true owner for the purpose of dealing with the goods. 1937 A.L.J. 130=1937 A. 255. Servant of firm ordering goods from another firm—Selling firm having no knowledge and making no inquiry—No right to proceed against other firm. 1937 S. 151=169 I.C. 423.

SEC. 237, ILL. (a).—Where a licensed auctioneer sells a house by auction to third person for an amount less than is authorised by the owner of the house and the owner admits the authority given thus inducing the third person to believe that the auction sale was within the scope of the auctioneer's authority the owner, as principal, is bound by the auction sale and is liable to the third person for the breach of contract although the auctioneer might have practised fraud in selling at a lower price. 151 I.C. 511=1929 L. 823.

SEC. 238.—The provision of sec. 238, according to which a fraud or misrepresentation

*Illustrations.*

(a) A being B's agent, for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

[CHAPTER XI.—Sections 239—266.—Of Partnership.] *Repealed, Act IX of 1932, S. 73, and Sch. II.*

## SCHEDULE.

*Enactments repealed.*

[*Repealed by S. 3 and Sch. II of the Repealing and Amending Act, 1914 (X of 1914).*]

THE CONVEYANCE OF LAND ACT (XXXI OF 1854).<sup>1</sup>

Year.	No.	Short title.	Amendment.
1854.	XXXI	The conveyance of Land Act, 1854.	Repealed in part, XIV of 1870; XIV of 1874; XII of 1876. Repealed in part (locally), IV of 1882.

[16th December, 1854.]

*An Act [\* \* \* \*] to simplify the modes of conveying land in cases to which the English Law is applicable.*

WHEREAS it is expedient, in cases to which the English law applies, [\*

Preamble. \* \* \* \*] to simplify the modes of conveying

land, and to exempt the purchasers of trust property from the liability to see to the application of the purchase money; It is enacted as follows:—

1. [*Real actions, fines and recoveries abolished.*] *Rep. by the Repealing Act, 1870 (XIV of 1870).*

2. Every tenant in tail or other owner of an estate of inheritance less than

Tenant in tail may dis- any lands or hereditaments, not being under any disability, shall have power to dispose of such lands and by simple deed, etc. hereditaments against the issue tail, and all persons

## LEG. REF.

<sup>1</sup> Short title, "The Conveyance of Land Act, 1854". See the Indian Short Titles Act (XIV of 1897). The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act (XV of 1874), S. 3.

<sup>2</sup> The words "to abolish real actions and also fines and common recoveries and" were repealed by the Repealing Act XVI of 1874.

tion practised or made by an agent invalidates a contract into which the agent enters on behalf of the principal do not apply to a case where an agreement to sell a house is entered into between the vendor himself and the vendee and the deed of sale itself is executed by the vendor. There may be cases outside the scope of the provisions of sec. 238 in which such fraud may invalidate agreement entered into by the principal. But where there is no evidence to show that the principal was a party to the fraud practised by the agent or that there was express authority to the agent to give the false informa-

tion in question, an agreement followed by a sale deed executed by the principal himself to the vendee could not be avoided on the ground of the alleged false information having been given by the agent. 1942 A.L.W. 395=A.I.R. 1942 All. 841. It is enough if the fraud is committed by the agent in the course of his business for his principal, i.e., in matters falling within the scope of his authority. 50 C. 258=27 C.W. N. 18; 36 A. 416=24 I.C. 29. Principal and agent—Criminal liability. 42 C. 1094=33 I.C. 289=19 C.W.N. 1239. Forgery and fraud by agent—Principal not bound. 15 S. L.R. 93.

SECS. 238 AND 186: AGENT WITH IMPLIED AUTHORITY—FRAUD BY HIM FOR HIS BENEFIT—LIABILITY OF PRINCIPAL—The authority of an agent may, according to sec. 186, be expressed or implied. A principal is liable for the fraud of his agent acting within the scope of his implied authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. I. L.R. (1945) Nag. 204=1945 N.L.J. 115=A. I.R. 1945 Nag. 121.

whose estates are to take effect after the determination or in defeasance of his own, or to enlarge his said estate into an estate in fee-simple, by any deed declaring an intention so to dispose of the said lands or hereditaments, or to enlarge his estate therein; and every tenant in tail or other owner of an estate of inheritance less than an estate in fee-simple, who shall be under the disability of coverture, shall have power to dispose of or enlarge her said estate in manner aforesaid, by any deed declaring her intention so to do, and acknowledged by her as hereinafter mentioned:

Provided that every disposition under this section shall be subject to the rights of all persons in respect of estates prior to the estate tail or other estate of inheritance which is the subject of such disposition, and the rights of all other persons, except those against whom such disposition is by this Act authorised to be made.:

3. Every married woman who, either alone; or jointly with her husband is

Married woman, with husband's concurrence, may dispose of her estate by deed acknowledged.

possessed of or entitled to any estate or interest in or any power to be exercised over, any lands or hereditaments, which, but for the passing of this Act, she might have disposed of or extinguished by levying a fine, or suffering a recovery, or by joining in either of such assurances, shall have power by deed, to be acknowledged by her as hereinafter mentioned, to dispose of, release, surrender or extinguish any such estate, interest or power, as fully and effectually as if she were an unmarried woman.<sup>1</sup>

Secs. 2 and 3 to apply to money subject to be invested in land.

4. The provisions of the last two preceding sections shall, so far as circumstances will admit, apply to money subject to be invested in lands or other hereditaments.

5. No deed to be executed by a married woman under the provisions here-

Execution of deeds by married women.

inbefore contained shall, so far as regards the interest of such married woman, be valid or effectual unless her husband concur therein, nor unless the deed be acknowledged in manner hereinafter prescribed before a Judge of one of Her Majesty's Supreme Courts, or before a Judge or other covenanted officer of the East India Company exercising civil jurisdiction in the place wherein such deed shall be acknowledged, or before some Commissioner appointed either especially for the occasion, or appointed as a permanent Commissioner by one of Her Majesty's said Courts to take such acknowledgments.<sup>2</sup>

6. If the husband of any married woman, desirous of enlarging, passing

If husband be lunatic, etc., Court may direct acknowledgment by deed without his concurrence, saving right of the husband, etc.

or destroying any estate, interest or power, by a deed to be acknowledged by her under this Act, shall be a lunatic, idiot or of unsound mind, whether he shall have been found such by inquisition or not, or from any other cause, shall be incapable of executing a deed, or if his residence shall not be known, or if he shall be in prison, or living apart from his wife either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatever, it shall be lawful for any of Her Majesty's said Courts, by an order to be made in a summary way upon the application of such married woman, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of her husband in the deed so to be acknow-

ledged; and any deed to be executed or acknowledged by her in pursuance of such order shall (but without prejudice to the rights of her husband as then existing, independently of this Act), be as valid and effectual as if he had concurred therein.<sup>1</sup>

7. It shall be lawful for any of Her Majesty's said Courts to appoint by its order, under the seal of the Court, to be published in the Official Gazette or otherwise as the Court shall direct, permanent commissioners, either by name, or office, and to appoint from time to time, under special commissions, special commissioners, any one of whom shall be authorized and empowered unless the act is directed to be done before more than one to take the acknowledgment of any deed by any married woman, who, by reason of her place of residence, or ill-health, or other sufficient cause, shall be unable to make such acknowledgment before one of the Judges or other officers described in the preceding section.

8. Every such Judge, officer or commissioner as aforesaid, before he shall receive the acknowledgment by any married woman of any deed to be acknowledged by her under this Act, shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she understands its object, and freely and voluntarily consents to the same, and unless she appears to understand its object, and freely and voluntarily to consent to such deed, he shall not permit her to acknowledge the same, and in such case such deed, so far as relates to the execution thereof by such married woman, shall be void.<sup>2</sup>

9. Every Judge, officer or commissioner taking such acknowledgment under this Act shall, at the time of taking the same, sign a memorandum to be endorsed on or written at the foot, or in the margin of such deed, which memorandum shall be to the following effect, namely, "this deed, marked ( ), was this day produced before me and acknowledged by therein named to be her act and deed, previous to which acknowledgment the said was examined by me separately and apart from her husband touching her knowledge of the contents of the said deed, and her consent thereto and appeared to understand the same and declared the same to be freely and voluntarily executed by her."<sup>3</sup>

10. Every deed executed by a married woman and hereby required to be acknowledged shall, so far as regards the interest of such married woman, take effect only from the time of the acknowledgment thereof.

11. It shall not be necessary for any person producing a deed so acknowledged in any Court of Justice to prove the handwriting or authority of the Judge or other officer, or the commissioner taking such acknowledgment, but if such memorandum purports to have been in substance regularly made and signed, the deed shall be presumed to have been duly acknowledged by the party until the contrary is shown.

#### LEG. REF.

<sup>1</sup> Cf. the Fines and Recoveries Act. 1833. (3 & 4 Will. IV, c. 74), S. 81.

<sup>2</sup> Cf. the Fines and Recoveries Act, 1833, (3 & 4 Will. IV, c. 74); S. 80.

<sup>3</sup> Cf. the Fines and Recoveries Act. 1833, (3 & 4 Will. IV, c. 74); S. 84.

SEC. 7.—For order appointing the Sub-Judge of the Nilgiris to be permanent Commissioner for the purposes of taking the acknowledgment of deeds by married women resident in the Nilgiri District, see Mad. List of Loc. E. & O., Vol. 1,

12. Nothing in this Act contained shall abridge, extend or affect the powers of alienation or disposition which any married woman might have exercised over any property or rights, otherwise than by levying a fine or suffering a recovery, or by joining in one of such assurances before the passing of this Act.

13. In any deed or will executed after this Act comes into operation, and disposing of immovable property situate in [British India]<sup>1</sup> wherein contingent estates are limited without the appointment of any trustees to preserve such contingent estates the same shall be, to all intents and purposes, as effectually protected by the law as if such trustees had been duly appointed.

14. Any estate or interest in immovable property, situate within the said territories, whether in possession, remainder or reversion, may, in addition to any other mode of conveyance or release which is now valid, be conveyed, passed or released by a simple deed, whether such deed operate under the Statute of Uses or not.

15. No conveyance of any kind shall operate to destroy, impair or affect any estate or interest which the conveying party has no right to destroy, impair or affect or beyond the extent to which he may impair or affect the same.

16. It shall not be necessary in any deed relating to immovable property situate within the said territories, to be executed after the passing of this Act, to add words of limitation to heirs, when the intention is to give the absolute interest to a person and his heirs general; but a gift, grant or other conveyance of immovable property to, or in favour of, any person shall be taken to give him the entire and absolute interest in the nature of an estate in fee-simple, unless such construction is rendered inadmissible by the other contents of the deed; and when in any deed or will executed after the passing of this Act any property is given to a person for life or for other freehold interest, and afterwards in the same deed, or will, is limited to his heirs or her special, the estates shall not unite, but the limitation to the heirs shall be a limitation of an estate to be taken by the heirs by purchase.

17. When any property is sold, the proceeds of which are subject to any trust, the bona fide purchaser of the property shall not in any case be bound to see to the application of the purchase money to the purposes of the trust.

18. Nothing in this Act contained shall extend to any case to which the English law is not applicable.

19. [Interpretation clause.] Rep. by the Repealing Act, 1874 (XVI of 1874).

#### LEG. REF.

<sup>1</sup> Substituted for "the territories under the Government of India" by Government of India (Adaptation of Indian Laws), Order, 1937.

<sup>2</sup> See the Real Property Act, 1845 (8 and 9 Vict., c. 106), ss. 2 and 4, respectively.  
<sup>3</sup> Repealed in places to which the Transfer of Property Act (IV of 1882) extends or is extended by Act (IV of 1882), S. 2.

## THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).

Year.	No.	Short title.	Amendment.
1912	II	The Co-operative Societies Act, 1912.	Rep. in part and amended, Act 38 of 1920. Rep. in part, Act 17 of 1914. Amended (in U. P.), U. P. Act 3 of 1919. Amended (in Madras), Mad. Act 10 of 1920. Repealed in its application to Bombay, Bom. Act 7 of 1925. Repealed in its application to Burma, Bur. Act 6 of 1927. Declared in force— in British Baluchistan (with an addition), Reg. 2 of 1919, S. 3. in the Arakan Hill District, Reg. 1 of 1916, S. 2.

*N.B.*—The Act is not in force in Madras, Bombay, and Burma and the Punjab as Special Acts relating to this subject have been passed in those provinces.

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THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).<sup>1</sup>

[1st March, 1912.]

*An Act to amend the Law relating to Co-operative Societies.*

WHEREAS it is expedient further to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means, and for that purpose to amend the law relating to Co-operative Societies; It is hereby enacted as follows:—

*Preliminary.*

Short title and extent.

1. (1) This Act may be called THE CO-OPERATIVE SOCIETIES ACT, 1912; and

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “by-laws” means registered by-laws for the time being in force, and includes a registered amendment of the by-laws:

(b) “committee” means the governing body of a registered society to whom the management of its affairs is entrusted:

(c) “member” includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules:

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1911, Pt. V., p. 95; for Report of Select Committee, see *ibid.*, 1912, Pt. V, p. 7; and for Proceedings in Council, see *ibid.*, 1911, Pt. VI, pp. 186, 679 and *ibid.* 1912, Pt. VI, pp. 3, 31 and 256.

It has been declared in force under S. 3 of the British Baluchistan Laws Regulation (II of 1913) in British Baluchistan, see Bal. Code.

SEC. 1.—Policy of the Act is to save persons from protracted expensive and sometimes ruinous litigation in Civil Courts. 1935 L. 631; 15 A.L.J. 653=42 I.C. 968=40 A. 89. Act should be strictly construed. 1935 L. 631. The right of the subject to have recourse to ordinary Courts of justice should not be unduly surrounded by restrictions. 1935 L. 631.

Bank registered under this Act—40 per cent. of total liability of, required by Government notification issued under S. 60 of Income-tax Act to be kept in fluid form—Investment of, in Government securities—Interest on—“Income” or “profits” under Ss. 8 and 10 (1) of Income-tax Act—Liability to income-tax. 56 M.L.J. 481 (F.B.). Effect of Government notification exempting profits of co-operative society from income-tax. (*Ibid.*) An award against the representative of a deceased debtor of a society affects only the estate of the deceased in his hands but cannot affect him personally. 146 I.C. 565=1933 L. 376.

SEC. 2 (c).—The term “member” is elastic enough to embrace a joint family within its ambit and the fact that some of the members thereof were minors

does not invalidate the award passed by the Registrar against the joint family. 142 I. C. 487=1933 N. 211. A joint Hindu family can be a member of a Co-operative Society. 48 L.W. 285=1938 Mad. 809=(1938) 2 M.L.J. 186; I.L.R. (1945) Nag. 677=1945 N.L.J. 482. The fact that the bye-laws of a co-operative society established under the Co-operative Societies Act do not expressly state that the membership of the society is open to a Hindu joint family is no justification for holding that a joint family can in no event become a member of the society, when there is no provision in the by-laws. It is no doubt desirable to have an express provision in the bye-laws stating that a Hindu joint family may join a society through one of its members chosen by all the other adult members of the family and that loans to such a family would be granted only on proof that the money is required for some legal necessity of the family. Where it is clearly proved that a member of a joint family joined the society in a representative capacity with the consent of all the adult members of the family, though he may not have been the karta of the family and that the debts incurred by him were for the purpose of the family, it must be held that the money was borrowed for the necessity and benefit of the entire joint family, because the member represents the entire joint family in his dealings with the society. In such a case the society can proceed against joint family properties including the properties purchased out of the money borrowed, although that member is not described in the registers of the company as representing his family. 19 Pat.L.T. 328=1938 Pat. 315 (S.B.).

(d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the by-laws to give directions in regard to the business of the society:

(e) "registered society" means a society registered or deemed to be registered under this Act:

(f) "Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act: and

(g) "rules" means rules made under this Act.

#### *Registration.*

3. The Provincial Government may appoint a person to be Registrar of

The Registrar. Co-operative Societies for the Province or any portion of it, and may appoint persons to assist such

Registrar, and may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

4. Subject to the provisions hereinafter contained, a society which has as

Societies which may be its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with or without limited liability:

Provided that unless the Provincial Government by general or special order otherwise directs—

(1) the liability of a society of which a member is a registered society shall be limited;

(2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists, and of which no member is a registered society, shall be unlimited.

Restrictions on interest of member of Society with limited liability and a share capital.

5. Where the liability of the members of a society is limited by shares, no member other than a registered society shall—

(a) hold more than such portion of the share capital of the society, subject to a maximum of one-fifth, as may be prescribed by the rules; or

(b) have or claim any interest in the shares of the society exceeding one thousand rupees.

6. (1) No society, other than a society of which a member is a registered

Conditions of registration. society, shall be registered under this Act which does not consist of at least ten persons above the age of eighteen years and, where the object of the society

is the creation of funds to be lent to its members, unless such persons—

(a) reside in the same town or village or in the same group of villages; or

(b) save where the Registrar otherwise directs, are members of the same tribe, class, caste or occupation.

(2) The word "limited" shall be the last word in the name of every society with limited liability registered under this Act.

7. When any question arises whether for the purposes of this Act a person

Power of Registrar to decide certain questions. is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages

shall be considered to form a group, or whether any person belongs to any parti-

SEC. 4.—Where a decree is passed against a co-operative society as a corporate body the decree-holder cannot pursue his remedy in execution against the shareholders or member of the society in their individual capacity. 1934 M. 181=66 M.L.J. 475.

cular tribe, class, caste or occupation, the question shall be decided by the Registrar, whose decision shall be final.

Application for registration. 8. (1) For purposes of registration an application to register shall be made to the Registrar.

(2) The application shall be signed—

(a) in the case of a society of which no member is a registered society, by at least ten persons qualified in accordance with the requirements of section 6, sub-section (1); and

(b) in the case of a society of which a member is a registered society, by a duly authorized person on behalf of every such registered society, and where all the members of the society are not registered societies, by ten other members, or, when there are less than ten other members, by all of them.

(3) The application shall be accompanied by a copy of the proposed by-laws of the society, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Registrar may require.

9. If the Registrar is satisfied that a society has complied with the provisions of this Act and the rules and that its proposed by-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its by-laws.

10. A certificate of registration signed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.

11. (1) No amendment of the by-laws of a registered society shall be valid until the same has been registered under this Act, for which purpose a copy of the amendment shall be forwarded to the Registrar.

(2) If the Registrar is satisfied that any amendment of the by-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

(3) When the registrar registers an amendment of the by-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

#### *Rights and liabilities of members.*

12. No member of a registered society shall exercise the rights of a mem-

SECS. 8 (3) AND 43 (5).—There is no rule of law that when there is a conflict between the rule and the bye-law, the bye-law should be preferred. Ordinarily the rule, which is as effective as a section of the Act, must be followed in a preference to a bye-law, if there is a conflict between the two. 171 I. C. 395=1938 Lah. 8. Where a bye-law of a Co-operative Society provides that the profits should be divided, and that a fourth of it should be paid as honorarium to the Secretary, the Secretary is entitled to recover the same without a vote of the general body. Although it is open to the latter to alter the bye-law, it is not open to them to withhold payment of the honorarium. But where the law provides for the payment of an annual lump sum, it is not open to the Secretary to claim the proportionate amount for a part of the year. The payment contemplated is contingent on the

Secretary serving as such for the entire period of a year. 45 L.W. 297=1937 Mad. 379=(1937) 1 M.L.J. 511. Where a bye-law framed by a society provides that one of the objects of the society is to build residential houses and other buildings for private and public use and convenience of the members, the society undertook to construct a house for a member and after the house had been constructed, there was some dispute between the parties as to the amount claimable on account of it by the society. *Held*, the transaction does not amount to the granting of a loan by the society to one of its members. 1938 L. 8=171 I.C. 395.

SEC. 12.—The disputed liability of a member to repay money due to the Society is a dispute "touching the business of the society" within the meaning of R. 12 of the Rules framed under the Co-operative Societies

Member not to exercise rights till due payment made. ber unless or until he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or by-laws.

13. (1) Where the liability of the members of a registered society is not limited by shares, each member shall, notwithstanding the amount of his interest in the capital, have one vote only as a member in the affairs of the society.

(2) Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

(3) A registered society which has invested any part of its funds in the shares of any other registered society may appoint as its proxy, for the purpose of voting in the affairs of such other registered society, any one of its members.

14. (1) The transfer or charge of the share or interest of a member in the capital of a registered society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.

(2) In cases of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless—

(a) he has held such share or interest for not less than one year: and

(b) the transfer or charge is made to the society or to a member of the society.

#### *Duties of registered societies.*

15. Every registered society shall have an address, registered in accordance with the rules, to which all notices and communications may be sent, and shall send to the Registrar notice of every change thereof.

16. Every registered society shall keep a copy of this Act and of the rules governing such society, and of its by-laws, open to inspection free of charge at all reasonable times at the registered address of the society.

17. (1) The Registrar shall audit or cause to be audited by some person authorized by him by general or special order in writing in this behalf the accounts of every registered society once at least in every year.

(2) The audit under sub-section (1) shall include an examination of over-due debts, if any, and a valuation of the assets and liabilities of the society.

(3) The Registrar, the Collector or any person authorized by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection may require.

Act; and being a dispute between one member and the other members, it is covered by Cl. (1) of the rule. A Society borrowed money from a Bank and lent it to the appellant who was a member of the Society. An award was obtained by the Bank against

the Society, and the latter then made a reference to the Registrar who duly made an award against the appellants and in favour of the society for the amount of the loan. *Held*, the Registrar had jurisdiction to make the award against the appellant, 14 P. 292.

*Privileges of registered Societies.*

18. The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

19. Subject to any prior claim of the <sup>1</sup>[Crown] in respect of land-revenue or any money recoverable as land revenue or of a landlord in respect of rent or any money recoverable as rent, a registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member—

(a) in respect of the supply of seed or manure or of the loan of money for the purchase of seed or manure—upon the crops or other agricultural produce of such member or person at any time within eighteen months from the date of such supply or loan;

(b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things— upon any such things so, supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

20. A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to

## LEG. REF.

<sup>1</sup> Substituted for "Government" by Government of India (Adaptation of Indian Laws) Order, 1937.

Sec. 18.—A Co-operative Society is a statutory corporation and a legal person, and its debts are distinct from the liability of its members; and the members can only be reached by the creditors of the society in winding up proceedings. An award against the society, which has the force of a decree, cannot be executed against the members. An award ordering that a Co-operative Society "consisting of its members or past members all of whom are jointly and severally liable for the debts of the society pay at once, etc." cannot be construed to be one making the members and past members also liable for the debt; the award cannot be executed against the members. 20 N.L.J. 6. The effect of registering a society is to render it a body corporate, a separate legal entity. Neither under the Companies Act, nor under this Act is there any statutory provision which entitles the creditor of a registered society to proceed against a member for the debts of the society whether the society is of limited or unlimited liability. Not until there is a winding up can the creditor come face to face with the individual members. The remedy for the creditor is indicated in Ss. 36 and 39 and the excep-

tional right of the Government under S. 44 to have direct recourse against the members demonstrates the general rule to the contrary. (40 O.L.J. 254, Ref.) 134 I.C. 421 =1931 P. 321 (F.B.).

Sec. 19.—The Chairman of a Co-operative Credit Society has no right to sue a member of a society in his own name. The suit should be brought by the society itself under S. 6 (2) of the Co-operative Credit Societies Act. 10 I.C. 570.

Musical instruments are not industrial implements or machinery and do not come within any other part of the class of articles referred to in the section. See 38 I.C. 414 = (1916) 2 U.B.R. 133. See also cases referred to therein.

Secs. 19 AND 20.—Under S. 73 of the C.P. Code the claim of a Co-operative Society cannot be enforced under S. 19 of the Co-operative Societies Act unless they have a decree or charge under S. 20 of the latter Act. 42 C. 377=18 O.W.N. 1140.

Sec. 19 (b).—Fat intended to be purchased and sold at a profit and not for the purpose of manufacturing some other commodity is not "raw material" within S. 19 (b) of the Act. 3 P.W.R. 1917=39 I.C. 378.

Sec. 20.—Share of a member in Co-operative Society is not liable to attachment and sale under S. 20 of the Act. 42 P.L.R. 225=1939 Lah. 305.

the society, and may set-off any sum credited or payable to a member or past member in or towards payment of any such debt.

**21.** Subject to the provisions of section 20, the share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee under the Presidency Towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1907, shall be entitled to or have any claim on such share or interest.

**22.** (1) On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member, or pay to such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws:

Provided that—

(i) in the case of a society with unlimited liability, such nominee, heir or legal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained as aforesaid.

(ii) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative, as the case may be, being qualified in accordance with the rules and by-laws for membership of the society, or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified.

(2) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

**23.** The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

Sec. 22 (1), Pro. (ii).—S. 22 of the Act provides that on the death of a member, the share or interest of the deceased member shall be transferred to his nominee or to his legal representative who may be qualified in accordance with the rule or bye-laws of the society. R. 6 of the bye-laws or the appellant bank provided that "the following are eligible for membership:—(a) persons above 18 years residing or holding property in Bakarganj." R. 17 (b) of the bye-laws provided that "in the case of the death of a preference shareholder his shares may be transferred to his heir or nominee if he is eligible for membership and is duly elected as such." Held, that R. 17 (b), in so far as it made election as a condition to membership was in excess of the provisions of S. 22 proviso (ii) and *ultra vires* and was not validated by

R. 7 of the bye-laws which referred to election, because the qualifications of members were contained in R. 6 and not R. 7. 151 L. C. 165=38 C.W.N. 459=1934 O. 537.

SEC. 23.—"Debts of a registered society" in S. 23 refer only to those debts which the society owes and not to those which are owed to the society. 18 Lah. 649=1937 Lah. 931. S. 23 governs S. 42 (2) (b). See 1937 Lah. 912. See also 1935 Lah. 330; 1935 Lah. 947. As to the extent of liability of past member for debt due to society, see 1935 L. 947. Inasmuch as no member can be called upon to contribute to the debts of the Society until liquidation. S. 23 of the Act applies only to members who cease to be members before liquidation. 1946 N.L.J. 252.

SCOPE AND APPLICABILITY OF SECTION.—The words 'the debts of a registered so-

24. The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease.

Liability of the estates of deceased member.

25. Any register or list of members or shares kept by any registered society shall be *prima facie* evidence of any of the following particulars entered therein:—

Register of members.

(a) the date at which the name of any person was entered in such register or list as a member;

(b) the date at which any such person ceased to be a member.

26. A copy of any entry in a book of a registered society regularly kept in the course of business, shall, if certified in such manner as may be prescribed by the rules, be received, in any suit or legal proceeding, as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is admissible.

Proof of entries in societies' books.

Exemption from compulsory registration of instruments relating to shares and debentures of registered society.

27. Nothing in S. 17, sub-section (1), clauses (b) and (c), of the Indian Registration Act, 1908, shall apply to—

ciety as they existed at the time when he ceased to be a member' occurring in S. 23 clearly refer to the debts due from the society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no bearing whatever on the debts of the outgoing members due to the society itself. 16 Luck. 658=1941 O.W.N. 404=1941 Oudh 315. The period of two years mentioned in S. 23 is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society, that is the date on which its registration was cancelled. (1937 Lah. 912, Rel. on.) 43 P. L.R. 305=1941 Lah. 284=I.L.R. (1942) Lah. 379.

SECS. 23 AND 24.—Award against estate of past or deceased member—Jurisdiction of liquidator and of Civil Court. A liquidator has no jurisdiction to award anything against the estate of a past or a deceased member, because of the limitation provided under Ss. 23 and 24. The Civil Court has jurisdiction to go into the question whether the liquidator had jurisdiction to make the award. 41 P.L.R. 269.

SECS. 23 AND 42 (2).—A suit by a past member for a declaration that he is not liable to pay certain amounts as contribution due from him on the ground that his liability ceased under S. 23 on the expiration of two years after removal of his name, is not maintainable in a Civil Court, because it has no jurisdiction to go into the matter. Under S. 42 (2), the liquidator has jurisdiction to decide the matter. 1935 L. 380. See also 1935 L. 497; 1937 Lah. 912.

SEC. 24.—The section cannot be called to aid except in liquidation proceedings under S. 42. See 84 I.C. 999=1925 C. 203.

Under S. 24, the estate of a deceased member which devolves by inheritance on his widow under the Hindu Women's Rights to Property Act, is liable to the same extent as it would have been had he been alive. 1946 N.L.J. 252. It does not matter whether a member dies before or after liquidation. His estate is liable for a year after his death, but only for the debts as they existed at the date of his death. 1946 N. L.J. 252. Limitation—Starting point. Under S. 24, the limitation of one year for a suit by the liquidator against the heirs of a deceased member in possession of his estate for contribution due from him, starts from the date of death of the member and not from the date of liquidation. 1946 N.L.J. 252.

SEC. 26: SCOPE AND EFFECT.—Under S. 26, the mere filing of copies of the accounts is not enough. The section does not abrogate S. 34 of the Evidence Act. It merely obviates production of the original books of accounts. Books of accounts which are not regularly kept in the course of business would not come within the purview of S. 26 of the Co-operative Societies Act any more than it would under S. 34 of the Evidence Act. Therefore it is essential to produce evidence *abundant* to prove that the books are regularly kept in the course of business. If this is done the entries become evidence, but like all entries in books of account they are not substantive evidence except as regards admissions against the interests of the maker. They can only be used for corroboration. 1946 N.L.J. 252.



(1) Any instrument relating to shares in a registered society, notwithstanding that the assets of such society consist in whole or in part of immovable property; or

(2) any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(3) any endorsement upon or transfer of any debenture issued by any such society.

Power to exempt from income-tax, stamp-duty and registration fees. <sup>1</sup>[28. (1)] The Central Government by notification in the Official Gazette, may, in the case of any registered society or class of registered society, remit

<sup>1</sup>[\*] the income-tax payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits.

<sup>1</sup>(2) The <sup>2</sup>[\*] Government, by notification in the Official Gazette, may, in the case of any registered society or class of registered society, remit—

(a) the stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business of such society, or any class of such instruments, are respectively chargeable, and

(b) any fee payable under the law of registration for the time being in force.]

<sup>3</sup>[In this sub-section 'Government' in relation to stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit policies of insurance, proxies and receipts, and in relation to any stamp duty falling within Item 59 in List I in the Seventh Schedule to the Government of India Act, 1935, means the Central Government, and save as aforesaid means the Provincial Government.]

#### *Property and funds of registered societies.*

##### *Restrictions on loans.*

29. (1) A registered society shall not make a loan to any person other than a member:

Provided that, with the general or special sanction of the registrar, a registered society may make loans to another registered society.

(2) Save with the sanction of the Registrar, a society with unlimited liability shall not lend money on the security of movable property.

(3) The Provincial Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immovable property by any registered society or class of registered societies.

##### LEG. REF.

<sup>1</sup> This section was re-numbered as section 28 (1) and in the same section the letter and brackets "(a)" and the whole of clauses (b) and (c) were omitted and sub-section (2) was added by Act XXXVIII of 1920, Part II.

<sup>2</sup> The word 'Local' was admitted by Government of India (Adaptation of Indian Laws) Order, 1937.

<sup>3</sup> Inserted by Government of India (Adaptation of Indian Laws) Order, 1937.

SEC. 29.—A bye-law of a Co-operative Society to the effect that the society shall

not sell goods on credit to a non-member cannot have the force of law. It cannot be pleaded in defence by vendee outsider in a suit brought against him for recovery of balance standing against him. 96 I.O. 351 (2)=1926 N. 463. See also 116 I.O. 552 *infra*. The law lays down that a Co-operative Credit Society shall not lend to non-members and consequently a contract for that purpose is undoubtedly illegal and a suit cannot lie to enforce it. *Held*, however, that the amount advanced could be recovered on the basis of the implied promise to repay. 116 I.O. 552=1929 L. 380. See also 96 I.O. 351=1926 N. 463.

30. A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

Restrictions on borrowing.

31. Save as provided in sections 29 and 30, the transactions of a registered society with persons other than members shall be subject to such prohibitions, and restrictions, if any, as the Provincial Government may, by rules, prescribe.

Restrictions on other transactions with non-members.

32. (1) A registered society may invest or deposit its funds—

Investment of funds.

(a) in the Government Savings Bank, or

(b) in any of the securities specified in section 20 of the Indian Trusts Act, 1882, or

(c) in the shares or on the security of any other registered society, or

(d) with any bank or person carrying on the business of banking approved for this purpose by the Registrar, or

(e) in any other mode permitted by the rules.

(2) Any investments or deposits made before the commencement of this Act which would have been valid if this Act had been in force are hereby ratified and confirmed.

33. No part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members:

Funds not to be divided by way of profit.

Provided that after at least one-fourth of the net profits in any year have been carried to a reserve fund, payments from the remainder of such profits and from any profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or by-laws:

Provided also that in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the Provincial Government on this behalf.

34. Any registered society may, with the sanction of the Registrar, after one-fourth of the net profits in any year has been carried to a reserve fund, contribute an amount not exceeding ten per cent. of the remaining net profits to any charitable purpose, as defined in section 2 of the Charitable Endowments Act, 1890.

Contribution to charitable purpose.

#### *Inspection of affairs.*

35. (1) The Registrar may of his own motion, and shall on the request of the Collector, or on the application of a majority of the committee, or of not less than one-third of the members, hold an inquiry or direct some person authorized by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

Inquiry by Registrar.

(2) All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorized by the Registrar may require.

Sec. 33.—A resolution passed at an annual general meeting of the shareholders sanctioning the payment of dividend is not in any way illegal or *ultra vires* so long as it does not contravene any of the provisions of the Co-operative Societies Act or any of

its bye-laws, although a considerable portion of the profits out of which the dividend could be paid are unrealised interest income. I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=1938 Cal. 394.

36. (1) The Registrar shall, on the application of a creditor of a registered society, inspect or direct some person authorized by him by order in writing in this behalf to inspect the books of the society:

Inspection of books of indebted society.

Provided that—

(a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time; and

(b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

(2) The Registrar shall communicate the results of any such inspection to the creditor.

37. Where an inquiry is held under section 35, or an inspection is made under section 36, the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

Costs of inquiry.

38. Any sum awarded by way of costs under section 37 may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of any movable property within the limits of the jurisdiction of such Magistrate belonging to such person.

Recovery of costs.

#### *Dissolution of society.*

39. (1) If the Registrar, after an inquiry has been held under section 35 or after an inspection has been made under section 36 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be dissolved, he may cancel the registration of the society.

Dissolution.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period.

(4) Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the appellate authority.

(5) The authority to which appeals under this section shall lie shall be the Provincial Government:

Provided that the Provincial Government may, by notification<sup>1</sup> in the Official Gazette, direct that appeals shall lie to such Revenue-authority as may be specified in the notification.

40. Where it is a condition of the registration of a society that it should consist of at least ten members, the Registrar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than ten.

Cancellation of registration of society.

Effect of cancellation of registration.

41. Where the registration of a society is cancelled, the society shall cease to exist as a corporate body—

#### LEG. REF.

<sup>1</sup> For notification by Chief Commissioner, Central Provinces, that appeals shall lie to the Financial Commissioner, see *Central*

*Provinces Gazette*, 1912, Pt. 1, p. 347. For notification in Madras that appeals shall lie to the Board of Revenue, see *Fort St. George Gazette*, 1923, Pt. 1, p. 1651.

(a) in the case of cancellation in accordance with the provisions of section 39, from the date the order of cancellation takes effect;

(b) in the case of cancellation in accordance with the provisions of section 40, from the date of the order.

42. (1) Where the registration of a society is cancelled under section 39 or section 40, the Registrar may appoint a competent person to be liquidator of the society.

(2) A liquidator appointed under sub-section (1) shall have power—

(a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office;

(b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society;

Sec. 42.—[See 1935 L. 330 and Notes under S. 23.] The Civil Court cannot interfere with an order passed by a liquidator of a registered Co-operative Society, under S. 42 of the Act, 1912, in order to collect the assets of the Society from persons who, he thinks, are responsible to account him for the assets. Suit against an auction-purchaser questioning the validity of the sale is not a matter connected with the dissolution of a registered society and does not fall within S. 42. 23 N.L.R. 66 = 103 I.C. 131 = 1927 N. 217. The members of a Co-operative Credit Society are subject to a statutory liability to contribute to the debts of the society; but that liability can only be enforced by the procedure of winding up contained in the Act and not directly by suit of a creditor even after the cancellation of registration. 35 Bom.L.R. 282 = 1933 B. 191 = 57 B. 319. An order of the liquidator under S. 42 of the Co-operative Societies Act is final and a Court executing the order cannot go behind it and investigate its legality. The rules framed under the Act do not provide for any appeal or revision. Where the order of the liquidator was passed after due enquiry and notice but the rules prescribed in the Civil Procedure Code were not literally followed, *held*, that assuming the Court had jurisdiction to interfere with such an order there was merely an irregularity. 7 R. 533. Proceedings taken before the liquidator under S. 42 (b) and (d) are to some extent in the nature of quasi-judicial proceedings. Under R. 29 (e) of the Bengal Government Rules the liquidator may issue summonses to persons whose attendance is required either to give evidence or to produce documents. He may compel the attendance of any person to whom a summons has been issued and for that purpose issue a warrant for his arrest. Where there is no compliance with the necessary procedure the Court may dismiss the application for execution of the order. 37 O.W.N. 177 = 145 I.C. 834 = 1933 C. 631. Liquidation—Members of executive committee asked to pay—Suit by them against ordinary members to

recoup themselves—Decree passed without any objection to jurisdiction—No appeal—Objection raised in execution proceedings—Maintainability. See 31 C.W.N. 739; 22 Bom.L.R. 732 = 44 B. 482.

CL. (2).—A Civil Court can examine the question whether a liquidator appointed under the Co-operative Societies Act has acted within his powers when he makes a contributory order. The relevant rule limits the power of the liquidator to make a contributory order to a time posterior to the determination of the assets. He cannot make such an order until he has ascertained the assets. He cannot be regarded in law as having ascertained the assets where he is in the course of realising the assets of the individual debtors and until the amount that can be obtained on such realisation is determined. Until then any contributory order made is *ultra vires*. These contributory orders are exceedingly oppressive and should in fairness to the contributories and in the interests of the co-operative society movement generally, only be made as a last resort. 1941 N. L. J. 412. Where the decretal amount due to a Co-operative Society was realised by the Collector as an arrear of land revenue according to the Co-operative Societies Act, no suit, *etc.* in the Civil Court in respect of such a claim. 1937 O. W. N. 298 = 1937 O. 249. The jurisdiction of Civil Court is ousted only in those cases where the acts of the liquidator are well within the four corners of S. 42. But in cases where his acts are *ultra vires* Civil Courts could go into the question, in order to determine the legality of the order. 18 Lah. 649 = 1937 Lah. 931. A Civil Court cannot entertain a suit for a declaration that an order of the liquidator under S. 42 (2) of the Act is *ultra vires* and thus cannot be executed. 44 I.C. 353 = 4 O.L.J. 583. But see 18 Lah. 649 = 1937 Lah. 931.

Sec. 42 (2) (b).—The Civil Court has no jurisdiction to entertain a suit against a Co-operative Society which has gone into liquidation for the recovery of Provident Fund money in its hands, in a case governed

(c) to investigate all claims against the society and, subject to the provisions of this Act, to decide questions of priority arising between claimants;

(d) to determine by what persons and in what proportions the costs of the liquidation are to be borne; and

by the provisions of the Co-operative Societies Act. 49 C.W.N. 164. S. 42 (2) (b) of the Co-operative Societies Act is limited to "members" and "past members". It has no application to claim for contribution against the heirs of a deceased member. In such a case, the liquidator's only remedy is by way of a Civil Suit. 1946 N.L.J. 252. The term "past member" is not defined in the Act but it cannot mean a "deceased member". Therefore it must mean a person who is alive at all material times but who has ceased to be a member of the Society otherwise than by death. 1946 N. L. J. 252. Where a Co-operative Society is dissolved and certain members are adjudicated as insolvents their liability as members is not provable under the terms of S. 34 (2), Provincial Insolvency Act, if no liquidator was appointed until after the insolvents had been discharged. Under S. 42, it is the liquidator alone who can ascertain and fix the liabilities of the members. Therefore until a liquidator is appointed, it cannot be said that there was any debt or liability certain or contingent which can affect the members. Hence the liquidator is not debarred under the provisions of the Provincial Insolvency Act from fixing the liability as members. 42 P.L.R. 260=1939 Lah. 275. The provisions of the Act provide stringent safeguards to prevent the society from having dealings with strangers. The admission of a member to a society cannot be unilateral on the part of the society. Where a joint family as such has not been mentioned with its various members as having been brought on the list on the membership of the society, no order of contribution can be passed against the members of the joint family who are not members of the society. 130 I.C. 820=1931 N. 48. Merely because a person was once a member of a Co-operative Society, it cannot be said that he has no right to ask the Civil Court to decide whether he is under any liability to contribute at all. There is no clear indication in the Co-operative Societies Act that the liquidator can under S. 42 of the Act determine the question of liability to contribute in such a way that his determination will not be subject to be set aside by the Civil Courts. A person who disputes his liability to contribute on the ground that he ceased to be a member *five years* prior to the dissolution of the Society, but is held liable, is entitled, after payment of the contribution, to sue in the Civil Court for a refund of the amount paid on the ground that he is not liable. S. 42 (6) is no bar to the suit. 59 M. 895=1936 M. 574=70 M.

L.J. 604. S. 42 (2) (b) is governed by S. 23 of the same Act and the words 'past member' in S. 42 (2) (b) mean a past member liable for debts under S. 23 of the Act. A person who does not claim to be a past member liable under S. 23 of the Act has a right to have his claim investigated by a Civil Court. 1937 Lah. 912. 'Member' obviously means member at the date of the dissolution of the society in S. 42 (b). 1939 Lah. 275=43 P.L.R. 260. Usually the word contribution means and has reference only to the amount payable by a member as such and does not include debts payable to the society. It is in other words the unpaid portion of the liability of a member. 18 Lah. 649=1937 Lah. 931. A Court called upon to execute an award on the ground that the member against whom the award had been entered an award on the ground that the member against whom the award has been made had prior to the award been declared an insolvent and therefore discharged under S. 44 of the Provincial Insolvency Act from the liability to pay any debt, as the matter is not one of lack of inherent jurisdiction on the part of the liquidator but only a question of illegal exercise of jurisdiction. 42 P. L.R. 126=1940 Lah. 280. Where an award obtained by a Bank against a Co-operative Society shows that it was an award against the members of the society, then the Bank could sell the property mortgaged to the society by the members. 1938 N.L.J. 166=1938 N. 308. *See also* 1937 Rang. 98. Order by liquidator under the section—Nature of—If "decree for money"—Suit to declare null and void—Court-fee. (1937) 1 M.L.J. 640.

SEC. 42 (2) (b) AND (5).—Order of liquidator assessing member's contribution after his complete discharge by Insolvency Court—If *ultra vires*—Power of Civil Court to refuse execution. *See* 44 P.L.R. 376.

SECS. 42 (2) (b) AND 24: CLAIM FOR CONTRIBUTION—WHEN ARISES.—No claim can be made for contribution either against a member, a past member or the estate of a deceased member until the assets and liabilities of the Society are determined. It is only when all the assets and liabilities are known and a proper balance struck between the two that it is possible to determine whether the Society is in debt at all and if so to what extent. If it can pay off its debts from existing assets no claim for contribution can be made. That is only a last resort when all else fails. 1946 N.L.J. 252.

(e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

(3) Subject to any rules, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witness and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.<sup>1</sup>

(4) Where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge.

(5) Orders made under this section shall, on application, be enforced as follows:—

(a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court;

(b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

#### LEG. REF.

1 In its application to British Baluchistan this sub-section shall be read as if the words "or the British Baluchistan Civil Justice Regulation, 1896, as the case may be" were added. See Schedule I of Regulation II of 1913, Bal. Code.

CL. (2) (e): DEBT DUE TO SOCIETY.—POWER OF LIQUIDATOR TO MAKE ORDER HAVING FORCE OF DECREE.—S. 42 (2) (e) does not give a liquidator power to make an order having the force of a decree in respect of a debt due to a Co-operative Society in liquidation. 196 I.C. 688=1941 Lah. 355.

SEC. 42 (3).—The power to enforce attendance of witnesses and production of documents is subject to the rules framed under the Act. R. 26 (e) of the Rules framed by the Punjab Government restricts the powers of the liquidators to those given in the sub-rule. A liquidator has, therefore, no power to ask a debtor of the society under liquidation summoned by him to furnish security for his appearance or to impose a sentence of imprisonment or fine for his failure to do so. I.L.R. (1939) Lah. 192=1939 Lah. 357.

CL. (4).—An amount realised by the Collector on a requisition to him by the Registrar of Co-operative Societies is realised by the Collector as arrears of land revenue; and under S. 233 (m) of the U.P. Land Revenue Act, a suit in the Civil Court in respect of such amount is barred. 11 O. W.N. 1060=151 I.C. 414=1934 O. 431.

CL. (5).—The liquidator cannot order that the debtors are jointly and severally liable for each other's mortgage but may determine the contribution to be made by

several debtors to meet the debt. Order passed by liquidator under S. 42 must be enforced by Civil Courts; no appeal lies from the Civil Courts, order under this section. 40 A. 89=15 A.L.J. 863. Where the award is against a society, the liquidation of that society cannot make any difference, so far as the executability of the award against the members is concerned. The liquidator is the only person competent to collect the assets of the society from its members and distribute them rateably among the creditors. So he cannot be proceeded against in execution of an award against the society. I.L.R. (1938) Nag. 604=1938 Nag. 434.

CL. (6).—See 84 I.C. 964=1925 R. 38. See also 84 I.C. 999=1925 C. 203 cited under S. 24. S. 42 (6), affords no immunity in respect of action taken by a Liquidator without jurisdiction. The forum for raising the objection is not executing Court unless there are exceptional circumstances patent on the face of the decree or closely allied to it circumstances which do not necessitate an enquiry into facts. Where in a case there is nothing whatever from which it might be assumed that the action of the liquidator was without jurisdiction, the remedy of a person having a genuine grievance lies by way of a suit for a declaration and not by an objection in execution proceedings. 1946 N. L. J. 28. The liquidator is given the power to determine the contribution to be made by a member; but he is not given power to determine whether a particular person is a member or not. And if any one disputes his membership, the dispute can be decided by a Civil Court. (1931 N. 48, Rel.

*Rules.*

43. (1) The Provincial Government may, for the whole or any part of the province and for any registered society or class of such societies, make rules to carry out the purposes of this Act.

on.) 144 I.C. 264=34 P.L.R. 717=1933 L. 442. There is nothing in S. 42 (6) to prevent the Court from entertaining the application of one of the debtors of a co-operative society which is in liquidation for being declared insolvent. In deciding whether such a debtor should or should not be adjudicated insolvent the Court is not dealing with any matter connected with the dissolution of the society nor will the dissolution be necessarily interfered with by reason of adjudicating such a debtor to be an insolvent. 149 I.C. 96 (1)=1934 P. 290. A Civil Court has no jurisdiction to question the legality of the acts of a liquidator in the matter connected with the dissolution of a registered society. A suit in the Civil Court by a person from whom the amount of contribution determined by the liquidator is realised, on the ground that such person is the heir of the members indebted to the society, is barred by reason of S. 42 (6). 151 I.C. 414=11 O.W.N. 1060=1934 O. 43. The Civil Court has no jurisdiction to entertain a suit for a declaration that an order of contribution made by a liquidator of a Co-operative Society under S. 42 (2) (b) is null and void on the ground that the liquidator did not hold a proper enquiry as required by the rules, when it is not contended that the society in question had not been validly dissolved. 47 O. W. N. 384=1944 Cal. 245=I.L.R. (1943) 2 Cal. 186. Where on a registered Co-operative Society being dissolved, the liquidator issues a warrant of attachment, Civil Courts have no jurisdiction to question the same. 94 I.C. 40=1926 N. 379=24 N.L.R. 5. If a liquidator's act or order is shown to be *ultra vires*, that is, outside the powers conferred on him by law as a liquidator, the Civil Court can then intervene. A liquidator of a society has no power to proceed against anybody and everybody irrespective of the fact that he had even been a member of the society and S. 42 (6) cannot be so construed as to oust the jurisdiction of the Civil Courts in cases where the liquidator passes an order against a person who is not a member of the society. 130 I.C. 820=1931 N. 48. As to jurisdiction of Civil Courts, *see also* 39 Bom.L.R. 249=1937 Bom. 231 (Suit to set aside arbitrator's award on ground of fraud and undue influence); 1937 Rang. 98 (Suit questioning validity of a transfer of property by liquidator); 1940 Rang. 157 (Suit to set aside award of arbitrator given contrary to law of limitation, *see also* 1937 Rang. 363). As to difference between bar of Civil Courts jurisdiction in respect of acts of Registrar,

arbitrator and liquidator in Burma, *see* 1937 Rang. 373.

**RULES—APPLICABILITY.**—There is no procedure for setting aside an *ex parte* decree in the rules. If the Sub-Deputy Registrar thinks it necessary to give an opportunity to the president or other members of the society to show that the decree was in any respect obviously erroneous on the face of it, he can do so. 1932 M.W. N. 18. The Act and the rules made thereunder are intended to provide a speedy remedy for the settlement of disputes and it is for that purpose that such cases have been removed from the jurisdiction of the ordinary Civil Courts. The enforcement of a mortgage under the Act is not subject to but is independent of O. 34 of the C.P. Code. The fact that the procedure of O. 34 was not adopted or that the mortgagor was not allowed a period of six months in accordance with O. 34 does not invalidate the decision of the Registrar which is in effect and substance a final decree for the sale of the mortgaged property. 142 I.C. 487=1933 N. 211.

**JURISDICTION OF CIVIL COURT.**—By S. 42 (6), Co-operative Societies Act, the liquidator is entitled to determine the contribution to be made by the members and past members of the society. But if a party denies that he is a member, he is entitled to have that question determined by the Court and the Court has jurisdiction to try the suit. 1937 Cal. 643.

**SEC. 43.**—Where the defendant dies before institution of proceedings relating to an award under Co-operative Societies Act, the award passed against him is a nullity and cannot be executed. 39 P.L.R. 139=1937 L. 63. An award granted under Co-operative Societies Act is to be executed in the same manner as a decree of Civil Court. 39 P.L.R. 139=1937 L. 63. On a reference made to the Registrar for an award under the Co-operative Societies Act, the Registrar acts as a Court and he has jurisdiction to decide whether a dispute before him is time barred or not. Once he has decided that rightly or wrongly, it cannot be said that he acted without jurisdiction. 181 I.C. 512=1939 Pat. 500. But *see* 1940 Rang. 157. Where an award made under the Co-operative Societies Act is alleged to have been made without jurisdiction and not according to the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in the execution proceedings started in pursuance of the award, the objector's remedy being an appeal to the



Registrar. 180 I.C. 242=1939 Lah. 40. *See also* 1940 Sind 147.

CL. (1).—Under R. 13 (7) of the Rules framed by the Government of Assam under S. 43 of the Act, an order of a Registrar or of the Chief Commissioner in appeal is, as between the parties to the dispute, not liable to be called into question in any Civil Court or Revenue Court and is final. This presupposes however that the order in question is in accordance with the Act and the rules. Where, therefore, the plaintiff calls into question the reference to the Registrar and alleges that there was no compliance by him with the procedure in the rules and pleads that the rules themselves are *ultra vires* in so far as they oust the jurisdiction of the Civil Court, the Civil Court has jurisdiction to entertain his suit. 41 C.W.N. 670.

RULES—MADRAS RULES—R. 14—POWERS OF REGISTRAR—QUAERE.—If the Registrar of Co-operative Societies acting under R. 14 is competent to pass a mortgage decree and not merely a money decree, *i.e.*, a mortgage decree which can straight away be enforced apart from the procedure contained in O. 34, R. 14, C.P. Code. 1933 M.W.N. 1938=38 L.W. 880. Madras Rules, R. 14 (5)—Collector deputing tahsildar to enforce decision—Tahsildar—If proper “Court” for execution—Limitation Act, Art. 182. 70 M.L.J. 31. *See also* 38 Bom.L.R. 927=1936 Bom. 396; 40 Bom.L.R. 889. Statutory Rules under R. 14 (5) (b)—Award under Act—Application to Civil Court to enforce—Limitation. 71 M.L.J. 759. *See also* I.L.R. (1940) 2 Cal. 460.

BENGAL RULES.—The limits within which the rule-making powers of the Local Government could be exercised are contained in sub-S. (1) of S. 43. Sub-S. (2) simply sets out by way of illustration certain matters, on which rules are considered desirable. It does not in any way limit the powers given by sub-S. (1) and the terms mentioned therein do not exhaust the list of matters on which rules might be framed by the Local Government. Accordingly R. 28 (3) of the Rules framed by the Local Government which relates to distribution of profits in case of societies with limited liability and which is framed to carry out the purpose in S. 33 is not *ultra vires*, although there is no specific item mentioned in S. 43 (2) relating to distribution of profits in case of Societies with limited liability. I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=1938 Cal. 394. *See also* 1938 Cal. 327. Where the plaintiff sues a Co-operative Society for recovery of a certain sum alleged to be due to him as dividend on certain preference shares held by him, on a declaration that the constitution of the Board of management was illegal, that it had no authority to call an extraordinary general meeting of the shareholders, and that the resolution passed at the meeting thus convened refusing dividend was illegal and *ultra vires*, the matter is

not one which is withdrawn from the Courts by R. 22 of the Rules framed by the Local Government under S. 43 of the Act, and a suit is maintainable in a Civil Court. I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=1938 Cal. 394. The different clauses of sub-S. (2) of S. 43 are only illustrative and do not restrict the general rule-making power to implement the avowed objects of the Act conferred by sub-S. (1). Sub-Rr. (2), (5) and (6) of R. 22 framed by the Local Government under the powers conferred by S. 43 of the Act are not *ultra vires*. I. L. R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 327. An award relating to a mortgage in favour of a Co-operative Society made by the Registrar under the Rules made by the Local Government under the provisions of S. 43 (1) can in no sense be a mortgage decree. The Registrar has no power to decide disputed claims of priority or to make a decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption. I.L.R. (1941) 2 Cal. 551=A.I.R. 1942 Cal. 290. Rule 22—Award—Execution—Limitation—Starting point, *See* I.L.R. (1940) 2 Cal. 460. Where a dispute between the committee and a member is referred to arbitration under R. 22, Sub-r. (1) of the Rules framed by the Government of Bengal, the proceedings before the arbitrator are not *ab initio* void for want of jurisdiction merely because a non-member is also a party to the suit. If the non-member submits to the jurisdiction of the arbitrator, he brings himself within the scope of R. 22, and under sub-R. (6) of that rule the award is not liable to be called into question by him in any Civil or Revenue Court and would be final. 41 C.W.N. 667=65 C.L.J. 206. Rule 22 (6) of the Rules framed under S. 43 of the Co-operative Societies Act is not *ultra vires* of the Local Government. But if the award is without jurisdiction, the Civil Court can certainly declare it a nullity. Even if the arbitrator is validly appointed, the award can still be a nullity if there is violation of the rules regulating the arbitration in matters of substance. Not only a proper appointment of the arbitrator in accordance with the rules is essential for creating jurisdiction in the arbitrator but the fundamental rules attaching restraint to the exercise of authority by the arbitrator are equally mandatory and a violation of them would nullify the award. But the fact that the arbitrator has ignored the law of limitation is not a ground which would entitle the Civil Court to interfere. I.L.R. (1940) 1 Cal. 82=188 I.C. 213=1940 Cal. 193. But *see* 1940 Rang. 157; 1937 Rang. 363. Before R. 22 (1) of the rules framed under S. 43 (2) (1) can apply, two conditions must co-exist: (1) the dispute must touch the business of the registered Society and (2) the dispute must be one between members or past members of the Society, or persons claiming

through a member or past member *inter se* or the dispute must be one between a member or past member, or persons so claiming on the one hand and the committee or any officer of the Society on the other. Where a Co-operative Society assigns to the plaintiff who is a non-member a loan advanced by it to the defendant, a suit by the plaintiff for the recovery of the loan from the defendant is not excluded from the jurisdiction of the Civil Court by the provisions of R. 22 (1), as neither of the conditions mentioned above are fulfilled. 50 C. W. N. 7. R. 25 of the Rules framed by the Local Government which requires the Co-operative Societies to inform the Registrar appointed under the Co-operative Societies Act whenever a loan exceeding Rs. 1,000 is granted, is a sort of departmental rule the breach of which would be a matter between the particular Co-operative Society and the Registrar but would not make the loan given an invalid one nor a loan not given by a Co-operative Society. 49 C.W.N. 377=A.I.R. 1945 Cal. 350.

**C. P. RULES.**—The Co-operative Societies Act nowhere gives any power to the Commissioner or any other Revenue Officer to examine or revise the proceedings of the Registrar or other officer of the department. A Revenue Court has no jurisdiction to question and disregard an award given by the Registrar of Co-operative Societies and the certificate issued to the Revenue Courts for recovery of the amount under the award, in pursuance of R. 33 of the rules framed under S. 43 of the Act. 1939 N.L.J. 405. Where an award under the rules framed under S. 43 (1) was in these terms: 'I therefore in this my award order that the J. Co-operative Society consisting of the following members or past members all of whom are jointly and severally liable, for the debts of the Society, pay at once' and proceeded to give a list of members, the decree on the face of it is only an award against the J. Society alone and not against its members. Moreover it is not legally possible for a Registrar to make an award against the member personally for a debt of the Society. I.L.R. (1938) Nag. 604=1938 Nag. 434. A "dispute" within the meaning of R. 26 of the Rules arises, when a demand made for payment of a debt is not immediately complied with and cannot be recovered without recourse to law. The expression "the business of a Co-operative Society" in R. 26 is not restricted to the dealings with the members of the Society only but it includes business which the Co-operative Society is empowered to transact. Where a joint Hindu family is in its corporate capacity a member of a Co-operative Society and also its treasurer, it cannot exonerate itself from the liability arising in its capacity as treasurer by discarding its character as member. As member of the Society it is bound to fulfil the obligation which it has undertaken as treasurer of the Society and in that

sense a dispute relating thereto can well be treated as a domestic dispute between the member on the one side and the Society on the other. The Registrar of the Co-operative Societies has, therefore, jurisdiction to decide that dispute. I.L.R. (1945) Nag. 677=1945 N.L.J. 482. Under R. 33 of the Rules framed under S. 43 of the Deputy Commissioner cannot sell any property specified in the award by *force of the award*, as a Civil Court can. All that he can do under that rule is that he can recover "any sum falling due under the award" as an arrear of land revenue. Accordingly he is not empowered to deal with the property covered by the award except under the powers conferred on him under S. 128 of the C.P. Land Revenue Act. Under this section, if the award does not create a charge on the property, he can only sell it if he first attaches it; and one who purchases it before such attachment is protected. I.L.R. (1945) Nag. 651=1945 N. L.J. 510=A.I.R. 1945 Nag. 281. A co-operative Bank has no power to suspend an accountant of the Bank. An accountant has no power to give any direction in regard to the business of the Bank and he is, thus, not an officer within the meaning of S. 2 (d); he is merely a servant of the Bank. There is no statutory provision in the Act empowering the Bank to appoint, suspend or dismiss its servants. Nor has any rule been framed by the Provincial Government empowering the Bank to do so. I.L.R. (1945) Nag. 457=1945 N.L.J. 221=A.I.R. 1945 Nag. 183.

**PESHAWAR RULES.**—No procedure is provided in R. 18 for the conducting of the inquiry either by the Registrar or by the arbitrator. It would therefore be unsafe to rely on the appointment of a guardian by a Registrar in the summary proceeding and to extend it to the execution in a Civil Court, which should by its very nature be governed by the Civil Procedure Code. As a matter of general policy, therefore, it would be just that whenever an executing Court is approached to carry out the order of the Registrar and there are minors in the case, the execution Judge should act under O. 32, C.P. Code, and appoint a proper person to protect the interests of the minors concerned. Failure of the execution Judge to do so renders the execution proceedings void. A.I.R. 1945 Pesh. 39.

**PUNJAB RULES.**—Civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1). 1937 Lah. 268.

**U. P. RULES.**—Jurisdiction has been specially given to the Registrar of Co-operative Societies to decide certain matters under R. 115 of the rules framed by the U. P. Government under S. 43 (2) (i) or to refer those matters for decision by an arbitrator. As this jurisdiction is contrary to the ordinary

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) subject to the provisions of section 5, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member;

(b) prescribe the forms to be used and the conditions to be complied with in the making of applications for the registration of a society and the procedure in the matter of such applications;

(c) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altering and abrogating by-laws, and the conditions to be satisfied prior to such making, alteration or abrogation;

(d) prescribe the conditions to be complied with by persons applying for admission or admitted as members, and provide for the election and admission of members, and the payment to be made and the interest to be acquired before the exercise of the right of membership;

(e) regulate the manner in which funds may be raised by means of shares or debentures or otherwise;

(f) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings;

(g) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers;

(h) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication of a balance-sheet showing the assets and liabilities of a society;

(i) prescribe the returns to be submitted by a society to the Registrar and provide for the persons by whom and the form in which such returns shall be submitted;

(j) provide for the persons by whom and the form in which copies of entries in books of societies may be certified;

(k) provide for the formation and maintenance of a Register of members and, where the liability of the members is limited by shares, of a register of shares;

(l) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member

jurisdiction of Civil Courts, it must be construed strictly. The passing of a personal decree against an alleged representative of a past deceased member (who denies that he is such a representative) is clearly outside the sub-section or the rule. Both the rule and sub-section give jurisdiction to the Registrar or the arbitrator merely to decide matters concerning the estate of a deceased member. The passing of a personal decree cannot come under this jurisdiction. As such a Civil Court can set aside such a decree. 1940 A.L.J. 58=1940 All. 482. All that R. 137

(1) lays down is that the Collector can adopt the same methods for the realisation of the money as he can adopt for the recovery of an arrear of revenue. It does not invest a debt due to Co-operative Society with the character of land revenue due to the Crown. It merely provides a summary procedure for the realisation of the money and does not confer

a substantive right of priority over other debts. I.L.R. (1940) All. 181=1940 A.L.J. 45=1940 All. 188.

SEC. 43 (2) (l).—The words “touching the business of a society” in S. 43 (2) (l) are not confined to disputes in connection with the internal management of the affairs of a society or dispute in regard to principles which would regulate the conduct of the business thereof. 28 C.W.N. 131=1924 C. 467. See also 47 A. 374=23 A.L.J. 129=1925 A. 356; 14 P. 292 (Dispute between member and society in respect of loan by society). The words “concerning the business of a Society” occurring in S. 43 (2), Cl. (l) and in R. 22 (1) framed by the Local Government, cannot be limited to disputes concerning the internal management of the Society. The principal business of a Society being to finance its members, a dispute concerning the financial obli-

gations of its members to the Society would be a dispute concerning the business of the Society. The use of the word "committee" in S. 43 (2), Cl. (1) and R. 22 (1) is sufficient to indicate a dispute with the Society itself and enable proceedings to be initiated and carried on before the authority referred to therein in the name of the Society. I.L.R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 327. There would be a dispute so long as a claim is asserted by one party and denied by the other, be the claim a false or a true one. I.L.R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 327. A claim by one co-operative society against another for a sum of money as being due is enough to constitute a dispute within the meaning of R. 14. 1932 M. W. N. 18. R. 14 (4) only requires that the parties should be heard only when they are present, and it is impossible for the Registrar to hear a party who is absent. (*Ibid.*) A dispute between a member who happens to be an officer of a co-operative society and the society in regard to sums of money entrusted to the former for purchase of certain articles is within S. 43 (2) (4) of the Act. 44 M.L.J. 382=72 I.C. 838=1923 M. 481. Where a Co-operative Society has considered its treasurer to be responsible for embezzlement of money deposited with it by a person and the treasurer has contended that he was not concerned with the alleged embezzlement there is clearly a dispute between the treasurer and the society regarding question of embezzlement of money and hence the dispute can be referred to arbitration. 42 P.L.R. 273=1939 Lah. 301. It is only members and persons claiming through members against whom the Registrar can pronounce a decision which can be executed as a Civil Court decree. The society must enforce in the regular course any claim which it may have against outsiders. The decision of the registrar, so far as it affects a stranger is a nullity as being made without jurisdiction. 148 I.C. 730=15 P.L.T. 111=1934 P. 145. Sub-r. (1) of R. 22 does not confine the dispute to such as may be referable to membership only. A dispute between the society and the members in their capacity as brokers can be the subject of reference. 36 C.W.N. 121=55 C.L.J. 89. R. 22 (b) is not meant to take away the jurisdiction of an executing Court to enquire into the competency of the award on the ground of jurisdiction. 36 C.W.N. 121. A dispute between a member who happens to be an officer of a co-operative society on the one hand and the committee or an officer thereof on the other falls within the words of the section. 36 C.W.N. 121. An award given by the Inspector of Co-operative Societies appointed as arbitrator by the Registrar of Co-operative Societies under R. 22 of the Bengal Government Rules is not an award of an arbitrator in the ordinary sense and it

need not be filed in Court before it can be enforced. 60 C. 906=37 C.W.N. 649=1933 C. 695. See also 60 C.L.J. 572; 36 C.W.N. 121; I.L.R. (1941) 2 Cal. 551. In order that an award based on an arbitration under the Act may be binding the Society must prove that he was a member of the Society at the time when the reference to arbitration was made. Although ordinarily a Co-operative Society lends money only to its members, a Court cannot hold merely on the basis of an alleged loan taken by a person that he must have been a member on the date on which he took the loan, when the affairs of the Society do not appear to have been carried on in regular manner and it is found by the Court that the register produced by the Society is a fabricated one. 42 P.L.R. 112=1940 Lah. 193. Where a dispute between the committee and a member is referred to arbitration under R. 22, sub-R. (1) of the Rules framed by the Government of Bengal under S. 43 of the Act, the proceedings before the arbitrator are not *ab initio* void for want of jurisdiction merely because a non-member is also a party to the dispute. If the non-member submits to the jurisdiction of the arbitrator, he brings himself within the scope of R. 22, and under sub-r. (6) of that rule the award is not liable to be called into question by him in any Civil or Revenue Court and would be in all respects, final and conclusive. 41 C.W.N. 667=65 C.L.J. 206. See also 39 C.W.N. 1301. An award under the Act which is not appealed against within one month, becomes final, and cannot interfered with by the executing Court, even though the award may be anomalous and erroneous, 164 I.C. 802=40 C.W.N. 89; 1935 C. 418. When an Inspector was appointed arbitrator to decide a dispute between two societies and after he gave his award one of the societies sued to declare the reference and award invalid. *Held*, that the suit was maintainable in the Civil Court. *Quære*, whether R. 22 (6) framed by the Bengal Government under S. 43 was *ultra vires*. 60 C. 1207=37 C.W.N. 843. Where it is sought to entertain or continue proceedings against the legal representatives of a deceased debtor, the arbitrators are competent to decide who are the legal representatives. If a wrong conclusion is arrived at with regard to a particular person that person has got a remedy under the Act of filing an appeal to the registrar. The Civil Court has no jurisdiction to interfere. 28 Bom.L.R. 598=1926 B. 352. The execution of an award settling the dispute between the Society and its member was held by the executing Court as time barred and the Society again referred the same dispute to arbitration and obtained an award. *Held*, that the dispute between the Society and its member was determined by the first award and the subsequent dispute referred by the Society to arbitration was one which under the rules made under S. 43 could only

or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators;

(m) provide for the withdrawal and expulsion of members and for the payments, in any, to be made to members who withdraw or are expelled and for the liabilities of past members;

be decided by the executing Court for it related wholly to the discharge of the award. The proceedings of the executing Court were subject to the ordinary laws and if the society neglected to execute the award within time, its right, to have the award enforced, was lost, and that was an end of the dispute which left nothing to be referred to arbitration. Hence the second award was one which could not be passed within the scope of the Act and the rules made under it and a suit could lie to have it declared void. 38 P.L.R. 113=1936 L. 901. A dispute between A, B and C who were all members of Society related to a transaction which took place between A and the Society. The books of the Society showed that certain money had been borrowed by A from the Society, but in reality it had been misappropriated by B and C, the Secretary. *Held*, that the dispute was concerning the business of the Society between three of its members and revision could lie from an order of the executing Court refusing to execute an award on the dispute as it failed to exercise jurisdiction vested in it by law. 165 I.C. 511=1936 L. 786. *See also* 1935 L. 947; 1935 L. 631. Civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1). 1937 L. 268. After the death of a Secretary of a Co-operative Society the Union accepted liability for the members' deposits which had been embezzled by the late Secretary. The dispute between the Union and the heirs of the deceased was referred to arbitration but the heirs refused to join in the reference. *Held*, that the submission and the award were not within the scope of the rules under the Act and the award could not be enforced against the heirs of the deceased. 133 I.C. 888=32 P.L.R. 780, Rr. 31 and 34 framed under S. 43, provide that awards shall be enforceable as decrees of a Court having local jurisdiction if application is made to it to enforce it. 47 B. 92=65 I.C. 212; 97 I.C. 288 (2)=1926 L. 547. Where the rules provide for reference of disputes to Registrar, Civil Courts have no jurisdiction. 23 A.L.J. 129=47 A. 374=1925 A. 356; 71 I.C. 722=1924 L. 418. But *see also* 6 P.L.T. 452=88 I.C. 671=1925 P. 575; 59 I.C. 1165=36 C.W.N. 414=1932 C. 317; 60 C.L.J. 572; 42 C.W.N. 391=1938 Cal. 857. The ground that a minor was not properly re-

presented before the arbitrator, is not sufficient to give jurisdiction to the Civil Court to entertain the suit for a declaration that the award was not binding on the minor. 146 I.C. 565=1933 L. 376. The question whether certain persons are the legal representatives of a deceased member entitled to have shares in the bank and to be registered as shareholders in the bank in the place of the deceased is a question which does not relate to the "business" or the management of the society and the decision of the Registrar on such a question being referred to him is not final but is subject to a right of suit in the Civil Court. (36 C.W.N. 414, Foll.) 151 I.C. 165=38 C.W.N. 459=1934 C. 537. A Court having power to execute an award can transfer it for execution. 24 Bom.L.R. 909=47 B. 92. An award was made at Poona under rules framed under S. 43 and the Judge of the Small Cause Court, Poona, was requested to transfer the decree under S. 39, C. P. Code, but he refused. *Held*, that he was empowered to transfer the decree and he could refuse to retransfer it. 46 B. 128=23 Bom.L.R. 909. An *ex parte* decree was passed, in a suit in a Civil Court instituted by a Co-operative Society, for money lent on a bond executed by a member of the society. Subsequently there was an agreement, recorded in Court, under which the member agreed to pay the decretal amount in instalments of Rs. 10 per month. Default having been committed, execution proceedings were started, and the objection was raised that the decree was void and without jurisdiction, regard being had to S. 43 of the Act and R. 22 framed thereunder by the Bengal Government. *Held*, that the agreement was valid and could be enforced in execution and that it was not open to the defendant to go back on the same or to contend that the decree was void and unenforceable. 61 C.L.J. 24=39 C.W.N. 363.

SEC. 43 (2) (1) AND (s).—An award made by a person incompetent to be arbitrator is null and void and the Civil Court has jurisdiction to declare it void. But where it is made by a person validly appointed as arbitrator, it is not a nullity although the procedure adopted by the arbitrator is materially irregular and he is guilty of misconduct. Such an award has to be set aside only by proceedings provided for by the rules under S. 43 and the jurisdiction of the Civil Court

(n) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred;

(o) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member;

(p) provide for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society;

(q) prescribe the extent to which a society may limit the number of its members;

(r) prescribe the conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies;

(s) subject to the provisions of section 39, determine in what cases an appeal shall lie from the orders of the Registrar, and prescribe the procedure to be followed in presenting and disposing of such appeals; and

(t) prescribe the procedure to be followed by a liquidator appointed under section 42, and the cases in which an appeal shall lie from the order of such liquidator.

(3) The Provincial Government may delegate, subject to such conditions, if any, as it thinks fit, all or any of its powers to make rules under this section to any authority specified in the order of delegation.

(4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

(5) All rules made under this section shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

#### *Miscellaneous.*

44. (1) All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any costs awarded to the Government under section 37, may be recovered in the same manner as arrears of land-revenue.

(2) Sums due from a registered society to Government and recoverable under sub-section (1) may be recovered, firstly, from the property of the society; secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability; and, thirdly, in the case of other societies, from the members.

is barred. (37 C.W.N. 843, Expl.) I.L.R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 857.

SEC. 43 (5).—Bye-law framed by a Society under S. 8 (3), and rule enacted by the Local Government under S. 43 (5)—Conflict between the two as to the persons to whom the Registrar should make a reference—Registrar following the rule procedure proper. 171 I.C. 395, cited under S. 8, *supra*.

SECS. 43 AND 44.—The Registrar of Co-operative Societies has the power under the rules and regulations made under the Co-operative Societies Act to pass an award not only against a society but also against its members individually. A consolidated award both against the society and its members mentioning all the members, though it may be irregular in form, is not invalid. Its validity

could be questioned by a judgment-debtor and when not objected to by him, it cannot be raised after a sale in execution. I.L.R. (1942) Nag. 685=1942 N.L.J. 462=A.I.R. 1943 Nag. 7.

SEC. 44.—Where a decree is passed against a co-operative society as a corporate body the decree-holder cannot pursue his remedy in execution against the shareholders or members of the society in their individual capacity. 39 L.W. 143=1934 M. 181 (2)=66 M.L.J. 475. Reading S. 44 of the Act with S. 128 of the C.P. Land Revenue Act it could not be said that an agriculturist's house as such should be exempt from attachment. In such a case the provisions of S. 60, O.P. Code, could not be invoked. 23 N.L.R. 66=103 I.O. 131=1927 N. 217. As to the extent of the availability of the



45. Notwithstanding anything contained in this Act, the Provincial Government may, by special order in each case and subject to such condition, if any, as it may impose, exempt any society, from any of the requirements of this Act as to registration.

46. The Provincial Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

47. (1) No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the Provincial Government:

Provided that nothing in this section shall apply to the use by any person or his successor in interest of any name or title under which he traded or carried on business at the date on which this Act comes into operation.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to fifty rupees, and in the case of a continuing offence with further fine of five rupees for each day on which the offence is continued after conviction therefor.

Indian Companies Act, 1882, not to apply.

48. The provisions of the Indian Companies Act, 1882<sup>1</sup> shall not apply to registered societies.

49. Every society now existing which has been registered under the Co-operative Credit Societies Act, 1904, shall be deemed to be registered under this Act, and its by-laws shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

50. [Repeal.] *Rep. by the Second Repealing and Amending Act, 1914 (XVII of 1914), S. 3 and Sch. II.*

## THE INDIAN COPYRIGHT ACT (III OF 1914).

Year.	No.	Short title.	Amendment.
1914.	III.	The Indian Copyright Act, 1914.	Amended, IV of 1924. Repealed in part XII of 1927.

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## THE SECOND SCHEDULE.

## REPEAL OF ENACTMENTS.

[24th February, 1914.]

*An Act to modify and add to the provisions of the Copyright Act, 1911.*

WHEREAS it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to British India; It is hereby enacted as follows:—

## CHAPTER I.

## PRELIMINARY.

Short title and extent. 1. (1) This Act may be called **THE INDIAN COPYRIGHT ACT, 1914.**

(2) It extends to the whole of British India including British Baluchistan, the District of Angul and the Sonthal Parganas.

**Sec. 1.—Distinction between 'copyright' and 'patent',** 1938 A.L.J. 390. In a case relating to infringement of copyright, it is not only proper but essential that the case should be tried with the help of experts who might be appointed commissioners to investigate and report similarities. (*Ibid.*) The compiler of a work in which absolute originality is by the very nature of the work excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. But no one is entitled to convey the same information, merely with some additions. (*Ibid.*)

**ASSIGNMENT OF COPYRIGHT.**—Where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used. A.I.R. 1939 Lah. 433.

**ASSIGNMENT—FUTURE WORK.**—There cannot possibly be a transfer of copyright or assignment of copyright in a non-existing work. Where there is no proof that the work was substantially completed at the time when document transferring copyright was drawn up and on the face of it the docu-

ment refers to a future work, copy right cannot be transferred by it. 41 P.L.R. 879=A.I.R. 1939 Lah. 433. Assignment—Registration not necessary. I.L.R. (1939) A. 275=A.I.R. 1939 All. 305=1939 A.L.J. 71.

**INFRINGEMENT—BURDEN OF PROOF.**—In an action for infringement of a copyright, it is not for the defendant to prove that there has been no infringement. It is, for the plaintiff, on whom the onus lies, to prove that in fact there has been an infringement. I.L.R. (1939) Bom. 295=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347. Author agreeing to grant to publishers sole and exclusive licence to print, publish and sell his work—Agreement is merely a *publishing arrangement* and does not amount to an *assignment of copyright*. See I.L.R. (1938) Lah. 84=40 P.L.R. 622=A.I.R. 1938 Lah. 173. Where a person produces and publishes a picture of an idol with several variations and points of difference and embellishments which are the result of his own imagination, he acquires a copyright in the reproduction, as it is an original work containing skill and artistic merit. If another person brings out a picture of the same idol with the same variations and points of difference and embellishments, he infringes the copyright of the former in the picture. The test and the best way of detecting the piracy in an alleged infringing work is to make a careful examina-

## Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(1) "the Copyright Act" means the Act of Parliament entitled the Copyright Act, 1911; and

(2) words and expressions defined in the Copyright Act have the same meanings as in that Act.

## CHAPTER II.

## CONSTRUCTION AND MODIFICATION OF THE COPYRIGHT ACT.

3. In the application to British India of the Copyright Act (a copy of which Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, is set out in the First Schedule), the following modifications shall be made, namely:—

(1) the powers of the Board of Trade under section 3 shall, in the case of works first published in British India, be exercised by the Governor-General in Council;

(2) the powers of the Board of Trade under section 19 shall, as regards records, perforated rolls and other contrivances, the original plate of which was made in British India, be exercised by the Central Government; and the confirmation of Parliament shall not be necessary to the exercise of any of these powers;

(3) the references in section 19, sub-section (4) and in section 24, sub-section (1), to arbitration shall be read as references to arbitration in accordance with the law for the time being in force in that part of British India in which the dispute occurs;

(4) as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, the reference in section 22 to the Patents and Designs Act, 1907, shall be construed as a reference to the Indian Patents and Designs Act, 1911, and the reference in the said section to section 86 of the Patents and Designs Act, 1907, shall be construed as a reference to section 77 of the Indian Patents and Designs Act, 1911;

(5) as regards works first published in British India, the reference in section 24, sub-section (1), proviso (a), to the London Gazette and two London newspapers shall be construed as a reference to the Gazette of India and two newspapers published in British India; and the reference in proviso (b) of the same sub-section of the same section to the 26th day of July, 1910, shall, as regards works the authors whereof were at the time of making of the works resident in British India, and as regards works first published in British India, be construed as a reference to the 30th day of October, 1912.

4. (1) In the case of works first published in British India, copyright shall be subject to this limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work:

tion of it to see whether any of the deviations and mistakes which artistic licence permits in the original have been reproduced in the alleged infringing copy. 46 Bom.L.R. 679.

SEC. 5.—There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. A musical

composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. *Where not a word of a song is repeated in any form in a talkie film except that the title of the song is thrown on the film at the outset this does not constitute infringement of performing right in musical composition.* 187 I.C. 449=21 P.L.T. 355 =A.I.B. 1940 P.C. 55 (P.C.).

Provided that if within the said period the author, or any person to whom he has granted permission so to do, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, re-produce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

(2) For the purposes of sub-section (1) the expression "author" includes the legal representative of a deceased author.

5. In the application of the Copyright Act musical works the authors  
 Musical works made by whereof were at the time of the making of the works  
 resident of, or first publish- resident in British India, or to musical works first  
 ed in British India. published in British India, the term "musical work"  
 shall, save as otherwise expressly provided by the  
 Copyright Act, mean 'any combination of melody and harmony, or either of  
 them, which has been reduced to writing.'

6. (1) Copies made out of British India of any work in which copyright  
 subsists, which if made in British India would  
 Importation of copies. infringe copyright, and as to which the owner of the  
 copyright gives notice in writing by himself or his agent to the Chief Customs  
 officer, as defined in the Sea Customs Act, 1878, that he is desirous that such  
 copies should not be imported into British India, shall not be so imported, and  
 shall, subject to the provisions of this section, be deemed to be prohibited,  
 imports within the meaning of section 18 of the Sea Customs Act, 1878.

(2) Before detaining any such copies, or taking any further proceedings  
 with a view to the confiscation thereof, such Chief Customs officer, or any other  
 officer appointed by <sup>1</sup>[the Chief Customs authority] in this behalf, may require  
 the regulations under this section, whether as to information, security, condi-  
 tions or other matters, to be complied with, and may satisfy himself, in accor-  
 dance with these regulations, that the copies are such as are prohibited by this  
 section to be imported.

(3) The Central Government may, by notification in the Official Gazette  
 make regulations, either general or special, respecting the detention and confis-  
 cation of copies the importation of which is prohibited by this section, and the  
 conditions, if any, to be fulfilled before such detention and confiscation; and  
 may, by such regulations, determine the information, notices and security to be  
 given, and the evidence requisite for any of the purposes of this section, and the  
 mode of verification of such evidence.

(4) Such regulations may apply to copies of all works the importation  
 of copies of which is prohibited by this section, or different regulations may be  
 made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the  
<sup>2</sup>[Central Government] all expenses and damages incurred in respect of any  
 detention made on his information, and of any proceedings consequent on such  
 detention, and may provide that notices given under the Copyright Act to the  
 Commissioners of Customs and Excise of the United Kingdom, and communi-  
 cated by that authority to any authority in British India, shall be deemed to  
 have been given by the owner to the said Chief Customs officer.

(6) This section shall have effect as the necessary modification of section  
 14 of the Copyright Act.

#### LEG. REF.

<sup>1</sup> Substituted for the words "the Local Government" by Act IV of 1924, Sch.

<sup>2</sup> Substituted for "Secretary of State for India in Council" by A.O., 1937.

## CHAPTER III.

## PENALTIES.

Offences in respect of  
infringing copies.

## 7. If any person knowingly—

(a) makes for sale or hire any infringing copy of a work in which copyright subsists; or

(b) sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or

(c) distributes infringing copies of any such work, either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(d) by way of trade exhibits in public any infringing copy of any such work; or

(e) imports for sale or hire into British India any infringing copy of any such work;

he shall be punishable with fine which may extend to twenty rupees for every copy dealt with in contravention of this section, but not exceeding five hundred rupees in respect of the same transaction.

## 8. If any person knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work

Possession of plates for  
purpose of making infringing  
copies.

in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the

copyright, he shall be punishable with fine which may extend to five hundred rupees.

## 9. If any person, after having been previously convicted of an offence punishable under section 7 or section 8, is subsequently convicted of an offence punishable under

Punishment on second  
conviction.

either of these sections, he shall be punishable with

SEC. 7.—The mere failure of an author to make the payment prescribed by sec. 5 of Act XX of 1847 does not deprive him of his copyright in his book. On the other hand, the proviso to sec. 14 of the Act definitely states the contrary. It is only the right to sue under that Act that is prohibited if the registration fee has not been paid. 53 M.L.J. 529=105 I.C. 669=1927 M. 981. The procedure about payment of fees prescribed by Act XX of 1847 has no place in the present Act III of 1914, and therefore a complaint under sec. 7 of the new Act cannot be thrown out on the ground of non-payment of fees. (*Ibid.*). An acquittal will be set aside in revision in a case where the Court below has proceeded on a wrong view of the law, and where the matter is of great importance to the complainant in his position as author of a book, which, if the acquittal stands, will be pirated by the accused who will secure for himself the gains that ought legitimately to go to the complainant. (*Ibid.*) Under the old Act "copyright" did not include the exclusive right of translation but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. 13 A.L.J. 636=16 Cr. L.J. 656=30 I.C. 480; offence where complete. 28 P.B. 1916 (Cr.). On this section, see

also 51 M. 180.

Colourable Imitation—Question of Fact.—The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether a work is a colourable imitation of another is a question of fact. Similarity is a great point to be considered but mere similarity is not enough. A conglomeration of similarities which cannot be mere coincidence is evidence of infringement. 126 I.C. 197=51 C.L.J. 243=34 C.W.N. 540. But see also 142 I.C. 815=1933 P.C. 26=64 M.L.J. 193 (P.C.). Infringement of copyright of pictures—Offending pictures must be copies of substantial portions of copyright pictures. 112 I.C. 784=30 Cr.L.J. 16=33 C.W.N. 172. As to *infringement* of right in a *musical composition*, see 32 L.W. 10=1940 P.C. 55 (P.C.). In a criminal proceeding started for infringement of copyright of books the order was "summon the accused under sec. 7, Act III of 1914". From the order it did not appear under which clause of sec. 7 the accused was being summoned nor was it clear from the order sheet that the accused knew under what clause of sec. 7 he was going to be tried. *Held*, that the accused had not had a fair trial. 152 I.C. 248=1934 P. 522.

simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

10. (1) The Court before which any offence under this Chapter is tried

Power of Court to dispose of infringing copies or plates for purpose of making infringing copies.

may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be destroyed or delivered

up to the owner of the copyright, or otherwise dealt with as the Court may think fit.

(2) Any person affected by an order under sub-section (1) may, within thirty days of the date of such order, appeal to the Court to which appeals from the Court making the order ordinarily lie; and such appellate Court may direct that execution of the order be stayed pending consideration of the appeal.

Cognizance of offences.

11. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

Saving in case of infringement by construction of building.

12. The provisions of this Chapter shall not apply to any case to which section 9 of the Copyright Act, regarding the restrictions on remedies in the case of a work of architecture applies.

#### CHAPTER IV.

##### MISCELLANEOUS.

Courts having civil jurisdiction regarding infringement of copyright.

13. Every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge.

14. No suit or other civil proceeding instituted after the 30th of October,

Effect of non-registration under Act XX of 1847.

1912, regarding infringement of copyright in any book the author whereof was at the time of making the book resident in British India, or of any book first published in British India, shall be dismissed by reason only that the registration of such book had not been effected in accordance with the provisions of the Indian Copyright Act, 1847.

15. The enactments mentioned in the Second Schedule are hereby repealed to the extent specified in the fourth column thereof, [Repealed by Act XII of 1927.]

Repeals.

#### THE FIRST SCHEDULE.

[Portions of the Copyright Act applicable to British India.]

(See section 3.)

#### COPYRIGHT ACT, 1911.

[1 & 2 GEO. V, CH. 46.]

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## SCHEDULES.

[16th December, 1911.]

*An Act to amend and consolidate the law relating to copyright.*

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

## PART I.

## IMPERIAL COPYRIGHT.

*Rights.*

1. (1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

SECS. 1 AND 2, GEO. V., c. 46—LAW BEFORE—EXTENT OF COPYRIGHT.—Even under the Copyright Act, XX of 1847, copyright is infringed not merely by printing and publication but also by performance of the works. 38 C.W.N. 611=1934 C. 671. The Imperial Copyright Act of 1911 is applicable to India under the Indian Copyright Act except in so far as it has been modified by the latter Act. The sole right to offer for sale the copyright in certain dramas belongs to the owner of the copyright and hence an advertisement by another claiming that he had the right to sell the same, clearly comes under the definition of the word "Infringement" of "copyright". The language of sec. 2 of the Imperial Copyright Act, is wide enough to include not only a sale of the copyright by a

person not entitled to sell the same but also an attempted sale, and the owner can in such a case claim a declaration and if necessary an injunction. Wherever the advertisements circulated, there is a cause of action for the plaintiff and jurisdiction for the Courts. 1944 A.L.J. 496XI.L.R. (1945) All. 20=1945 All. 55.

CONSTRUCTION OF ACT.—All laws which put a restraint upon human activity and enterprise must be construed in a reasonable and generous spirit. Under the guise of a copyright a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge. 1934 L. 777.

SEC. 1 (1).—"Original" does not relate to ideas. 46 M.L.J. 637=51 I.A. 109=48 B.

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

308=28 C.W.N. 613=1938 A.L.J. 390. The laws of copyright do not protect ideas. Its protection falls within the patent laws. While a patentee has the sole right to use his invention within certain limits and if anybody uses the patent, though on independent investigations, there is infringement of the patent, in the case of an infringement of copyright, it must be shown that the defendant has derived his work from the plaintiff. I.L.R. (1938) All. 370=1938 A. L. J. 390=A.I.R. 1938 All. 266. The compiler of a work in which absolute originality is by the very nature of the work excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. But no one is entitled to convey the same information, merely with some additions. I.L.R. 1938 All. 370=1938 A.L.J. 390=1938 All. 266. Where certain tables (for instances list of dates and abridgement from post office guide) inserted in the plaintiff's diary are original in the sense that the tables were arranged by somebody, and are not to be found elsewhere, copyright may well subsist in them. The collection of such tables is a compilation which is entitled to copyright. (1943) 1 All. E.R. 322 (C.A.).

ORIGINAL WORKS include photographs taken from paintings, drawings or other photographs, or from engravings from pictures. (1868) L.R. 3 Q.B. 387; 37 L.J.Q.B. 161; (1869) L.R. 4 Q.B. 715; 39 L.J.Q.B. 31. If current traditional poems embodying the main incidents of legend are given a literary form demanding considerable powers of adaptation and polishing, the result is an original literary work within the meaning of sec. 1. 42 C.W.N. 541=1938 Cal. 594. A man who gets another to sing or recite traditional poems for the express purpose of recording the words and then publishes the record, is entitled to a copyright. 178 I.O. 106=42 C.W.N. 541=1938 Cal. 594.

"ARTISTIC WORK".—Means not merely the suggestion of the subject of a painting as executed by another. (1890) 25 Q.B.D. 99; or the employer of a photographer, (1883) 11 Q.B.D. 627; 52 L.J.Q.B. 767; distinguished in (1895) 2 Ch. 531; 65 L.J. Ch. 41. In *Kewrick v. Lawrence*, (1890) 25 Q.B.D. 99, cards with a hand holding a pencil in the act of completing a cross in a ballot paper were held unprotected. It would appear that the work must be something—apart from work specifically included in the defini-

tions in sec. 35—that is capable of being printed and published. See (1908) 1 K.B. 821; 77 L.J.K.B. 577; (1921) 1 Ch. 503; 90 L.J. Ch. 318.

ARCHITECT'S COPYRIGHT.—In or about 1912 H & Sons employed the firm S & B as architects in connection with buildings which shortly afterwards were erected on part of the premises of H & Sons. In 1935 H & Sons employed M as their architect in connection with an extension of the original building. The claim in the action was made by the sequels in title of S & B, who alleged that the buildings put up in accordance with M's plans, and the plans themselves, infringed the copyright vested in the plaintiffs both in the artistic design of the buildings for which S & B were responsible and in the relative plans. The main defence was that it was implicit in the transaction between H & Sons and S & B that H & Sons and any architect employed by them should stand authorised to do what in fact had been done.

Held, that (i) no such term can be implied in the original transaction on the facts of this case. (ii) An architectural plan finds its meaning and purpose in the use to which it is put and the copyright vests in the architect in regard to the building as well as the plans. The builder is only part of the machinery employed in the production of the structure which embodies the design and ideas of the architect. For copyright purposes, the author of the architectural work of art is the author of the plans and not the builder. (iii) Though the damages are presumably at large to a certain extent, the Court should proceed in fixing the same on the basis of considering what sum might fairly have been charged for a licence to use the copyright for the purpose for which it was used and one is entitled to take into account all the surrounding circumstances in exactly the same way as one is entitled to do in the case of the invasion of a common law right of property. (1941) 3 All. E.R. 144 (Ch.D.).

SEC. 1 (1) (b).—The Act does not define "the date of the making." It is submitted that such date does not mean the completion of the work, but it must be in so advanced a state that some more or less permanent record of it exists. Thus a mere idea or artistic conception cannot claim copyright. See (1887) 19 Q.B.D. 629, 636; 56 L.J. Q.B. 533; and as to proving the commencement of writing a play, see (1893) 2 Q.B. 308.

TITLE OF A WORK.—In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve



but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right—

(a) to produce, reproduce, perform, or publish any translation of the work;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a novel or other work, to convert it into a dramatic work, by way of performance in public or otherwise;

(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. Where the theme of a film is different from that of a song the use for the film of a title of the song is too unsubstantial to constitute infringement of literary copyright. 187 I.C. 449=21 P.L.T. 355=52 L.W. 10=A.I.R. 1940 P.C. 55 (P.C.). Musical composition, see 52 L.W. 10=1940 P.C. 55 (P.C.).

**BROADCAST OF PERFORMANCE OF MUSICAL WORK—INFRINGEMENT OF COPYRIGHT—LIABILITY OF BROADCASTERS.**—The acoustic representation of a musical work by means of wireless so that the musical work is heard many miles away from the transmitting studio or place of actual performance, is a performance (public or private) of the work within the meaning of sec. 19 of the Copyright Act. The sole right of the owner of the musical work is to perform it *in public*, and any one may perform the work in private. The original performance in the studio may be, and generally will be, a performance in private. In such a case the broadcasted performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place. If there is merely a broadcast from the studio where the piece is performed in studio, there is no performance in public at all. A broadcast *per se* is not an acoustic representation of the work. If the broadcast is picked up only by listeners in private it might be difficult to establish that there is a public performance; for each performance would be separate and each would be private. But a broadcast to all and sundry listeners will include hotels and other places of entertainment or refreshment who, if

not forbidden, will perform the piece to a number of members of the public, and such a performance will be a public performance within the meaning of the Act by the owners or occupiers of those places; for their actions in connection with the receivers which have been installed there and which they control have caused the public performances to take place. Whether the studio performance is public or private, if the persons who are responsible for that performance are also responsible for the broadcasting of the piece, there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loud-speaker and thus to perform the piece in public. The question as to the position of the broadcasters in such a case, so far as regards infringement, is answered by the language of sec. 1 (2) of the Act. It is sufficient to show that they have "authorised" the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. 188 I.C. 237=A.I.R. 1940 P.C. 111 (P.C.). The principal object of the Copyright Act, 1911 is to safeguard the property of authors or their transferees in their copyright and if employers of labour were entitled to cause compositions to be performed before their employees merely by buying a piece of music or gramophone record or paying for the ordinary licence for a broadcasting set, an author would very soon have his public seriously diminished and the protection of the Act would be to a great extent illusory. Accordingly the diffusion of music by broadcast and gramophone records with loud-speakers in a factory to the workmen amounts to a performance in public and an infringement

and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

2. (1) Copyright in a work shall be deemed to be infringed by any person

Infringement of copy-  
right.

who, without the consent of the owner of the copy-  
right, does anything the sole right to do which is by  
this Act conferred on the owner of the copyright:

Provided that the following acts shall not constitute an infringement of  
copyright:—

of copyright. [(1943) 1 All.E.R. 288, affirmed.] (1943) Ch. 167=112 L.J. (Ch.) 148 = (1943) 1 All.E.R. 413 (C.A.).

SEC. 1 (2): "SOME SUBSTANTIAL PART".—Means some material and substantial part. (1878) 3 A.C. 483; 47 L.J.C.P. 545.

LECTURE.—A reporter of a speech may have copyright in the report. (1900) A.C. 539; 69 L.J. Ch. 699.

SEC. 1 (2) (a): "REPRODUCE".—These words do not include the representation of a picture by a *tableau vivant*, formed by grouping in the same way as the figures in the picture living persons dressed in the same way and placed in the same attitude as the figures in the picture. (1894) 2 Ch. 1; 63 L.J. Ch. 417.

SEC. 1 (2) (a).—A person who employs another to adapt a foreign play is not the "author" of the adaptation. (1856) 25 L. J.C.P. 127.

SEC. 1 (2) (d).—The term "*musical work*" is not defined in the Act; but see the partially repealed definition in sec. 3 of the (English) Musical Copyright Act, 1906. An arrangement for the pianoforte of the score of an opera by a person other than the composer of the opera is an independent musical composition, of which the person who arranges the score for the pianoforte, and not the composer of the original opera, is the "author or composer." (1867) L.R. 3 Q. B. 223; 37 L.J.Q.B. 84. See also 52 L.W. 10=A.I.R. 1940 P.C. 55 (P.O.).

"AND TO AUTHORISE ANY SUCH ACTS AFORESAID."—In the absence of any stipulation to the contrary, the vendor of a copyright may, after the sale of the copyright sell any copies which were printed before such sale. (1869) L.R. 7 Eq. 418. The word "authorise" in sec. 1 (2) of the Act covers anything done with the knowledge and connivance of a person. 1939 Rang.L.R. 121=A.I.R. 1939 Rang. 266.

SEC. 1 (3): "COPIES".—No definition is given in the Act as to what will constitute a "copy". But see (1905) 1 Ch. 519; 74 L. J. Ch. 304; (1898) 14 T.L.R. 550; 55 Sol. J. 272.

"ISSUE OF COPIES OF THE WORK TO THE PUBLIC".—Under the Copyright Act, 1842, the legislature only contemplated publication within the country. (1868) L.R. 3 H.L. 100; 37 L.J. Ch. 454; but this was altered by the International Copyright Act, 1886, and the Orders in Council thereunder. Even gratuitous circulation would seem to amount to a publication. See (1852) 12 C.B. 177; 2 V. & B. 23.

SEC. 2.—The Imperial Copyright Act of 1911 is applicable to India under the Indian Copyright Act except in so far as it has been modified by the latter Act. The sole right to offer for sale the copyright in certain dramas belongs to the owner of the copyright and hence an advertisement by another claiming that he had the right to sell the same, clearly comes under the definition of the word "Infringement" of "copyright". The language of S. 2 of the Imperial Copyright Act is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempted sale and the owner can in such a case claim a declaration and if necessary an injunction. Wherever the advertisement circulated, there is a cause of action for the plaintiff and jurisdiction for the Courts. I.L.R. (1945) All. 20=1944 A.L.J. 496=1945 O.W.N. (H.C.) 41=A.I.R. 1945 All. 55.

SEC. 2: COPYRIGHT IN COMPILATION.—Though a book is a compilation from other works and is not original, the fact that its contents have been arranged on a new plan will give the compiler a copyright in the book. 43 A. 412=61 I.C. 394=19 A.L.J. 180. Where in an action for breach of copyright of a book much stress was laid by the plaintiff upon similarities with regard to the plan of the book, the scheme, upon phrasal identities and certain mistakes: *Held*, that the evidence was fantastic, and such actual coincidences as do exist were quite explicable, and should be explained that both the authors had to rely upon the accumulation of information which had been made by many authors before them and to which they have had to have recourse in writing their

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:

books. 1933 A.L.J. 393=1933 P.C. 26=64 M.L.J. 193 (P.C.); 99 C.W.N. 945=61 C.L.J. 573. *See also* 1938 A.L.J. 390; 126 I.C. 197=34 C.W.N. 540.

WHAT AMOUNTS TO WAIVER OF COPYRIGHT—34 I.C. 357=14 A.L.J. 724=38 A. 484.

FINE ARTS—COPYRIGHT IN ENGLISH AND INDIAN LAW.—The Fine Arts Copyright Act (25 and 26 Vic., C. 68) does not extend to any part of the British Dominions outside the United Kingdom. [(1903) A.C. 496, F.] In England before the Statute of Anne (8 Anne, c. 19) there was no copyright at common law for an author or a publisher in his productions. 22 Bom.L.R. 808=57 I.C. 592=44 B. 720. (4 H.L.C. 815; 19 B. 557, Foll.). Where a person produces and publishes a picture of an idol with several variations and points of difference and embellishments which are the result of his own imagination, he acquires a copyright in the reproduction, as it is an original work containing skill and artistic merit. If another person brings out a picture of the same idol with the same variations and points of difference and embellishments, he infringes the copyright of the former in the picture. The test and the best way of detecting the piracy in an alleged infringing work is to make a careful examination of it to see whether any of the deviations and mistakes which artistic licence permits in the original have been reproduced in the alleged infringing copy. 46 Bom.L.R. 679.

TEST OF INFRINGEMENT OF COPYRIGHT.—67 I.C. 983. Innocence is no defence to a charge of infringement of copyright. The offence is complete even if the offender authorises the performance of a musical piece without any knowledge of infringing the rights of any other person. 32 P. L. R. 20=124 I.C. 894=1930 P.C. 314 (P.C.). The question, what is an infringement of an author's copyright is one which must depend upon the circumstances of each particular case, having regard to the nature of the work into which the pirated parts are imported, and the value and extent of the infringement. *See* 1878 A.C. 483; 47 L.J. O.P. 545 and (1873) L.R. 8 Exch. 1; 45 L.J. Ex. 28, where the defendant was held to have been guilty of an infringement of copyright in publishing copies of all the cartoons which had appeared in *Punch* relating to the Emperor Napoleon III. Although there are some subjects which must lead to the same result if accurately performed, the compiler has a right to restrain others from using the result of his labours, or to sue him for doing so, as in the case of translations. (1814) 3 V. & B. 77; roadbooks, (1807) 1 East 353; directories, (1806) 12 Ves. 270; (1809) 16 Ves. 269; (1866) L.R. 1 Eq. 697; 35 L.J. Ch. 423; (1870) L.R. 5 Ch. 279; the heading of trades

directories though the letterpress consists only of advertisements. (1893) 1 Ch. 218; 62 L. J. Ch. 404; statistical tables, (1867) L.R. 3 Eq. 718; 36 L.J. Ch. 729, diaries, (1873) L.R. 14 Eq. 431; 41 L.J. Ch. 781; a telegraph code, (1884) 26 Ch.D. 637; 53 L.J. Ch. 589; or law reports (1823) cited in 5 Ves. 709; (1838) 3 Myl. & Cr. 711; (1840) 11 Sim. 51; 9 L.J. Ch. 323. In such cases the question is whether the alleged infringement is a legitimate use of the author's publication, in the fair exercise of a mental operation deserving the character of an original work. (1810) 17 Ves. 422; 11 R.R. 118. As to trade catalogues; *see* (1875) L.R. 19 Eq. 623 and (1882) 21 Ch.D. 369; 52 L.J. Ch. 67. As to dramatisation of novel, *see* (1890) 63 L.T. 762. To obtain protection, a work must have literary value. Protection has been in the case of a photograph album. (1886) 33 Ch.D. 546; 55 L.J. Ch. 892 and a perforated card, (1882) 47 L. T. 539; 52 L.J. Ch. 107. It has been held that a *fair abridgment* is no infringement of a copyright. (1740) 2 Aik. 141; 3 *ib.* 269; 5 Ves. 709; (1785) 1 Bros. C.O. 451, cited in 3 Swanst. 679; (1761) Amb. 402; (1801) 5 Ves. 709; and *see* 93 L.J.P.C. 113; but there appears to be reason for doubting the soundness of those decisions: *See* Scrutton on Copyright, 2nd Edn. at page 125, Every Day St. Vol. I, pp. 516-517. An *abridgment of a book* after the coming into force of Act III of 1914 may under certain circumstances amount to a reproduction of a substantial part of a book and therefore come within the rule of prohibition. 154 I.C. 207=1934 A. 922. *See also* 48 Bom. 308=61 I.A. 109=46 M.L.J. 637 (P.C.). With respect to *encyclopaedias* and compilations of that kind, a certain licence is allowed in extracting passages from other works. (1807) 1 Camp. 94; (1817) 2 Swans. 428; (1839) 8 L.J. Ch. 141. *Quotations are necessary for the purpose of reviewing*, and quotations for such a purpose are not to have the appellation of piracy affixed to them; but quotations may be carried to the extent of manifesting piratical intention. (1826) 2 Russ. 393; (1846) 10 Jur. 420. As to music, *see* (1835) 1 Y. & C. 288; 4 L.J. Ex. Eq. 21. *Similarities due to mere coincidence* are not an infringement. (1911) 28 T.L.R. 69. The registered owner of a copyright in a work is entitled to have all the unsold copies of a piratical edition delivered up to him for his own use, without making any compensation for the cost of production or publication. (1857) 3 K. & J. 581. In (1887) 12 A.C. 326; 57 L.J.P.C. 2 in which a professor of the University of Glasgow was held by the House of Lords in 1887 to be entitled to restrain other persons from publishing his *lectures*—delivered orally to students on payment of

(ii) Where the author of an artistic work is not the owner of the copy-right therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work;

(iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of an architectural work of art;

fees—was decided independently of the Lectures Copyright Act of 1835, which though it preserved the law, was silent as to what the law was. *A reporter has copyright in his own report.* (1900) A.C. 539; 69 L.J. Ch. 699.

**UNPUBLISHED WORK—COPYRIGHT IN.**—Where *P* purchased the right to publish and sell 90 songs composed by *D* and shortly afterwards *D* sold 40 of these to *M*, who published the same and sold them, *held*, that *P* was entitled to sue *M* for an injunction restraining him from publishing and selling the 40 songs in violation of the right exclusively acquired by him. 12 L.W. 151=39 M.L.J. 341=59 I.C. 229.

**BOOK PRODUCED BY AUTHOR AFTER FURTHER STUDIES AND RESEARCH.**—Every man can take what is useful from the original work, improve, add and give to the public the whole, comprising the original work, with the additions and improvements; and in such a case there is no invasion of any right. But a copy, much less a servile copy of a work, cannot be allowed. Where the new book is a work which the author has produced after further studies, and represents the result of ten years of research work, a mature art and a greater wealth of details in depicting the various incidents, and the imagery is of a superior type and there are fresh incidents and details, which are the result of researches made by the author into works which had existed before as well as those which came into existence after the first work had been written and published; the two works are substantially different and there is no infringement of copyright. 1934 L. 777.

**LAW REPRODS.—EXTRACTS BY REPORTER.**—A plaintiff's copyright is infringed when the defendant reproduced not only the judgments but also part of the plaintiff's reports not forming parts of judgments and facts collected by the plaintiff from the records of cases. The reporter has no copyright in the reports of judgment, but he has protection of the law in selecting and reporting cases which he obtains by expenditure of time, labour and money. 26 I.C. 30=18 C.W.N. 1078.

**INJUNCTION.**—In a suit for a perpetual injunction against the defendants who, it was alleged, had infringed the plaintiff's copyright by copying a large number of judgments from the plaintiffs' journal "Lahore

Law Times" and compiling and publishing a book called "Consolidated Revenue Rulings," it appeared that the allegations referred to the rulings portion only of the "Law Times" and that of past years; secondly, the defendants' publication consisted not merely of Lahore rulings, but those of other places as well; thirdly, the plaintiffs had, by bringing out a similar book at a cheaper price, substantially reduced the chance of a loss to themselves; lastly, the trial Court had, by directing the defendant to keep a separate account of their sales, amply safeguarded their interests. *Held*, in the circumstances, a temporary injunction was not necessary. 1933 L. 448=34 P.L.R. 249. But *see also* 1931 L. 624. The power of the Court to grant a temporary injunction is not limited by the absence of any finding on the question of jurisdiction which has been raised in the case. *Prima facie* until such a question is decided in the negative, a Court has jurisdiction to do all acts and take any action that may be sanctioned by law in connection with the case. 132 I.C. 586=1931 L. 624.

**ABRIDGMENT.**—Merely selecting passages and knitting them together—no infringement—Raw material or the original works are open for consultation for all—Use of another's labour and skill only is prohibited. 48 B. 308=51 I.A. 109=1924 P.C. 75=46 M.L.J. 637 (P.C.). On appeal from 23 Bom.L.R. 1299. The word "original" does not mean that the work must be the expression or original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of literary work with the expression of thought in print or writing, (*Ibid.*) The originality which is required relates to the expression, which must be in an original or novel form, but the work must not be copied from another work, that is, it should not originate from another. (*Ibid.*) *See also* 1934 All. 922.

**EVIDENCE.**—In an action for breach of copyright the plaintiff relied upon the intrinsic evidence to be derived from a comparison of the two works; and urged that on comparison between the two works it would be found that there was such an accumulation of similarities, of like omissions, of plan, of phrases, of mistakes, that the inference was irresistible that defendant should have had plaintiff's work before him before.

(iv) The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged;

(v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries;

(vi) The reading or recitation in public by one person of any reasonable extract from any published work.

(2) Copyright in a work shall also be deemed to be infringed by any person who—

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(c) by way of trade exhibits in public; or

(d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

he composed him work. *Held*, in the case of two literary works intrinsic evidence of that kind might not be sufficient to establish a case of copying even if the direct evidence was all the other way. 1933 A.L.J. 393=1933 P.C. 26=64 M.L.J. 193 (P.C.). See also 126 I.C. 197=34 C.W.N. 540.

**PRESUMPTION—BURDEN OF PROOF.**—Where the defendants in an action for damages for infringement of copyright in respect of a work do not put into issue the existence of the copyright in the work, there is an irrebuttable presumption that the alleged work was a work in which copyright existed and that the plaintiff was the owner of the copyright. In this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. The proper course, in such cases, is to get the opinion of experts who might be appointed Commissioners to investigate and report on the matters in issue. The opinion and finding of experts are not conclusive on the Court, but may be reviewed on exceptions. 39 C.L.J. 134=81 I.C. 754=1924 C. 595. The defence of having had no reasonable ground for suspecting that the performances of a musical piece would be infringement of copyright should be proved by the defendants affirmatively. 1930 A.C. 377=124 I.C. 894=1930 P.C. 314 (P.C.). Where a person complaining of infringement of his copyright produces the book and the certificate of registration of the copyright, the burden of proving that the portion of the

book which had been copied by the accused was also contained in a previous book published by the accused's father and that the complainant had, therefore, no subsisting copyright at the time of the infringement, is on the defence. 131 I.C. 865=1931 A.L.J. 304=1931 A. 353.

**SEC. 2 (1) PROVISIO: CONSTRUCTION.**—The proviso does not say that not more than two passages from each work of the same author are published, but says "not more than two passages from work by the same author". Obviously, the proviso is not intended to protect a man who brings out an unauthorized edition of a poet's poems by taking out two poems out of each of many works published by him separately. *Quære*.—Whether when a number of poems are brought out in one volume the whole volume is to be considered a literary work of the author or whether each separate poem in that volume is to be considered as separate literary work. 55 All. 564=1933 A.L.J. 791=1933 All. 474.

**COPYRIGHT—ASSIGNMENT—WHAT AMOUNTS TO.**—A sale of a first edition of 1,100 copies of a certain book, to be published in a particular form, amounts to an assignment of an interest in the copyright until the last copy is sold. Until then the purchaser has the right exclusively to the copyright, at any rate as far as the right to publish the book in any form is concerned. It is not merely a sale of a right to print and sell 1,100 copies in the particular form. 62 Cal. 57=39 C. W.N. 224.

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death:

Term of copyright.

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

4. If, at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

Compulsory licences.

SEC. 2 (3): "FOR THE PERFORMANCE IN PUBLIC".—The performance in public, though not necessarily for profit will be infringement. (1884) 13 Q.B.D. 843; 53 L.J.Q.B. 338. See (1911) 27 T.L.R. 554. To constitute infringement, it is not necessary to show that the defendant knowingly invaded the right. See (1859) 29 L.J.C.P. 20.

"CONSENT OF THE OWNER OF THE COPYRIGHT".—It need not be in the handwriting of the author, and may be given by any agent having due authority. (1855) 16 C.B. 517; 24 L.J.C.P. 169; see further, (1856) 25 L.J.C.P. 127; 17 C.B. 427; (1888) 20 Q.B.D. 378; 57 L.J.Q.B. 227. Under the English Dramatic Copyright Act, 1833, such person only was liable who, by himself or his agent, actually took part in the representation which was a violation of the copyright, and therefore the landlord of the rooms in which

the performance took place was not, as such, liable. (1849) 8 C.B. 836; 19 L.J.C.P. 33; and see further as to this point. 5 B. & S. 751; (1864) 17 C.B. (N.S.) 418; 33 L.J.C.P. 319. As to *infringement by a co-owner*, see (1916) 2 K.B. 325; 85 L.J.K.B. 1504. As to *proof of infringement by interrogatories*, see (1887) 18 Q.B.D. 625.

SEC. 3.—If a copyright is shown to have subsisted when Act III of 1914 came into force, the period of copyright substituted by that Act would be 50 years from the death of the author. Where the complaint for infringement is made after the new Act the question to be considered is whether the copyright was subsisting under the new Act and not whether it was subsisting under the old Act XX of 1847. 131 I.C. 865=1931 A.L.J. 304=A.I.R. 1931 All. 353.



Ownership of copyright,  
etc.

5. (1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that—

(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright;

(b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations, to the United

SEC. 5.—See 1930 A.C. 377=124 I.C. 894 =1930 P.C. 314.

SEC. 5 (1) (a).—*A husband can prohibit the exhibition of a photograph of his wife and children*, the inference being that the wife who ordered the photograph acted as the husband's agent. (1901) 18 T.L.R. 126.

SEC. 5 (1) (b).—In order to give the proprietor of a periodical a copyright in articles composed for him by others, it is not necessary that there should be an express contract that he should have the property in the copyright. Where the defendants published a monthly periodical, professing to be a digest of the cases decided in the Courts during the previous month, and inserted among others, head-notes or marginal notes copied verbatim from the plaintiff's publication, it was held that the defendants were guilty of piracy. (1855) 24 L.J.C.P. 175. See (1893) 1 Ch. 218; 62 L.J.Ch. 404; approved in (1904) A.C. 17; 7 L.J.Ch. 85, and see (1859) 29 L.J.C.P. 20. The proprietor of an encyclopaedia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopaedia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopaedia for all purposes. (1848) 16 Sim. 190; 17 L.J.Ch. 210. Where the publishers of a magazine employ and pay an editor, and the editor employs and pays persons for writing articles in the magazine, the copyright in such articles is not vested in the publishers under this section. (1846) 16 L.J.Ch. 140. As to a map, see (1871) L.R. 6 Ch. 346; 40 L.J.Ch. 489. The republication of the Christmas number of a periodical under a different title, form and price is a "separate publication" of an arti-

cle contained in such number, which the author is entitled to restrain. (1860) 1 J. and H. 312.

TRANSLATION.—The copyright of an English work translated by a foreigner is infringed by a re-translation of it by an Englishman into English. (1853) 1 Drew. 353; 22 L.J.Ch. 457.

SEC. 5 (2).—See A.I.R. 1939 Lah. 433; 1939 A.L.J. 71; A.I.R. 1938 Lah. 173, cited under sec. 1, *supra*. A sale, valid by the law of the country where made, has been held to pass the interest of the assignor. (1848) 5 O.B. 860 (Eng.). the assignment or grant must be in writing. (1876) 4 Ch.D. 419; 46 L.J.Ch. 103; evidence that the plaintiff in an action for printing a musical work acquiesced in the defendant's publication of it six years ago does not raise a presumption that the plaintiff has transferred his interest in the copyright; nor does a receipt given by the plaintiff for money received by him as the price of the copyright. (1818) 2 Stark 382; or on admission of an assignment, *ibid.*; (1814) 4 Camp. 9, n.; (1723) Vin. Abr. "Books", etc., 3. A receipt in writing for the price of the copyright operates as an effectual assignment 3 Matq.H. L. 611. It would seem that a copyright of a book not in existence can be assigned at law. (1906) 2 Ch. 550; 75 L.J. ch. 732, and the assignment may take the form of an agreement to assign (*ibid.*); but see (1839) 8 L.J.Ch. 216; (1838) 9 Sim. 151. On bankruptcy, the copyright would pass to the trustee without any writing. (1826) 2 Russ. 392. Actual payment is a condition precedent to the vesting of the copyright of the article in the proprietor of the work; a contract for payment is not sufficient. (1851) 1 Sim. 336; 20 L.J.Ch. 553.



Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right, comprised in copyright, the assignee, as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

#### *Civil Remedies.*

6. (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

SEC. 6.—A book containing selections from the works of different authors can be the subject-matter of copyright. The principle applicable to such cases is that one person is not at liberty to use or avail himself of the labour which another has been at for the purpose of producing his work, and so take away the result of that other's labour, *i.e.*, his property. 156 I.C. 841=A.I.R. 1935 Lah. 282. Where the legal right of the plaintiff, namely, his copyright in a particular book, was admitted and only its violation by the threatened publication of an alleged similar book was not denied and it further appeared that if the injunction was not issued irreparable injury or inconvenience might result to the plaintiff. *Held*, that it was a proper case in which a temporary injunction should be issued. Principles applicable to grant of interlocutory injunctions considered. 132 I.C. 586=1931 L. 624. *See also* 34 P.L.R. 249. In a case of infringement of copyright the application for temporary injunction is governed by sec. 6 of the Copyright Act and not by sec. 56 (f) of the Specific Relief Act. 132 I.C. 586=1931 Lah. 624. As to measure of damages, *see* (1898) 1 Ch. 58; 67 L.J.Ch. 6; and as to when damages are recoverable, *see* (1899) 1

I.R. 386. The owner of a copyright in any book has no right in a Court of equity to more than the usual account of the net profits of all copies of the book. He has no right to an account of the gross proceeds. (1857) 3 K. & J. 581.

SECS. 6 AND 7.—The reliefs to which a person complaining of infringement is entitled under Ss. 6 and 7 of the 1st schedule of the Copyright Act, are not alternative. He is entitled to recover both damages for infringement under S. 6 and also damages for conversion under S. 7. The value of the infringing articles that have been disposed of is not to be taken as the sale price. It has to be assessed by the methods or principles laid down. [1939 A.C. 178.]; 49 C.W.N. 280. Where in a case of infringement of copyright the plaintiff asked for damages under sec. 6 on the footing of the loss sustained and in the alternative under sec. 7 for the delivery of the unsold infringing copies and damages on the footing of conversion in respect of the infringing copies sold, and the Court awarded damages under sec. 6 and also decreed delivery of the unsold copies, *held*, that the plaintiff could not claim damages under sec. 7 also. *Quare*, whether the Court was justified in awarding

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

(a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;

(b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Rights of owner against persons possessing or dealing with infringing copies, etc.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had not reasonable ground for suspecting, that copyright subsisted in the work.

Exemption of innocent infringer from liability to pay damages, etc.

damages under sec. 6 and also ordering delivery of the unsold copies when the prayers had been cast in the alternative. 126 I.C. 197=51 C.L.J. 243=34 C.W.N. 540. Though the remedies given by sec. 6, are not alternative to those given by sec. 7, yet when an owner of a copyright obtains damages under sec. 6, it often happens that he can recover nothing further in respect of damages under sec. 7. Where the amount of damages awarded under sec. 6 covers the price for permission to publish the work in question, the author is not entitled to damages also under sec. 7. A.I.R. 1938 Lah. 173=40 P.L.R. 622.

SEC. 7.—The offence is complete as soon as the book infringing the copyright is printed and consequences contemplated in sec. 179, Cr.P.Code, are not necessary for the completion of the offence. 28 P.R. 1916 (Cr.)=

38 I.C. 737=18 Cr.L.J. 353. Under sec. 7, all infringing copies of any work in which copyright subsists, become the property of the owner of the copyright. He has, therefore, a right to recover the possession of the infringing copies unsold and the price of the copies sold. 1938 A.L.J. 390=A.I.R. 1938 All. 266.

SEC. 8.—Where in an action for infringement of a copyright, the defendant alleges that he was not aware of the existence of the alleged copyright, in order to come within the provisions of sec. 8 of the English Copyright Act which has been incorporated in the Indian Act (III of 1914), it is for the defendant to allege and prove that the infringement was innocent. I.L.R. (1939) Bom. 295=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347.

9. (1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties, shall not apply in any case to which this section applies.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

11.	*	*	*	*	*	*
12.	*	*	*	*	*	*
13.	*	*	*	*	*	*

### *Importation of Copies.*

14. (1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

(2) Before detaining any such copies or taking any further proceedings with a view to forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works, the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) The section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

*Delivery of Books to Libraries.*

15. (1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depot in London named in the demand a copy of the book for, or in accordance with the directions of the authority having the control of each of the following libraries, namely, the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh and the Library of Trinity College, Dublin; and, subject to the provisions of this section, the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression "book" includes every part or division of book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letter-press or in the maps, prints, or other engravings belonging thereto.

*Special Provisions as to certain Works.*

16. (1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down

by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

17. (1) In the case of a literary, dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint

Posthumous works.

authorship at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter and the proviso to section 3 of this Act, shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

18. Without prejudice to any rights or privileges of the Crown, where any

Provisions as to Government publications.

work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

19. (1) Copyright shall subsist in records perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts

Provisions as to mechanical instruments.

shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts

Sec. 19 does not in terms provide that the making of the record must be a lawful act or with the consent of the owner of the copyright in the original work, if such a person exists. But the section must be limited to a lawful making of the record. The copyright conferred by the section on the owner of the plate from which the record is made presupposes, therefore, that that plate came into existence lawfully. I.L.R. (1937) Bom. 724=39 Bom.L.R. 654=A.I.R. 1937 Bom. 472. Where the original work is the subject-matter of the copyright, it necessarily follows that the consent of the owner of that copyright must be obtained

to the making of the plate. Obviously it would be lawful for the owner to refuse his consent. It would also be legitimate for him to give his consent subject to certain conditions and those conditions may involve restricting the copyright which the owner of the plate would otherwise acquire under sec. 19. Such copyright might be restricted in various ways, amongst others, by restricting the public performance of records made from the plate. (*Ibid.*) *Quaere*.—Whether the rights which accrue to the maker of a record or plate under sec. 19, are subject or subsidiary to the rights of the owner of copyright in the original work? (*Ibid.*)

of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make, within the parts of His Majesty's dominions to which this Act extends, records, perforated rolls or other contrivances by means of which the work may be mechanically performed, if such person proves—

(a) that such contrivances have previously been made by, or with consent or acquiescence of, the owner of the copyright in the work; and

(b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned:

Provided that

(i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and

(b) in the case of contrivances sold as aforesaid after the expiration of that period, be five per cent.

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this

section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work shall not apply;

(b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten;

(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to author or his legal personal representatives and not to the assignees, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives:

(d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section:

(e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.



20. Notwithstanding anything in this Act, it shall not be an infringement

Provisions as to political speeches.

of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

21. The term for which copyright shall subsist in photographs shall be

Provisions as to photographs.

fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative

at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

22. (1) This Act shall not apply to designs capable of being registered

Provisions as to designs registrable under 7, Edw. VII, c. 29.

under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section 86 of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

23. If it appears to His Majesty that a foreign country does not give, or

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.

has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall

not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions and thereupon those provisions shall not apply to such works.

24. (1) Where any person is immediately before the commencement of

Existing works.

this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have

SEC. 20.—“Public meeting” is not defined in this Act, but *see* sec. 4 of the English Law of Libel Amendment Act, 1888 (51 and 52 Vic., c. 64).

SEC. 24.—Under sec. 24 no new right was conferred on an author in respect of an existing book. Whatever copyright he had at the commencement of the Act was continued in his favour. 154 I.C. 207=1934 All. 922. An entry in the Copyright Register Book under sec. 3 of the previous Copyright Act is *prima facie* evidence of the partnership of the person mentioned therein, but the absence of that provision from the new Copyright Act does not make it any the less evidence when the new Act grants to the owners of existing copyrights, rights at least as

valuable as the rights given under the repealed Act. Sec. 14 of the Indian Evidence Act can, therefore, be invoked to make such evidence admissible. A High Court can in such cases interfere under sec. 15 of the Charter Act. 30 I.C. 721=16 Cr.L.J. 673. If a copyright is shown to have subsisted when Act III of 1914 came into force the period of copyright substituted by that Act would be 50 years from the death of the author. Where the complaint for infringement is made after the new Act the question to be considered is whether the copyright was subsisting under the new Act and not whether it was subsisting under the old Act XX. 131 I.C. 865=1931 A.L.J. 304=1931 All. 353.

subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would have so expired was the owner of the right or interest shall be entitled at his option either—

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found advertised in the London Gazette and in two London newspapers;

(b) where any person has, before the twenty-sixth day of July nineteen hundred and ten, taken any action whereby he has incurred an expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section 19, sub-sections (7) and (8) and of section 33 of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

#### *Application to British Possessions.*

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend

Application of Act to British dominions. throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either

without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26. (1) The legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copy-right passed by Parliament (including this Act) so far as they are operative within that dominion: <sup>Legislative powers of self-governing dominions.</sup> Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

nion in respect of which the certificate is issued should, for the purposes of the rights conferred by the (English) Act (but for those purposes only), be treated as if it were a Dominion to which the Act extended. Thus although under sec. 1, (English) Act, an author writing in a Dominion would not, when the (English) Act was passed, have any copyright under the (English) Act, the effect of the certificate would be that such an

author would become a person entitled to "the rights conferred" by the (English Act). Hence the authors in that Dominion will have the same rights under the (English) Act, within the area to which that Act extends as they would have if the Act extended to the Dominion. But the certificate does not and cannot extend the (English) Act to the Dominion, if it is not in force there. 171 I.C. 406=A.I.R. 1937 P.C. 326 (P.C.).

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this sub-section, authorized to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this

Power of Legislatures of British possessions to pass supplemental legislation.

Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the works, resident in the possession, and to works first published in the possession.

28. His Majesty may, by Order in Council, extend this Act to any territories under His protection and to Cyprus, and, on the

Application to protectorates.

making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

## PART II.

### INTERNATIONAL COPYRIGHT.

29. (1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

Power to extend Act to foreign works.

(a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;

(b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were, at the time of the making of the works, subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;

(c) in respect of residence in a foreign country to which the Order relates in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends; and thereupon, subject to the provisions of this Part of this Act and of the Order this Act shall apply accordingly:

Provided that—

(i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act;

(ii) the Order in Council may provide that the terms of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;

(iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;

(iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;

(v) in applying the provisions of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;

(vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possession specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like Orders as under this Part of this Act His Majesty in Council is authorized to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any Order any part of his dominions, not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

### PART III.

#### SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

32. (1) His Majesty in Council may make orders for altering, revoking or varying any Order in Council made under this Act, or under any enactment repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made under this Act shall be published in the *London Gazette* and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

SEC. 30 (3).—This provision will not revive a right of preventing unauthorised translations of a foreign work in England

which under the previously existing law had expired before the passing of the Act. See (1892) 3 Ch. 402; 61 C.L.J.Ch. 580.

**33.** Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

**34.** There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books:

Provided that this compensation shall not be paid to a library in any year unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

**35.** (1) In this Act, unless the context otherwise requires,—

“Literary work” includes maps, charts, plans, tables, and compilations;

“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;

“Artistic work” includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engraving and proto-graphs;

“Work of sculpture” includes casts and models;

“Architectural work of art” means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction;

“Engravings,” include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs;

“Photograph” includes photo-lithograph and any work produced by any process analogous to photography;

“Cinematograph” includes any work produced by any process analogous to cinematography;

SEC. 35: “LITERARY WORK”.—It is to be noted that this definition as well as ones which follow it do not purport to be exclusive and that the ordinary and popular meaning must be given to the words interpreted as well as making them inclusive of those things specifically mentioned. The word “book” does not appear in this section, but the definition of “book” given in the Copyright Act (1842), 5 & 6 Vic., c. 45, was held to include wood engravings. (1852) 5 De G. & Sm. 267; 21 L.J.Ch. 470; maps, (1871) L.R. 6 Ch. 346; 40 L.J.Ch. 489; and newspapers. (1881) 17 Ch.D. 708; 50 L.J.Ch. 621; (1899) 40 Ch.D. 425; 58 L.J.Ch. 293 (C.A.), overruling (1869) L.R. 9 Eq. 324; 39 L.J.Ch. (52) which have no right to copy from each other, (1892) 3 Ch. 489; 61 L.J.

Ch. 521; but not the title of a book in the ordinary sense, (1881) 18 Ch.D. 76; 50 L.J.Ch. 809.

“ENGRAVINGS”.—Copyright was extended to lithographs by sec. 14 of the International Copyright Act 1852 (15 & 16 Vic., c. 12).

“PHOTOGRAPHY”.—This will include, copying by a process discovered after the passing of the Act. (1863) 14 Q.B. (N. S.) 306; 32 L.J.C.P. 166; 1867) L.R. 2 C.P. 410; 36 L.J.C.P. 139.

“ENCYCLOPEDIA”.—“COLLECTIVE WORK”.—The infringement of articles composed at the joint expense of proprietors of several newspapers may be restrained at the joint suit of all the proprietors. (1889) 40 Ch.D. 425; 58 L.J.Ch. 293. See (1907) 23 T.L.R. 370.

“Collective work” means—

- (a) an encyclopædia, dictionary, year book, or similar work;
- (b) a newspaper, review, magazine, or similar periodical; and
- (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

“Infringing” when applied to a copy of a work in which copyright subsists means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;

“Performance” means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;

“Delivery”, in relation to a lecture, includes delivery by means of any mechanical instrument;

“Plate” includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are intended to be made;

“Lecture” includes address, speech, and sermon;

“Self-governing dominion” means the dominion of Canada, the Commonwealth of Australia, the dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty’s dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place unless the publication in such parts of His Majesty’s dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was during any substantial part of that period, a British subject or a resident within the parts of His Majesty’s dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty’s dominions to which this Act extends if he is domiciled within any such part.

**36.** Subject to the provisions of this Act, enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Repeal.

Provided that this repeal shall not take effect in any part of His Majesty’s dominions until this Act comes into operation in that part.



Short title and commencement.

37. (1) This Act may be cited as THE COPYRIGHT ACT, 1911.

(2) This Act shall come into operation—

(a) in the United Kingdom, on the first day of July, nineteen hundred and twelve or such earlier date as may be fixed by Order in Council;

(b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;

(c) in the Channel Islands, at such date as may be fixed by the States of those islands respectively;

(d) in any other British possession to which this Act extends on the proclamation thereof within the possession by the Governor.

#### FIRST SCHEDULE.

##### EXISTING RIGHTS.

Existing Right.	Substituted Right.
(a) <i>In the case of Works other than Dramatic and Musical Works.</i>	
Copyright . . . . .	Copyright as defined by this Act. <sup>1</sup>
(b) <i>In the case of Musical and Dramatic Works.</i>	
Both copyright and performing right . . . . .	Copyright as defined by this Act. <sup>1</sup>
Copyright, but not performing right . . . . .	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright . . . . .	The sole right to perform the work in public, but none of the other rights comprised in copyright, as defined by this Act.

#### SECOND SCHEDULE.

##### ENACTMENTS REPEALED.

Section and Chapter.	Short title.	Extent of Repeal.
8 Geo. 2, c. 13	The Engraving Copyright Act, 1734 . . . . .	The whole Act.
7 Geo. 3, c. 38	The Engraving Copyright Act, 1767 . . . . .	Do.
15 Geo. 3, c. 53	The Copyright Act, 1775 . . . . .	Do.
17 Geo. 3, c. 57	The Prints Copyright Act, 1777 . . . . .	Do.
14 Geo. 3, c. 56	The Sculpture Copyright Act, 1814 . . . . .	Do.
3 & 4 Will. 4, c. 15	The Dramatic Copyright Act, 1833 . . . . .	Do.
5 & 6 Will. 4, c. 65	The Lectures Copyright Act, 1835 . . . . .	Do.
6 & 7 Will. 4, c. 59	The Prints and Engravings Copyright (Ireland) Act, 1836 . . . . .	Do.
6 & 7 Will. 4, c. 110	The Copyright Act, 1836 . . . . .	Do.
5 & 6 Vict., c. 45	The Copyright Act, 1842 . . . . .	Do.
7 & 8 Vict., c. 12	The International Copyright Act, 1844 . . . . .	Do.
10 & 11 Vict., c. 95	The Colonial Copyright Act, 1847 . . . . .	Do.
15 & 16 Vict., c. 12	The International Copyright Act, 1852 . . . . .	Do.
25 & 26 Vict., c. 68	The Fine Arts Copyright Act, 1862 . . . . .	Do.
		Sections one to six. In section eight the words "and pursuant to any Act for the protection of copyright engravings," and "and in any such Act as aforesaid." Sections nine to twelve.

<sup>1</sup> In the case of an essay, article, or portion forming part of and first published in a review, magazine or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section

eighteen of the Copyright Act, 1842. For the purposes of this schedule the following expressions were used in the first column thereof, have the following meanings: "Copyright," in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publi-

Section and Chapter.	Short title.	Extent of Repeal.
38 & 39 Vict., c. 12 39 & 40 Vict., c. 36	The International Copyright Act, 1875 .. The Customs Consolidation Act, 1876 ..	The whole Act. Section forty-two from "Books wherein" to "such copyright will expire". Sections forty four, forty-five and one hundred and fifty-two.
45 & 46 Vict., c. 40	The Copyright (Musical Compositions) Act, 1882, ..	The whole Act.
49 & 50 Vict., c. 33	The International Copyright Act, 1886. ..	Do.
51 & 52 Vict., c. 17	The Copyright (Musical Composition)s Act, 1888 ..	Do.
52 & 53 Vict., c. 42	The Revenue Act, 1889 ..	Section one, from "Books first published" to "as provided in that section."
6 Edw. 7, c. 36	The Musical Copyright Act, 1906 ..	In section three the words "and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886."

THE SECOND SCHEDULE.<sup>1</sup>

## REPEAL OF ENACTMENTS.

(See section 15.)

Year.	No.	Short title.	Extent of Repeal.
1847	XX	The Indian Copyright Act, 1847.	So much as has not already been repealed.
1867	XXV	The Press and Registration of Books Act, 1867.	In section 18 the following words, namely :— "Every registration under this section shall, upon the payment of the sum of two rupees to the office keeping the said Catalogue, be deemed to be an entry in the Book of Registry kept under Act No. XX of 1847 (for the encouragement of learning in the territories subject to the Government of the East India Company by the defining and providing for the enforcement of the right called copyright therein) ; and the provisions contained in that Act as to the said book of Registry shall apply <i>mutatis mutandis</i> to the said catalogue."
1878	VIII	The Sea Customs Act, 1878.	Clause (a) of section 18.

cation, includes the right at common law (if any) to restrain publication or other dealings with the work; "Performing right," in the case of a work which has not been performed in public before the commencement

of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

<sup>1</sup> Repealed by Act XII of 1927.

## THE COURT-FEES ACT (VII OF 1870.)

No.	Year.	Short title.	Repealed or otherwise how affected by legislation.
1870	VII	The Court-Fees Act, 1870 .	<p>Repealed in part XIV of 1870; VIII of 1871; XIII of 1889; VIII of 1890; V of 1908; XVIII of 1923.</p> <p>Repealed in part and amended, XX of 1870; VI of 1889, S. 18; XII of 1891; XI of 1923.</p> <p>Amended, XV of 1872, S. 2; XIII of 1875, S. 6. V of 1881, S. 153; VII of 1889, S. 13; XI of 1899, Ss. 2 and 3; VI of 1900, s. 47; IX of 1900; X of 1901; VI of 1905; VII of 1910; XIV of 1911; XVII of 1914, S. 2; XXIV of 1917, S. 2; XVIII of 1919; XXXVIII of 1920; Reg. V of 1933; Government of India (Adaptation of Indian Laws Order, 1937.</p> <p><i>N.B.</i>—As to Provincial amendments of the Court-Fees Act, <i>See</i> Assam, III of 1932, Bengal Acts, IV of 1922; VI of 1922; XI of 1935; VII of 1935; III of 1948; Bom. Act III of 1926; Burma Acts XI of 1922 and III of 1926; II of 1932; Bombay Finance Acts, 1935-1940; Bom. Act IV of 1939 and Act I of 1942; Mad. Acts V of 1922 and XIX of 1922; Punjab Acts XVII of 1887; VII of 1922; and IV of 1939; U. P. Acts III of 1923; III of 1932; VII of 1933; II of 1936; XIX of 1938; Orissa Act V of 1939; Bihar and Orissa Act II of 1922; Bihar Act XVII of 1939; C. P. Acts I of 1923 and XVI of 1935.</p>

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## APPENDIX.

THE COURT-FEES ACT (VII OF 1870).<sup>1</sup>

[11th March, 1870.]

## CHAPTER I.

## PRELIMINARY.

Short title

1. This Act may be called The COURT-FEES Act, 1870.

## LEG. REF.

<sup>1</sup> For the Statement of Objects and Reasons, see *Gazette of India*, 1869, Pt. V, p. 57; for proceedings in Council, see *ibid.*, 1869, Supplement, pp. 1179 and 1462; *ibid.*, 1870, Supplement, pp. 52, 378, 421, 427 and 434.

For rules under the Act by the High Court, Madras, Appellate Side, see *Fort St. George Gazette*, Supplement, dated 20th December, 1904, p. 1, and for Civil Rules of Practice by the same Court, under this Act, the Civil Procedure Code and certain other Acts; for

SEC. 1: OBJECTS AND SCOPE OF THE ACT.—The object of the Act is not to arm a litigant with a weapon of technicality but to secure revenue to the State and its provisions are to be so construed. 43 B. 507=46 I.A. 24=36 M.L.J. 437 (P.C.). See also 22 L.W. 42; 34 C.W.N. 1129. As to the imperative necessity to faithfully follow the provisions of the Act, see 1940 A.L.J. 891=1940 All. 55. The Act not only prescribes the fees, but provides how these are to be ascertained, how questions as

Extent of Act.

It extends to the whole of British India ;

Commencement of Act.

And it shall come into force on the first day of April, 1870.

## LEG. REF.

observance of the Subordinate Civil Courts in that province, except the Small Cause Court at Madras, see *ibid.*, 1903, Supplement, p. 1. Act VII of 1870 has been declared in force—in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1), Sch. I, Bur. Code; in British Baluchistan, by the British Baluchistan Laws Regulation (I of 1890), S. 3, Bal. Code; in the Sonthal Parganas, by the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code; in the sub-division of Angul, by the Angul District Regulation (I of 1894), S. 3, Ben. Code.

It has further been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XVI of 1874), to be in force in the following Scheduled Districts, namely:—the District of Hazaribagh, *Gazette of India*, 1881, Pt. I, p. 507; the District of Lohardaga (now called the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44; the District of Lohardaga then included the present District of Palamau, separated in 1894), see *Gazette of India*, 1881, Pt. I, p. 508; the District of Manbhum, *Gazette of India*, 1881, Pt. I, p. 509; the Pargana Dhalbhum in the District of Singhbhum, *Gazette of India*, 1881, Pt. I, p. 510; the Scheduled Districts in Ganjam and Vizagapatam, see *Gazette of India*, 1898, Pt. I, p. 869; the Tarai of the Province of Agra, see *Gazette of India*, 1876, Pt. I, p. 505.

It has been extended by notification under S. 5 of the same Act to the Kolhan in the District of Singhbhum, see *Gazette of India*, 1907, Pt. I, p. 655 and under Ss. 5 and 5-A of that Act to the following Scheduled Districts, namely:—the Garo Hills District, the Khasi and Jaintia Hills District, the Naga Hills District, the North Cachar Sub-Division of the Cachar District, the Mikir Hill Tract in the Nowgong District and the Dibrugar Frontier Tract in the Lakhimpur District, provided that the Act does not apply to natives of these districts and tracts who are assessed to house-tax except in such places and cases as the Deputy Commissioner may withdraw from the operation of the exemption, see *Assam Gazette*, 1881, Pt. I, p. 861; *Gazette of India*, 1884, Pt. I, p. 164; the Lushai Hills, with the same proviso, see *Gazette of India*, 1904, Pt. I, p. 913, and *Assam Gazette*, 1904, Pt. II, p. 787.

The Act came into permanent operation in Aden on 1st April, 1876, see *Bombay Government Gazette*, 1876, Pt. I, p. 956.

It has been declared inapplicable to pro-

ceedings before officers making a settlement, and in certain other cases under the Sonthal Parganas Settlement Regulation (III of 1871), S. 8, as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code.

The Act has been amended in Upper Burma by the Upper Burma Civil Courts Regulation (I of 1896), S. 36, Bur. Code; in the Punjab, by the Punjab Courts Act (XVIII of 1884), S. 71, P. and N. W. Code; and in Lower Burma by the Lower Burma Courts Act (VI of 1900), S. 47.

to sufficiency of fees are to be determined, etc. 12 A. 129=(1890) 10 A.W.N. 39. See also 32 M. 305 (810)=19 M.L.J. 340 (F.B.).

CONSTRUCTION OF THE ACT.—The Act is a fiscal enactment, and must, in cases of doubt, be interpreted strictly in favour of the subject. 39 C.L.J. 209; 8 A. 438; 9 M. 148 (F.B.); 23 Cr.L.J. 121; 115 P.B. 1918=44 I.C. 261 (F.B.). See also 54 M.L.J. 67; 43 C.W.N. 52=1938 Cal. 785; 1933 A.L.J. 673=1933 A. 488 (F.B.); 152 I.C. 244=15 P.L.T. 548=1934 P. 571 (S.B.); 15 A.L.J. 163=38 I.C. 993; 14 A.L.J. 850=36 I.C. 877; 37 A. 159=27 I.C. 731; 34 B. 239=5 I.C. 610; 34 C.W.N. 1129; 1930 N. 73; 1928 L. 113. See also the observations of Justice Mahmood and Chief Justice Edge on the point in 12 A. 129=(1890) 10 A.W.N. 39 (F.B.). The drafting of the Act is imperfect and unscientific and its interpretation gives rise to much difficulty. 4 P. 336=6 P.L.T. 262=1925 P. 392. The Act must be taken as a whole and individual sections should not be considered by themselves in order to give effect to the legislative intent upon a particular matter. 21 I.C. 502=18 C.W.N. 121. Though the Court-Fees Act is a fiscal enactment and its provisions have therefore to be strictly construed, yet they should not be so construed as to furnish a chance of escape and means of evasion. 13 Luck. 628=1937 O. W.N. 1186=1938 O. 1. See also 18 P.L.T. 438=1937 Pat. 514. Practice of Court though long established cannot override the express provisions of the Act. See 12 A. 129=(1890) 10 A.W.N. 39 (F.B.). See also 41 I.C. 446 (Cal.); 43 B. 507 (P.C.); 27 C. 508; 13 C.W.N. 815 at 821. Provisions of other statutes which are in *pari materia* may be referred to, but when the Acts are different in their scope and character, they cannot be read together. 22 M. 494=9 M.L.J. 37; 4 B. 515. Thus Limitation Act cannot be consulted. 29 A. 749; 22 M. 494; 9 M. 134. The special provisions of the Land Acquisition Act should not be extended by analogy to vary

the provisions of the Court-Fees Act. 152 I.C. 244=15 P.L.T. 548=1934 P. 571. In such an Act as the Court-Fees Act if there is a special provision which applies to a particular case then that special provision must be applied by the Court rather than some general classification in which the suit may also be included which may be more favourable to the plaintiff. 36 L.W. 225=1932 M. 605=63 M.L.J. 764. The Act ought to be liberally construed. 1927 M. 1002=105 I.C. 881=54 M.L.J. 67. See also 152 I.C. 244=1934 P. 571 (S.B.).

**OPERATION OF THE ACT.**—Court-fee on an application (for review) should be calculated according to the law in force when the application was filed. 1932 A.L.J. 908=1933 A. 20. See also 1940 A.L.J. 904=1941 All. 184. Notification increasing Court-fees issued and published on a certain date in the official Gazette even if it was received at 5 P.M. after office hours, would apply to plaints filed on the same date earlier in the day. 45 M.L.J. 557=46 M. 685 (F.B.). Plaint returned for presentation to proper Court—Court-Fees Act coming into force before actual presentation—Court-fee is payable under the new Act. 30 C.W.N. 90=91 I. C. 862=1926 C. 355. An amending Act passed subsequent to the filing of the document need not be taken into account. 1932 A.L.J. 908=1933 A. 20. See also 51 C. 216 (Plaint originally filed with insufficient stamp). Though the operation of its provisions may result in some extraordinary situation, the Act must be construed as it stands. See 1941 A.L.J. 409=1941 All. 357. Where on the death of a plaintiff in a suit for partition of his share in certain property, his brother, one of the defendants, steps into his shoes and continues the suit and obtains an amendment of the plaint so as to include his share of the property also and this amendment is obtained after the passing of the U.P. Court-Fees (Amendment) Act of 1938, the Court-fee payable in respect of the extra share must be calculated according to the Amended Act and not according to the Act prior to its amendment. I.L.R. (1942) All. 376=201 I.C. 460=1942 A.L.J. 351=A.I.R. 1942 All. 222.

**APPLICATION OF ACT.**—The various sections of the Court-Fees Act apply not only to suits but to appeals also. All the High Courts have always taken it for granted that appeals are valued in the same way as suits. 165 I.C. 972=44 L.W. 763=71 M.L.J. 677. Act does not apply to cases coming before the ordinary original jurisdiction of High Court. 13 R. 156=1935 R. 460.

**DETERMINATION OF COURT-FEES UNDER THE ACT.**—In order to determine the amount of Court-fee payable in a suit, the Court has to see in each particular case what the nature of the relief claimed is, and for that purpose it must look at the allegations contained in the

plaint. 21 C.W.N. 375=35 I.C. 797. See also 15 L. 531=150 I.C. 994=1934 L. 563 N. DAMODARAM . . . 27th JUNE . . . (F.B.); 40 C.L.J. 150=79 I.C. 982. In other words, the cause of action as stated in the plaint must be seen. 20 C. 762=1928 B. 476; 15 P. 386=161 I.C. 706=1936 P. 171. The Court-fee payable on a plaint in a suit and the forum of trial depend on the allegations made in the plaint and not on the defence set up by the defendant. If the plaintiff can prove his allegations he would be entitled to the relief on the lines that he has claimed, and the forum of trial is the Court in which he has brought the suit. The fact that the defendant sets up a different title cannot alter the nature of the plaintiff's claim. If the facts are found to be as pleaded by the defendant, the proper course is to dismiss the suit and not to convert the suit into another of a different character. 182 I.C. 178. For purposes of calculation of Court-fee, the Court must take the allegations in the plaint to be *prima facie* correct; and a plaintiff is entitled to insist that the Court-fee should be assessed on the basis on which he has framed his plaint although there might be room for suspicion that the plaint has been so drafted as to avoid inconvenient facts and the payment of a higher Court-fee. (1937) 1 M.L.J. 572=45 L.W. 720=1937 Mad. 402. The Court-fee has to be determined on the nature of the allegations in the plaint and not on what is set up or pleaded in the defence. 138 I.C. 88=1932 M. 409; 16 I.C. 773 (Sind); 35 C.W.N. 942; 5 P. 631; 6 P. 506=1927 P. 145. The Court should not ask itself whether the allegations made in the plaint are true or probable. 64 M.L.J. 24=141 I.C. 80=1933 M. 430. See also 30 I.C. 73 (Oudh); 16 I.C. 773 (Sind). The substance and not the mere language of the plaint must be looked to. 28 I.C. 79=38 M. 922, following 30 Mad. 18 and 40 C. 59=21 I.C. 404. See also 1932 M. 605=63 M.L.J. 764=36 L.W. 225; 1939 M. 435=(1939) 1 M.L.J. 425; 46 L.W. 484=1937 M. 876=(1937) 2 M.L.J. 616; I.L.R. (1938) All. 470=1938 A.L.J. 578; 1938 All. 481; 1938 Oudh 1; 139 I.C. 317=1932 M. 605=63 M.L.J. 764; 1930 N. 73; 50 M.L.J. 406=91 I.C. 709=1925 M. 243; 13 Luck. 628=1937 O.W.N. 1186=A.I.R. 1938 Oudh 1 (F.B.); 10 Pat. 432=180 I.C. 46=A.I.R. 1931 Pat. 78; 202 I.C. 648=1942 N.L.J. 466=I.L.R. 1943 Nag. 440=A.I.R. 1943 Nag. 70; A.I.R. 1944 Pat. 17 (F.B.). But see 1928 M. 929=110 I.C. 752 (Parties can avail themselves of any camouflage that the law allows or does not forbid). But see 1935 A.M.L.J. 4. (Though Court-Fees Act is a fiscal enactment, Courts must see that it is not evaded). It has not been the practice of the Patna High Court to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper Court-fee payable, or to permit a

1-A. <sup>1</sup>[In this Act 'the Appropriate Government' means, in relation to fees or stamps relating to documents presented or to be presented before any officer serving under the Central Government, that Government, and in relation to any other fees or stamps, the Provincial Government.]

LEG. REF.

<sup>1</sup>Inserted by A.O., 1937.

tiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unnecessary. 18 P.L.T. 438=1937 Pat. 514. Merely asserting that a suit is a suit for administration does not make it one, and if a party sues to recover an estate, the valuation of the suit must be the value of the estate he seeks to recover. 1937 Rang.L.R. 426=1937 Rang. 455. It is the duty of Court to see that proper value is put on the relief claimed. Where it is too small on the face of the plaint, the Court can question the same. 21 I.C. 404=40 C. 615. The question whether Court-fee should be paid or not is a matter that is important from the point of view of Government alone. 133 I.C. 465=1931 A.L.J. 727=1931 A. 659. The plaintiff's estimate of the value of land, if contrary to the section of the Court-Fees Act, cannot be allowed to operate to the prejudice of the defendant at any stage of the suit. The defendant can object to the valuation whenever it is in his interest to do so. 49 A. 398=25 A.L.J. 258=1927 A. 308. Court-fee is paid on the relief available at the institution of the suit, but if circumstances change and it becomes necessary for the plaintiff to ask for any further relief, it is open to him to apply to the Court for amendment of the plaint by adding new relief and to offer to pay Court-fee thereon. 20 P.L.T. 818=1939 P.W.N. 61=1939 P. 219. Appeal liable to *ad valorem* Court-fee but not valued as such—*Ad valorem* fee should be levied before admission of appeal. See 1937 Pat. 514=18 P.L.T. 438. As to refund of Court-fees, see under S. 13.

#### COMPROMISE BETWEEN PARTIES AND COURT.

—The question of Court-fee cannot be settled by any compromise between the parties and the Court, in the absence of any one representing the fiscal authorities. 14 L. 558=144 I.C. 636=1933 L. 905. See also 1939 A. 659.

COURT-FEES AND LIMITATION.—Where no Court-fee stamp was affixed to the copy of the order appealed against filed along with the memorandum of appeal and in spite of the objection raised by the office the stamp was not affixed till long after the expiry of the period of limitation. *Helid*, that the appeal was not properly presented within time. 147 I.C. 342=35 P.L.R. 142=1934 L. 272. A memorandum of appeal presented to the Court of the District Judge under the law applicable to appeals, which has been transferred to the

High Court on an application by the appellant, should bear court-fee stamp as prescribed for a memorandum of appeal presented to the High Court. 41 C.W.N. 1083=65 C.L.J. 499=1937 C. 514.

JURISDICTION.—The Suits Valuation Act and the Court-Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper Court for the institution of the suit having regard to the value of the property. 1932 A.L.J. 416=1932 A. 413. When a Court has disposed of a suit, it has no jurisdiction to take up the question of valuation of the suit for purposes of Court-fee or to direct the payment of additional Court-fee. 1936 R.D. 390. There is no provision in the Court-Fees Act which justifies a process of attachment for recovery of court-fees after the Court finally parts with seisin of a case. 140 I.C. 191=1932 A.L.J. 165=1932 A. 316. See also 1933 M. W.N. 330=1934 A.L.J. 820. The only Court which can rectify an improper order as to Court-fee is the appellate Court and in cases where no appeal lies, the revisional Court. 81 I.C. 56=1923 All. 86.

COURT-FEE AND VALUATION CHARTS.—Charts showing the minimum values of lands of different classes in different parts of the district may be used for the purposes of S. 9 of the Court-Fees Act. But such charts cannot and must not be put upon the parties as though they are evidence in themselves and any judicial officer acting in a judicial matter upon such charts is acting without evidence before him. 33 C.W.N. 952=50 C.L.J. 164. The Court-Fees Act provides that the Court may issue a commission for local investigation but there is no provision for a chart issued by the District Court to the subordinate Court in which the valuation is set out of the various classes of lands in the District. 33 C.W.N. 845=49 C.L.J. 562=1929 Cal. 717.

REFUND OF COURT-FEE.—The Court can order a refund of Court-fees (1) where the Court-fees Act applies, (2) where there is an excess payment by a mistake, and (3) where on account of a mistake of a Court a party has been compelled to pay the Court-fees either wholly or in part. Outside these cases the Court has no authority to direct a refund. Thus where an appeal is withdrawn and consequently dismissed, the appellant is not entitled to apply for a refund of the Court-fees paid on the memorandum of appeal. 57 M. 1028=1934 M. 566=67 M.L.J. 321. See also 159 I.C. 443=1935 C. 707; 1935 Pesh. Where on a memorandum of appeal filed out of time a conditional order was made by the



"Chief Controlling Revenue authority" defined.

12. [In this Act, unless there is anything repugnant in the subject or context, "Chief Controlling Revenue authority" means—

(a) in the Presidency of Fort St. George<sup>2</sup> (The Presidency of Fort William in Bengal) and the territories respectively under the administration of the Provincial Governments of (Bihar and Orissa)<sup>3</sup> and the North-Western Provinces<sup>4</sup> and the Chief Commissioner of Oudh—the Board of Revenue;

(b) in the Presidency of Bombay outside Sind and the limits of the town of Bombay—a Revenue Commissioner;

(c) in Sind—the Commissioner;

(d) in the Punjab<sup>5</sup> and Burma, including Upper Burma—the Financial Commissioner; and

(e) elsewhere—the Provincial Government or such officer as the<sup>6</sup> [Provincial Government may, by notification in the [Official Gazette,]<sup>7</sup> appoint in this behalf.] [*Repealed by A.O.*].

#### LEG. REF.

1 S. 2 has been omitted as in force elsewhere than in Bengal by A.O., 1937.

2 The words "The Presidency of Fort William in Bengal" were inserted by Act XXIV of 1917.

3 The words "Bihar and Orissa" were substituted for the word "Bengal" by Act XXIV of 1917.

4 These Provinces are now known as the United Provinces of Agra and Oudh and the Lieutenant-Governor and Chief Commissioner as the Lieutenant-Governor of those Provinces, see Proclamation No. 9196, P., dated the 22nd March, 1902; *Gazette of India*, 1902, Pt. I, p. 228 and the United Provinces Designation Act (VII of 1902).

5 As to the N.-W.F. Province, see the N.-W.F. Province Law and Justice Regulation (VII of 1901), S. 6 (1) (d), P. and N.-W. Code.

6 Substituted by A.O., 1937.

7 For officer appointed for (1) the Island of Bombay, see *Bombay Government Gazette*, 1902, Pt. I, p. 35; (2) Baluchistan, see *Gazette of India*, 1908, Pt. I, p. 389 and (3) The Assam Valley Districts and certain parts of the district of Cachar, see *B. B. and A. Gazette*, 1905, Pt. I, p. 5.

8; 46 L.W. 757=(1937) 2 M.L.J. 788. Where on a memorandum of appeal filed out of time a conditional order was made by the Court for its admission and the condition was not complied with by the appellant, he is not entitled to get refund of Court-fees paid on the memorandum of appeal. 41 C. W.N. 1184. The Court has inherent jurisdiction to order a refund of Court-fee even in cases which do not fall within Ss. 13, 14 and 15, Court-Fees Act. Where there has been no real trial of the main issues involved in the case in both the Courts below, the appellant is entitled to a refund of Court-fee paid by him in the lower appellate Court on the memorandum of appeal. 41 P. L.R. 796=1939 L. 257. See also (1939) M.L.J. 867. Apart from the provisions of Ss. 14 and 15 of the Act, the Court has power in proper cases to make an order for

refund where it is found that the Court-fees have been paid under an order subsequently held to be wrong. I.L.R. (1942) 2 Cal. 253=75 C.L.J. 393=46 C.W.N. 697=A.I. R. 1942 Cal. 539. Where a suit is properly filed in a Civil Court, but in the meantime the legislature takes away, by an amendment of the law, the right to the relief claimed in the suit, the Civil Court should dismiss the suit. It cannot invoke its inherent powers to order the refund of the Court-fee or grant a certificate under the Court-Fees Act. 51 L.W. 105=1940 M.W.N. 68=1940 Mad. 451. The District Court, as a Court of appeal, is not entitled to issue an order of refund of excess Court-fees paid on the memorandum of appeal. Recovery of excess amount paid is a matter between the party concerned and the Revenue Authorities. All that the District Court can do is to certify that in its opinion the amount paid by the appellant is in excess of the amount required by law. Armed with the certificate the party may go to the Revenue authorities and claim a refund from them. The certificate is however merely the expression of the opinion of the Court which the executive orders of the Government require to be obtained where any person desires to make an application to the Revenue authorities for the refund of the fees paid in excess. 164 I.C. 639=1936 R. 352. The plaintiff who was called upon to make good a deficiency in Court-fee, without having done so, made an application to the Court to permit her to withdraw the suit with liberty to sue again. Her application was granted but subsequently an attachment of her property was ordered to enforce the payment of the deficiency in Court-fee whereupon she paid. In revision, held, that it was not open to a Court to issue an order of attachment for realisation of deficiency in Court-fee stamp. Held, further that as no order permitting the plaintiff to withdraw the suit and to bring a fresh suit could have been made on the basis of an insufficiently stamped plaint, which was liable to be rejected, the plaintiff had paid what was due from her and was, therefore, not entitled to get back the money. 152

## CHAPTER II.

## FEES IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS.

3. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by Letters Patent, by virtue of the power conferred by [section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915]<sup>1</sup> [or section 229 of the Government of India Act, 1935.]<sup>2</sup>

or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, [ \* ]<sup>3</sup>, 20 and 21 of the second schedule to this Act annexed ;

and the fees for the time being chargeable in the Courts of Small Causes at the Presidency-towns,<sup>4</sup> and their several offices,

shall be collected in manner hereinafter appearing.

## LEG. REF.

<sup>1</sup> The words "Section 15 of the Indian High Courts Act.....1915" were substituted for the words "St. 24 and 25 Vic., Ch. 104, S. 15" by Act XXIV of 1917.

<sup>2</sup> Inserted by A.O., 1937.

<sup>3</sup> The number "sixteen" was repealed by the Repealing and Amending Act XII of 1891.

<sup>4</sup> See the Presidency Small Cause Courts Act (XV of 1882), Ch. X.

I.C. 816=1934 A.L.J. 820=1934 A. 989. A plaintiff whose plaint is rejected for non-payment of deficit Court-fee within the time fixed by the Court is not entitled to an order of refund of the Court-fee paid by him originally on his plaint, and the Court has no inherent jurisdiction to refund the Court-fee in such a case. 1937 A.L.J. 481=1937 All. 505.

**COURT-FEE—PRECEDENCE OVER OTHER DEBTS.**—Court-fees form crown debts and are entitled to precedence over the debts of other creditors. 80 I.C. 935=1925 Mad. 433.

**CHARGE FOR COURT-FEES IN PAUPER SUIT—LIABILITY OF PURCHASER FROM PAUPER.**—The charge under O. 33, r. 10, C. P. Code, is created by law and a purchaser of a decree obtained by a pauper takes it subject to the charge. The charge however is only for the Court-fee and not for the fees of the Government Pleader also. 147 I.C. 751=1934 A. 438. Suit or appeal *in forma pauperis*—Review of judgment in—Application for—Court-fee—If payable. See 40 C.W.N. 1407.

"BRITISH INDIA."—See General Clauses Act, S. 3 (7). See also 9 B. 244 and notes under S. 3, C. P. Code.

**SECS. 3 AND 4: SCOPE OF THE SECTIONS.**—S. 4, Court-Fees Act, is imperative and enacts that no document of any kind shall be received unless it bears Court-Fees of the requisite value. Though S. 149, C. P. Code, which was subsequently introduced in the Code of Civil Procedure, vests in the Courts a discretion as to whether appeals with insufficient Court-fee should be allowed to be received when proper Court-fees are paid within the

time allowed by the Court, the discretion should be exercised on correct judicial principles, and not so as to nullify the express provisions of S. 4 of the Court-Fees Act. 61 C. 663=38 C.W.N. 650=1934 C. 659. S. 4 has no application to the ordinary original civil and criminal jurisdiction, or admiralty and matrimonial jurisdictions, etc., of the High Court. But S. 3 enacts that the procedure laid down in Chapter V, Ss. 25 to 28 for collections and the mode of levying the fees shall apply to the original jurisdiction as well as the appellate jurisdiction of the High Court but it is not applicable to Letters Patent appeal from the judgment of a single Judge of the High Court and no Court-fee is leviable thereon except Rs. 2 prescribed for an application to the High Court. 44 A. 13=19 A.L.J. 677. See also 18 B. 156; 1933 S. 148 (Income-tax Reference); 45 M. 849=1922 M. 421; 65 I.C. 675; 3 L. 420=1923 L. 275; 1 P. 384=3 P.L.T. 194; nor to appeals under Agency Rules referred by Government to High Court for disposal 22 M. 162. A reasonably wide construction must be given to S. 3 and if a particular fee could have been imposed under the High Courts Act or the Government of India Act, it is payable in virtue of the power conferred by that Act within the meaning of the section, even although the High Court purported to impose the fee under a power derived from some other source. B. 204 of the Insolvency Rules (Calcutta) made under S. 112 of the Presidency Towns Insolvency Act could have been made by the High Court under the powers conferred on it by S. 15 of the Indian High Courts Act and the fees prescribed thereby are accordingly covered by S. 3 of the Court-Fees Act. 42 C.W.N. 1146=1938 Cal. 755. Suit transferred to High Court under Cl. 13 of the Letters Patent (Mad.) from Presidency Small Cause Court—Deficiency must be paid according to Court-Fees Act. 22 L.W. 15=91 I.C. 751=1925 M. 1216. Where a suit is transferred from the City Civil Court to the High Court under Cl. 13 of the Letters Patent and tried by the High Court as a

4. No document of any of the kinds specified in the first or second schedule to this Act, annexed, as chargeable with fees,

Fees on documents filed,  
etc., in High Courts in their  
extraordinary jurisdiction.

shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise

of its extraordinary original civil jurisdiction ;

or in the exercise of its extraordinary original criminal jurisdiction ;

or in the exercise of its jurisdiction as regards appeals from the [judgments (other than judgments passed in the exercise

In their appellate jurisdiction.

of the ordinary original civil jurisdiction of the Court) of one]<sup>1</sup> or more Judges of the said Court, or of a

Division Court;

or in the exercise of its jurisdiction, as regards appeals from the Courts subject to its superintendence ;

As Courts of reference and revision. or in the exercise of its jurisdiction as a Court of reference or revision ;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

5. When any difference arises between the officer whose duty it is to see

Procedure in case of  
difference as to necessity or  
amount of fee.

that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to

the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the

#### LEG. REF.

<sup>1</sup> The words "judgments (other than.... Court) of one" were substituted for the words "judgment of two" by Act XIX of 1922.

Court of extraordinary original jurisdiction, the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Jurisdiction (and not those payable under the Court-Fees Act) as the case is expressly governed by S. 14 of the Madras City Civil Court Act (VII of 1892). 132 I.C. 647 = 1931 M. 457 = 60 M.L.J. 435. O. 7, R. 11, C.P. Code, does not refer to a plaint which bears no stamp. Such a plaint must be rejected in accordance with the provisions of Ss. 4 and 6. 1930 N. 224.

SEC. 4: MEMORANDUM OF APPEAL.—Under S. 4, "documents" includes memorandum of appeal. 12 A. 129 (F.B.). Appeal should not be entertained without payment of proper Court-fee. 30 I.C. 379 (Pat.); 3 P.L.J. 74 = 42 I.C. 675; 25 M. 24 (memorandum of cross objections). See also 1929 A. 75. The appeal is liable to be rejected if the deficiency is not made up within the period of limitation. 1924 L. 401; 46 I.C. 509 = 3 P.L.J. 484; 119 I.C. 700; 1930 N. 224; S. 28, *infra*. High Court has power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter that the Court-fee is deficient. 50 A. 980 = 118 I.C. 228 = 26 A.L.J. 1199 = 1929 A. 75. Under r. 19 of Chapter VII of the Patna High Court Rules the Stamp Reporter would be required to take action if he found that a

memorandum of appeal which was insufficiently stamped had been accepted by mistake or inadvertence as sufficiently stamped. When the appeal is once admitted and registered the functions of the Stamp Reporter are not necessarily at an end. Where the law was changed after the decision of the Reporter by reason of a Bench decision of the High Court and additional Court-fee was sought to be levied under the later decision. *Held*, that the action of the Stamp Reporter was valid in law. 14 P.L.T. 180 = 12 Pat. 694; see also 21 Pat. 720 = 1943 Pat. 102. S. 4 is imperative in its terms. Filing of an appeal on insufficient Court-fee stamp, with the knowledge that it is insufficient, with a view to save limitation cannot be allowed. 119 I.C. 700 = 1929 N. 294. See also 1930 N. 224.

APPLICABILITY.—DOCUMENTS PRODUCED IN HIGH COURT UNDER INCOME-TAX ACT (1922), S. 66.—As no mention of the Court-fee payable on a reference under S. 66, Income-tax Act, is to be found in Schs. I and II, Court-Fees Act, S. 4 of that Act does not apply to documents produced in a reference to the High Court under S. 55, Income-tax Act, and therefore no Court-fee is chargeable on such documents. 145 I.C. 254 = 27 S.L.R. 243 = 1933 S. 148.

SEC. 5: SCOPE OF THE SECTION.—See the observations of Collins, C.J., in 21 M. 269 (270). Conditions necessary for the operation of the section. See 12 A. 129 (F.B.); 14 P.L.J. 700; 3 P.L.J. 92 = 43 I.C. 521. Before S. 5 can be applied, it must be shown that the subject-matter of the reference is a

final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance in which case he shall refer it to the final decision of the first Judge of such Court.

The Chief Justice shall declare who shall be taxing-officer within the meaning of the first paragraph of this section.

fee covered by S. 3 of the Act. 42 C.W.N. 1146=1938 Cal. 755. The jurisdiction of a Taxing Officer does not arise like the jurisdiction of an arbitrator upon a difference of opinion between a Court clerk and a suitor and upon formal reference to decide the dispute. The intention of S. 5 is merely to ensure that the question should be raised before the Taxing Officer, that he should bring his mind to bear on the question and decide it. 52 C. 871=29 C.W.N. 879=1925 C. 1201. *See also* 20 M. 398; 44 L. W. 763=71 M.L.J. 677. S. 5 of the Act contemplates a decision of the Taxing Officer on the merits of the question. Where the Taxing Officer declines to entertain the question and to decide it, his order cannot be considered to be one under S. 5, so as to operate as a bar to the question of Court-fee being considered by the Court. 1933 A. L.J. 1537. The power of the Taxing Officer under S. 5 is not confined merely to memoranda of appeal filed in the High Court, but extends to deficiencies in stamp on a plaint or memorandum of appeal in the Courts below when the fact of detriment to the revenue is brought to his notice. 22 A.L.J. 1038=84 I.C. 822=1925 A. 184. *See contra* 45 I.C. 213=17 P.L.T. 677 (Court-fee payable in lower Court is to be determined by Court). The decision of the Taxing Officer of the High Court holding that *ad valorem* fees are payable in respect of a matter is final under S. 5 of the Court-Fees Act and final for every purpose and cannot be impeached before the Court at the time of the hearing. S. 5, like several other sections, is undoubtedly defective, as it makes no provision for the Taxing Officer being compelled to refer the question to the Judge of the Court. 44 L.W. 763=71 M. L.J. 677; 14 P. 658=159 I.C. 4=16 P.L.T. 433=1935 P. 396. Under S. 5, it is competent to the Chief Justice to refer a dispute *re*. Court-fee between a suitor or his attorney and the Officer of the Court, to the decision of a particular Judge of the High Court. 45 M. 849=43 M.L.J. 436=1922 M. 421. *See also* 71 M.L.J. 677. The decision of such Judge is final. 1927 B. 643=52 B. 61=106 I.C. 66 (2). It is not proper for a Judge to whom a Court-fee matter is referred to refer the matter to a Bench. 3 P. 146=75 I.C. 871. Nor has the Division Bench jurisdiction to decide the reference. 33 A. 20=7 A.L.J. 842 (30 M. 96, Foll.) A Division Bench of the High Court has no jurisdiction to re-open

the valuation of the appeal after it is admitted. 4 P.L.J. 700=52 I.C. 508. S. 5 does not give the Taxing Judge of the High Court power to decide questions with regard to sufficiency of Court-fees paid in Subordinate Courts. He has jurisdiction only to deal with questions relating to Court-fees in the High Court. 12 R. 335=1934 R. 268; 23 Pat. 749=219 I.C. 453=(1945) P.W.N. 199=A.I.R. 1945 Pat. 81. It is not within the province of a taxing Judge of the High Court under S. 5 to say whether the trial Court ought to have required payment of *ad valorem* Court-fee before the trial of the suit, while holding that an appeal in that suit is liable to *ad valorem* Court-fee. 18 P.L.T. 438=16 P. 491=1937 P. 514.

**FINALITY OF THE DECISION OF THE TAXING OFFICER.**—A decision of the Taxing Officer is final and is not open to appeal, review or revision. 4 P.L.J. 700=52 I.C. 508; 3 P. L.J. 92=43 I.C. 521; 60 C.L.J. 201=39 C.W.N. 131; 12 A. 129; 105 I.C. 119=1927 M. 940=53 M.L.J. 457; 1932 A.L.J. 244=1932 A. 319; 45 Bom.L.R. 880=A.I.R. 1943 Bom. 441; 59 L.W. 85=(1946) 2 M.L.J. 103. It is final both as to the category under which the suit falls and the amount of the fee payable by the suitor. 12 A. 129; 23 A.W.N. 214; 32 A. 119=6 A. L.J. 972=4 I.C. 123; 15 A. 117. It is final though wrongly given. The Bench hearing appeal will not interfere with it. 2 P. 919=5 P.L.T. 315. *See also* 2 P. 198=4 P.L.T. 71; 4 P. 336=87 I.C. 137=1925 P. 392 (F.B.); 1926 P. 147; 52 C. 871=29 C.W.N. 89=1925 C. 1201. The remedy of the party aggrieved is to move the Board of Revenue to grant a refund. 1926 P. 147. *See also* 39 P.R. 1907. In 45 Bom.L.R. 880=A.I.R. 1943 Bom. 441, the remedy in case of a wrong decision was held to be to ask Government for remittal of fee which ought not to have been charged. The effect of a wrong decision, however, by the Taxing Officer cannot be to prejudice the rights of the parties. 15 A. 117=13 A.W.N. (1893) 45.

**OBJECTIONS AS TO INSUFFICIENCY OF COURT-FEE.**—When once the Taxing Officer has decided the amount of Court-fee no objection can be taken by the respondent at the time of hearing. 20 M. 398; 20 A. 11 at 17. Where, however, no reference and decision under S. 5 has been made at all, the Court hearing the appeal must decide such

## CHAPTER III.

## FEES IN OTHER COURTS AND IN PUBLIC OFFICES.

6. Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second

Fees on documents filed, etc., in Muffassal Courts or in public offices. schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

question. 47 A. 756=23 A.L.J. 725. See also 20 M. 328; 37 C. 914; 21 M. 269; 1930 M. 597=58 M.L.J. 497; 12 R. 335=1934 R. 268.

**TAXING OFFICER—JURISDICTION.**—The jurisdiction of the Taxing Officer is limited to cases in which it is alleged that a document filed, exhibited or received in the High Court is not sufficiently stamped. It does not extend to cases in which it is alleged that a party paid insufficient Court-fee on his plaint or memorandum of appeal in the lower appellate Court. To this class of cases. S. 12 (ii) is clearly applicable. 1934 A.L.J. 957=150 I.C. 653=1934 A. 805. Taxing Officer of the High Court is the Registrar on the Appellate Side. 37 C. 914=8 I.C. 1145. In Madras, the Registrar was the *ex officio* Taxing Officer—*Fort St. George Gazette*, 29th September, 1915, Pt. II, p. 1769. But under a recent Notification the Master has been appointed as the Taxing Officer. The Deputy Registrar is not the Taxing Officer and his order is not final under the section. The question decided by him can be raised at the hearing of the appeal. 37 C. 914=8 I.C. 1145. But see also 12 R. 335=1934 R. 268.

**POWERS OF THE TAXING OFFICER.**—To determine the amount of Court-fee payable, the Taxing Officer has power to investigate for himself the proper valuation of the appeal. He can take evidence for that purpose and should not exercise his powers in a summary manner. 4 P. 336=6 P.L.T. 262. A taxing Judge is bound to follow the law as laid down by a Division Bench of the High Court, whether he is acting administratively or judicially. 42 P.L.R. 101. As to the nature of the powers of the Taxing Officer and Taxing Judge, see 1942 N.L.J. 466=202 I.C. 643.

**REPORT OF STAMP REPORTER—POWER OF COURT.**—Though in view of R. 11 of Allahabad High Court Rules, Ch. III, it is not open to the advocate or the party to question the accuracy of the report of the Stamp Reporter, if it has not been made within three weeks from the date of the report, it does not prevent the Court from overruling his report or entering into a question of the sufficiency of the Court-fee. 1933 A.L.J. 1537.

**SEC. 6: DOCUMENTS.**—A memorandum of appeal is a document within the meaning of this section, as also a plaint, and an application for review. 12 A. 57=A.W.N. (1889) 197. In a case to which S. 17 applies, S. 6

is controlled by S. 17. 141 I.C. 533 (1)=1933 M. 178. Documents not required to be stamped, see Ss. 33 and 19, *infra*. Application not required to be in writing does not fall within the section. 2 N.W.P. 418. Thus an application by an auction-purchaser for a certificate of sale need bear no stamp. 13 B. 670. So also an application for issue of succession certificate. 17 W.R. 489. As to Court-fee on application for letter of administration, see 154 I.C. 722=1935 A. 449. Also an application for refund of stamp duty. 9 W.R. 357; 1932 A.L.J. 601=1932 A. 590. No additional Court-fees are payable on a plaint returned for presentation to the proper Court. 8 B. 313. See also 1 B. 538; 7 C. 157; 2 A. 357. When a suit properly instituted before the Settlement Officer without a Court-fee under S. 8 of Reg. III of 1872 was under S. 5 of the Regulation transferred to the Civil Court, no institution Court-fee had to be paid in the Civil Court also. 12 C.W.N. 917. Under the section, a certificate under Act XL of 1858 cannot come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of stamp duty. 12 C. 542. A document not properly stamped is not a nullity. 1936 C. 277. It is always open to the Court to find out by looking into the allegations in the plaint in a suit whether or not the suit is really what it purports to be and whether the Court-fee paid is sufficient. In fact it is a duty cast upon the Court under S. 6 of the Court-Fees Act; and if it finds that the suit in substance is not what it ostensibly appears to be but one requiring a larger Court-fee, it can demand additional Court-fee. 1937 A.L.J. 562=1937 A. 411.

**"FILED."**—Meaning of. See 20 A. 11 (17).

**"FURNISHED."**—See 17 W.R. 489.

As to payment of stamp duty on documents insufficiently stamped, see under S. 28. The cause of action arose on 24th September, 1929, and the suit was filed on 11th October, 1932, on the opening of the Courts after the long vacation. The plaint was stamped with a Court-fee stamp of Rs. 4 instead of Rs. 39, and on the office report the Court ordered that the deficiency should be made good within two days. The deficiency was made good on 18th October, 1932, and the suit was then registered. *Held*, that although the Court-fee had not been paid on 11th October, 1932, the order of the Court passed under S. 149

Computation of fees payable in certain suits—

7. The amount of fee payable under this Act in the suits<sup>1</sup> next hereinafter mentioned shall be computed as follows :

#### LEG. REF.

<sup>1</sup> For the amount of fee payable in certain suits and proceedings under the Agra Tenancy Act (U.P. Act II of 1901), see S. 170 of that Act, U.P. Code.

allowing the plaintiff two days in which to make good the deficiency undoubtedly had the effect of giving the plaintiff the same force and effect as if such fee had been paid in the first instance. 1934 A.L.J. 533=1934 A. 160. Document insufficiently stamped—Rejection of—Powers of single judge of High Court. See 157 I.C. 347=1935 A. 620=1935 A.L.J. 681 (F.B.).

SECS. 6, 13, 14 AND 15.—Refund of Court-fee—Limitation on the inherent power of Court. See 157 I.C. 443=62 C.L.J. 298=1935 C. 707.

SECS. 6 AND 17.—In a case to which S. 17 applies S. 6 is controlled by S. 17. 37 L. W. 74=1933 M. 173=65 M.L.J. 252.

SECS. 6 AND 28.—Any conflict between S. 6 of the Court-Fees Act and S. 149, C.P. Code is resolved by S. 28 of the Court-Fees Act. When an insufficiently stamped memorandum of appeal is received and comes before the Court, it falls to be dealt with under S. 149, C.P., Code, read with S. 28 of the Court-Fees Act. The Court acting under S. 149, C.P. Code, may reject the memorandum as inadmissible in cases in which it sees no good ground for extension of time to make good the deficiency or merely return it. In other case re-presentation with proper Court-fee is not precluded. I.L.R. (1941) Nag. 467=1941 N.L.J. 258=1941 Nag. 220.

U.P. AM., SEC. 6, CL. (4).—Where in an appeal in a partition suit, the question of proper Court-fee is raised on an office report and the appellant attacks the finding of the trial Court as to possession, he has to satisfy the Court that it is erroneous and if he fails to do so, the finding as to possession must be regarded as *prima facie* correct for the purposes of Court-fee. The question of Court-fee must be decided before proceeding with any other issue. It cannot be postponed till the hearing of the appeal. 1945 O.W.N. 114=1945 A.W.R. (C.C.) 85=A.I.R. 1945 Oudh 207.

SEC. 6-A (AS AMENDED BY UNITED PROVINCES ACT XIX OF 1938).—When an appeal lies against an order directing payment of Court-fee, incidental orders which lead up to it can be set right. I.L.R. (1941) A. 558=1941 O.W.N. 704=1941 A. 298. The right of appeal given to a suitor under S. 6-A of U.P. Act XIX of 1938 is a part of procedure relating to determination of Court-fee and is purely a matter in which the Crown is interested and in which neither the plaintiff nor the defendant has such a vested right as cannot be

affected by a subsequent enactment. Act XIX of 1938, which allows an appeal against the order demanding Court-fee does not take away any right which was vested in the plaintiff on the date when he filed the plaint; it only confers upon him a new right, and it does not take away any right which was vested in the defendant either. The defendant has no vested right in the procedure by which the proper Court-fee is determined. A change in procedure cannot be said to deprive him of any vested right. Where in respect of a suit filed before the Act XIX of 1938 came into force, an order for payment of Court-fee is passed subsequent to the Act coming into force, the right of appeal under S. 6-A is available to the aggrieved party. I.L.R. (1941) A. 558=1941 A.L.J. 376=1941 O. W.N. 704=1941 A. 208. Where on an objection as to Court-fee paid being raised the Court decides the question of Court-fee along with the merits of the case and embodies everything in a single judgment and adds a direction that the decree is to be drawn up after the deficiency is made good, the procedure adopted by the Court is in flagrant violation of the provisions of the Court-Fees Act. Where the plaintiff in such a case does not make good the deficiency and appeals the appeal is an appeal against an order in accordance with S. 6-A, Court-Fees Act and not against a decree under S. 96, C.P. Code, for no decree has been drawn up in the case. 1940 O.A. 1168=1941 A. 55. As to whether cross-objections can be filed in an appeal under the section, see 1942 O.W.N. 382.

SECS. 6-B AND 6-C : REFERENCE BY WHOM COMPETENT.—Under S. 6-C, Court-Fees Act it is only the Chief Controlling Revenue Authority that is giving the power to make a reference to the High Court. The Chief Inspector cannot make a reference under that section. He is only entitled under S. 6-B within the prescribed period to move the prescribed Court "by an application in writing" for revision. A letter sent by the Chief Inspector containing a statement of his opinion and not bearing a stamp cannot be considered to be an application in writing for revision under S. 6-B. I.L.R.-(1941) A. 585=1941 A.L.J. 487=1941 A. 369.

The petition for revision presented by the Chief Inspector of stamps must state the date on which he received the order as the date is material for finding whether it is in time. 1946 C.W.N. (1 & C) 118=1946 A.L.W. 126.

SEC. 7: SCOPE OF THE SECTION.—S. 7 states the various processes by which the values in different suits are to be ascertained and the schedule then applies the proper Court-fee to these values. 6 N.L.R. 164=8 I.C. 1125. Once the value of a relief is ascertained for purposes of a plaint, the first schedule rates the relief at the same value for purposes of appeal. The value of the same relief remains



(i) In suits for money (including suits for damages or compensation, or arrears of maintenance of annuities, or of other sums payable periodically)—according to the amount claimed;

unchanged all through the succeeding stages though the appeal is made against its grant or its refusal by the lower Court. (*Ibid.*) See also 1933 N. 362; 49 I.O. 962 (P.); 30 M.L.J. 402=39 M. 725. The value of the suit thus artificially ascertained is quite distinct from valuation for jurisdiction although it may be the same in many cases. 5 O. 489=4 O.L.R. 491; 4 B. 515; 15 C. 104; 12 B.L.R. 115 (Note)=18 W.R. 109. See Suits Valuation Act. The provisions of S. 7 are applicable equally to appeals as to original suits. But the Court-fee payable in appeal need not be the same as in the suit, as the nature of the litigation may be changed in appeal. See 25 O.C. 30=1932 O. 82. In suits to obtain a declaratory decree or order where consequential relief is prayed for, and in suits to obtain an injunction, where the Court finds the relief claimed as undervalued, it is under O. VII, r. 11 (b), entitled to require the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7, Court-Fees Act. But so long as there are no rules framed under S. 9, Suits Valuation Act (VII of 1887), the Court would have no standard before it on which it may regard the plaintiff's valuation as an under-valuation, and its powers of correction would have to be exercised on that footing. 61 C. 796=38 O.W.N. 589=1934 C. 448 (F.B.). See 149 I.C. 109=1934 P. 234. See also cases cited under Sch. I, Art. 1, on the point. The application of any particular clause of S. 7 must depend on the substance of the claim and not on the mere words used in the plaint. 1925 M. 248=91 I.C. 709=50 M.L.J. 406; 29 L.W. 584. Court-fee is payable on the footing of the plaint and not on what is afterwards decided by the Court. 79 I.C. 913=5 P.L.T. 655.

OPERATION OF AMENDING ACTS.—Where a suit for injunction is filed before the amendment of the Court-Fees Act, by U.P. Act XIX of 1938 and Court-fee paid according to the law then in force but a second appeal is filed after the amendment, on a question as to the court-fee payable on the appeal, it was held that it was the amount mentioned in the plaint which was the basis of valuation and that one must look back to the date of the institution of the suit to ascertain it. I.L.R. (1940) A. 793=1940 A.L.J. 904=1941 A. 134. See also 1941 A.L.J. 376=1941 O.W.N. 704=1941 A. 298.

SEC. 7, CL. (1): SCOPE AND APPLICATION.—This clause has no application to suits or appeals in which no amount is claimed. 30 M. 96=16 M.L.J. 458. Suits for recovery of money by the sale of mortgaged property fall under this clause and not under Cl. (iv). 30 A. 103; 58 C. 829=1931 C. 159; 18 B. 696; 7 Bom.L.R. 194. A co-mortgagee suing to recover his individual share in the

mortgage must value his suit according to the full amount due under the deed and cannot value it according to his own share. 54 L. W. 679=(1941) 2 M.L.J. 986; I.L.R. 1942 Mad. 438=(1939 M. 986) overruled. Sub-mortgage—Suit by sub-mortgagee impleading original mortgagor also—Prayer for sale of the properties mortgaged under original mortgage—Court-fee is payable on original mortgage amount and not sub-mortgage amount. 1937 M.W.N. 1040. The stamp on a plaint on an instalment bond should be calculated not on the amount of the whole bond but on the amount claimed in the suit. 4 W.R. 12.

WHAT ARE MONEY SUITS.—A suit for the balance due on a commission agency account is a money suit under S. 7 (i). 64 I.O. 626=15 S.L.R. 82. See also 18 B. 696. Also a suit for a definite sum as commission. 1928 B. 476. So also a suit for arrears of maintenance in which no declaration as to future maintenance is asked for. 87 I.O. 911=1925 N. 435; 42 A. 356; 1927 O. 623; 149 I.C. 982=1934 L. 150. A suit to obtain a declaration that the plaintiff is the sole and exclusive owner of G.P. Notes which are not mature for payment is not a suit for recovery of money, and S. 7 (i) does not apply. 188 I.C. 471=1940 Lah. 26. A suit for an order that the defendant should specifically perform a contract of guarantee or for compensation for breach of the contract falls under Cl. (1). Bom.P.J. (1890) p. 204. See also 2 R. 462=1925 R. 65; 47 I.C. 992. A suit for specific movable property of different kinds or their value as compensation, must be stamped under S. 7 (1) on the total value of the claim. 3 A. 131. Suit for an ascertained sum of cesses is governed by this clause (i). 11 P.L.T. 619. Also a suit for rent accrued due. 42 A. 353=55 I.C. 809; 17 I.C. 44. As to suit for enhancement of rent, see 61 C. 513=38 C.W. N. 527=1934 C. 674. A suit for taking of accounts of the assets and income of the joint family property for the purposes of partition of the share of the outstandings, after taking accounts, is not a claim for money governed by S. 7 (i), so far as the assets of the family or even such funds as may be found to be in the possession of the defendants on the taking of the accounts are concerned, and the Court cannot refuse to accept the plaintiff's valuation even on the ground that it is arbitrary. 165 I.C. 412 (2)=1936 M.W.N. 401=1936 M. 562. See also 160 I.C. 935=70 M.L.J. 292. In a suit for accounts, the mere fact that the plaintiff refers in the plaint to the account sent by the defendant wherein it is stated that a specific amount was remaining in the hands of the defendant, would not convert the suit into a suit for recovery of a specific



- (ii) In suits for maintenance and annuities or other sums payable periodically for maintenance and annuities ; —according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year.
- (iii) In suits for moveable property other than money, where the subject-matter has a market-value—according to such value for moveable property having a market-value ; at the date of presenting the plaint ;
- (iv) In suits—

sum of money stated in the letter so as to be chargeable to Court-fee on that amount. 163 I.C. 822=1936 M. 525. *See also* 1936 B. 166.

**SUIT MESNE PROFITS.**—A suit for means profits falls under this clause and not under Cl. (6) of Art. 17, Sch. II, Court-fee should be paid on the amount claimed antecedent to the suit. 13 C.W.N. 815=1 I.C. 670. *See also* 1 P.L.W. 781=40 I.C. 579; 165 I.C. 972=44 L.W. 763=71 M.L.J. 677. No Court-fee need be paid on the amount claimed subsequent to the suit. 15 B. 416. *See also* under S. 11. In an appeal from a decree directing ejectment and awarding mesne profits, Court-fee must be calculated on the value of land and the mesne profits. 16 M. 310. *See also* 23 M. 84; 43 I.C. 962.

**SEC. 7, CL. (ii).**—Suits for declaration of right to periodical payment fall under the clause. 43 A. 353=18 A.L.J. 328=55 I.C. 809. If in addition to such declaration, arrears are claimed, Court-fee must be paid also on such claim under cl. (1). *Ibid.* *See also* 24 B. 386=163 I.C. 471=1936 M. 388=70 M.L.J. 128. Where a suit is to secure a certain sum as arrears of annuity and also to call upon the defendant to furnish security for the payment of a certain sum per mensem the second part of the prayer is chargeable under S. 7 (ii). 1886 A.W.N. 228. A suit to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances does not come under the clause and may be presented on a Court-fee stamp of Rs. 10. 24 B. 386=2 Bom.L.R. 191. *See also* 1 A. 594; 59 M. 159=69 M.L.J. 202=1935 M. 655. Suit by A against B and C for a declaration of title to certain property and injunction restraining C from paying and B from receiving an allowance of Rs. 2,400 a year out of the income thereof falls under S. 7, Cl. 4 (c) and (d) and not under S. 7, cl. (2). 17 B. 56. A suit to remove *mutawalli*, for accounts and for recovery of amounts directed to be paid annually to descendants of *wakif* under the *wakf* deed and for appointment of a new *mutawalli*, is governed by S. 7, cl. (ii) and not Sch. II, Art. 17 (vi). I. L.R. (1942) Kar. 424=A.I.R. 1942 Sind 160.

**OTHER SUMS PAYABLE PERIODICALLY.**—*Re:* Court-fee payable for suits for arrears of maintenance, *see* 1 Luck. 648. *See also* Madras Amending Act V of 1922. In construing S. 7, cl. (ii) the expression "Other sums payable periodically" must be limited by the specific words which precede it. Court-

fee on a suit for assessment of rent and recovery of a specific sum of money as damages for use and occupation should be computed under Cl. (iv) (c) of S. 7. 51 I.C. 15=4 P.L.J. 561. But *see* 59 C. 997=55 C.L.J. 303=1932 C. 674. On this section, *see also* 40 C.W.N. 1149.

**SEC. 7, CL. (iii).**—A suit for the recovery of movable property pledged falls under this clause. *See* D.C.B. (Central Provinces) Part V, p. 3. Bonds have a certain market-value a suit for bonds must be valued according to the amount secured by them and not on the value of the stamp paper. 10 P.R. 1871. *See also* 4 C. 322=3 C.L.R. 375.

**SEC. 7, CL. (iv).** Court-Fees Act, must be read with O. 7, r. 11 (b), C.P. Code. S. 7 (iv) simply means that the relief sought is to be valued in the plaint or memorandum of appeal by the plaintiff. (1933 S. 322; 1931 S. 15 and 1934 C. 448, Rel. on.) 161 I.C. 384=1936 S. 25.

**BENGAL AMENDMENT ACT, SEC. 8-C.**—In Bengal S. 7, cl. (iv) is subject to S. 8-C of the Court-Fees Bengal Amendment Act, 1935. 68 C.L.J. 144. *See also* 44 C.W.N. 591=1940 Cal. 566; 44 C.W.N. 745. [For recent cases bearing on Ben. Am. Act, S. 8-C, *see* 41 C.W.N. 1339=1937 C. 748; 42 C.W.N. 504=1938 C. 865; 43 C.W.N. 167; I.L.R. (1939) 2 Cal. 20=1939 C. 743; 44 C.W.N. 745=1940 Cal. 451; I.L.R. (1940) 1 Cal. 409=1940 C. 482; 68 C.L.J. 144; 42 C.W.N. 315; 1941 Cal. 509; 42 C.W.N. 614=1939 Cal. 265.]

**PLAINTIFF'S RIGHT TO PUT HIS OWN VALUATION IN SUITS COMING UNDER THE CLAUSE.**—*"The nature of the suits comprised in the six articles of the clause which in some instances renders it impossible, and in others either impossible or generally extremely difficult, to lay down even approximately fair ad valorem scale as a means of fixing the Court-fee in such suits would appear fully to account for the legislature leaving it to the plaintiff to name the valuation."* *Per Westropp, C.J.*, in 2 B. 219. There is a conflict of rulings as to whether the Court has power to question or interfere with the plaintiff's valuation or whether the Court is bound to accept the valuation of the plaintiff however arbitrary it may be. The Calcutta High Court is of the view that it was never intended that the plaintiff should assign an arbitrary value and that if he puts an arbitrarily low value, it is open to the Court to determine the true value. 40 C. 245=15 C. L.J. 194=17 C.W.N. 591; 11 C.W.N. 705.

for moveable property of no market-value;

to enforce a right to share in joint family property;

(a) for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

(b) to enforce the right to share in any property on the ground that it is joint family property,

6 C.L.J. 427. *See also* 31 C. 301; 14 C.L.J. 47=15 C.W.N. 823; 40 C.L.J. 150=79 I.C. 982=1924 C. 969; 27 C.W.N. 627=86 I.C. 853=1925 C. 814. But *see* 27 C.W.N. 457=1923 C. 329; 33 C.W.N. 231 (23 C.W.N. 753, P.C. Rel. on.) The Patna High Court and the Allahabad High Court are of the same view. 2 P. 198=4 P.L.T. 71; 56 I.C. 316=4 P.L.J. 703; 41 I.C. 95=2 P.L.W. 173; 5 P.L.J. 394; 131 I.C. 808=1931 P. 195; 36 A. 500=12 A.L.J. 844=24 I.C. 679. But the Bombay and Madras High Courts hold that the plaintiff has the right to put his own valuation on the claim and that the Court cannot revise such valuation. 44 B. 331=22 Bom.L.R. 289; 33 B. 307=11 Bom.L.R. 30. *See also* 2 B. 219 cited *infra* and 17 B. 56; 23 M. 490=10 M.L.J. 240; 38 M. 922=28 M.L.J. 118=28 I.C. 79. *See also* 27 M. 480; 30 M. 18; 24 M.L.J. 233 (F.B.). The Privy Council ruling in 23 C.W.N. 753=43 B. 376 would seem to support this view. There it was held that where a plaintiff sues for a declaratory decree and asks for consequential relief, then for purposes of Court-fee and for purposes of jurisdiction, it is the value that the plaintiff puts upon the claim that determines both. *See also* 33 C.W.N. 231; 68 C.L.J. 144. In Punjab also the Court does not interfere with plaintiff's valuation of the suit. 1922 L. 236; 111 P.R. 1913=22 I.C. 503; 1927 L. 890=9 L. 366. So also in Burma. *See* 3 Bur.L.J. 128=1924 R. 378 (2). But *see* 1933 R. 40. For decisions of Nagpur Judicial Commissioner's Court, *see* 1924 N. 295; 1924 N. 316. *See also* 79 I.C. 582. [*See also* under Cl. (iv) (c).]

**APPEAL.**—In the light of the reference to the memorandum of appeal in the last paragraph of the clause, the appellant can set his own value where the subject-matter of the appeal is not co-extensive with the original claim. 23 M. 490. But a party cannot differently value the relief sought by him at different stages of the same litigation. 24 M. 331. *See also* 82 I.C. 614=5 L. 481=1925 L. 1.

**SEC. 7 (iv) (a).**—A suit to recover title-deeds, although it may involve a question of title, is not a suit to obtain possession of land. 4 C. 322=3 C.L.R. 375. *See also* 26 C. 204=2 C.W.N. 718; 10 P.R. 1871. As to whether suit for recovery of mortgage deed falls under this clause, *see* 39 P.R. 1875; 63 C. 657; 164 I.C. 1042=40 C.W.N. 90=62 C.L.J. 405. A suit for a declaration that the person really interested in a promissory note is the plaintiff and not the defendant, though it is in the defendant's name, and for recovery of the note but not for recovery of the money due thereunder,

to which the maker of the note is also a party falls under S. 7, cl. (iv) (a) of the Court-Fees Act, and the plaintiff has got to state the value at which he values the relief. Cl. (iv) of S. 7 does not apply to the case. 58 M. 228=40 L.W. 709=1934 M. 730 (1)=67 M.L.J. 680.

**CASE UNDER U.P. AMENDMENT ACT, S. 7 (iv) (a).**—When along with a declaratory relief there is sought some consequential relief in respect of immovable property, but such relief is not capable of valuation in money, then court-fee should be paid as if the relief was one for possession of immovable property. 15 Luck. 415=1940 O.W.N. 223=1940 O. 249.

**SEC. 7 (iv) (b): "RIGHT TO SHARE".**—The expression "right to share" has been differently interpreted by the different High Courts. The Bombay High Court has held that the words refer to a suit for the enforcement of what may be called an abstract claim of right to share in any joint property. In such view the clause would apply only where the right which is sought to be enforced is a right to share as a joint sharer in joint family property, where the plaintiff's status as a co-parcener is in dispute. *See* 33 B. 658=11 Bom.L.R. 1074=4 I.C. 243. Ordinary suits for partition would fall either under Cl. (v) of Art. 17 (6) of Sch. II according as the plaintiff is in joint possession or not. For cases where the Bombay High Court has held that *ad valorem* Court-fee should be paid under Cl. (v) *see* 33 B. 658; 18 B. 209. In a previous case (22 B. 315), however, this Court had held that the fee payable in a suit for partition would be according to the amount at which the relief sought is valued in the plaint. [S. 7, Cl. (iv) (b).] The Calcutta High Court also has held the view that the clause refers to a suit for joint possession by a co-parcener who is out of possession and not to a suit for partition which is governed by Art. 17, Cl. (6). 6 C.L.J. 651=12 C.W.N. 37. Where the plaintiff is already in possession of his share and all that he wants is to obtain a partition which is merely to change the form of enjoyment of the property, the suit is incapable of valuation. 8 C. 757=11 C.L.R. 95; 5 C. 188=4 C.L.R. 418; 13 C.L.R. 253. *See also* 20 C. 762; 27 I.C. 465 (C); 137 I.C. 519=36 C.W.N. 291=1932 C. 353; 22 C.W.N. 669; 38 C. 681. In a recent Full Bench decision, the Madras High Court also has taken the view that the clause does not apply to ordinary suits for partition between co-parceners of a Hindu family. *See* I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32=51 L.W. 11=1940 Mad. 113 (F.B.) overruling 21 M.L.J. 21. The *Allaha-*

*bad* High Court and *Patna* High Court are of the same view. See 34 A. 184=8 A.L.J. 1329=13 I.C. 185 following A.W.N. (1900) P. 90 and 28 A. 340; 49 I.C. 115 (Pat.); 58 I.C. 236=5 P.L.J. 540; 2 P. 32. As also the *Nagpur* Judicial Commissioner's Court. See 15 C.P.L.R. 120; 1924 N. 86=81 I.C. 766; 19 N.L.R. 99; 101 I.C. 770=1927 N. 248. Where the plaintiff is out of possession of his share in the joint property he is required to pay *ad valorem* Court-fee under S. 7, Cl. (iv) upon the valuation of his share in the property. 58 I.C. 236=5 P.L.J. 540. See also 63 I.C. 203 (Pat.); 1924 N. 86=81 I.C. 766; 19 N.L.R. 99; 101 I.C. 770=1927 N. 248. [The plaintiff cannot give this value as he likes according to the view taken by these Courts—see cases cited *supra* on the point.] The *Patna* High Court went to the length of holding that a party seeking partition must ask for joint possession if he is out of possession as a condition precedent to a decree for partition and that in a suit so framed he must pay fixed fee in addition to an *ad valorem* fee. 3 P. 618=1924 P. 558=81 I.C. 1052. See also 6 P.L.J. 662=65 I.C. 294 (Declaration of title prayed for regarding one of the items to be partitioned); 1 P.L.T. 529=56 I.C. 570; 123 I.C. 525=1930 L. 839; 131 I.C. 283=1931 L. 170; 141 I.C. 175=1933 L. 208=34 P.L.R. 84; A.I.R. 1939 L. 568. For older decisions, see 40 P.L.R. 2=1938 L. 321; 2 L. 114=61 I.C. 628; 104 P.R. 1895; 28 P.R. 1903=65 P.L.R. 1903. In a suit to enforce the right to share in joint family property, i.e., a suit to be restored to joint possession or enjoyment of joint family property, Court-fee would be payable under S. 7 (iv) (b), *ad valorem* on the value of the relief as fixed by the plaintiff; and in a suit for partition of joint property whether owned by a joint family or otherwise, where the plaintiff alleges that he is in actual or constructive possession thereof, Court-fee payable would be Rs. 10 under Art. 17 (vi), Sch. II, Court-Fees Act. But if the Court finds, on a plea being raised by the defendant, this allegation to be untrue, then ordinarily the suit will be dismissed solely on the ground that the plaintiff being out of possession is not entitled to sue for partition without asking for possession of the property in dispute, unless for special reasons the Court deems it proper to allow an amendment of the plaint on payment of the requisite Court-fee. 15 L. 531=150 I.C. 994=36 P.L.R. 48 (F.B.); (1941) Lah. 152 (F.B.). For older decisions, see 40 P.L.R. 2=1938 L. 321; 2 L. 114=61 I.C. 628; 104 P.R. 1895; 28 P.R. 1903=65 P.L.R. 1903. S. 7 (iv) (b) will not apply to cases where the plaintiff is in joint possession of the joint family property but it must apply to cases where he is out of possession of it and seeks partition. In the former case the court-fee is levied under Art. 17 (vi) of Sch. II. 1939 O.L.R. 607=1939 O.W.N. 1055=15 Luck. 76=1940 O. 47.

In *Burma* also, in a suit for partition, the plaint must be stamped according to the plaintiff's valuation of his share which he seeks to recover. 9 Bur.L.T. 97=35 I.C. 731. (The value given by the plaintiff in this case does not seem to have been arbitrary but the value assessed by the Divisional Judge.) See also 7 R. 164=1929 R. 211 holding that in a suit by a Mahomedan for a share or inheritance, *ad valorem* Court-fee is payable under the clause. See also 1937 R.L.R. 447 cited under Ch. II, Art. 17 (viii). In a suit for partition of joint property, where the plaintiff alleges joint possession, a Court-fee of Rs. 10 only is sufficient under Sch. II, Art. 17 (vi) S. 7 (iv) (b) of the Act does not apply to such a claim. To determine the Court-fee leviable regard must be had to the allegations in the plaint and the substance of the relief sought apart from the consideration of any evidence in the case. I.L.R. (1945) Kar. 84=A.I.R. 1945 Sind 128.

"ANY PROPERTY."—The terms are wide enough to include movable property.

"JOINT FAMILY PROPERTY."—The old decisions of the *Madras* High Court as to the distinction between partition of joint family property and partition of other joint property are rendered obsolete by the Full Bench decision in I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32. As for the previous decisions on the point, see 90 I.C. 848=1926 M. 122; 1930 M.W.N. 508; 141 I.C. 80=64 M.L.J. 24; 129 I.C. 824=1931 M. 94; 43 M. 397=38 M.L.J. 92. See also for other High Court decisions as to the meaning of the words "joint family property". 20 I.C. 177; 1930 L. 839. See 7 R. 164=1929 R. 211, where the Rangoon High Court applied the clause to a suit by a Mahomedan for a share of inheritance.

SUIT BY PLAINTIFFS NOT IN POSSESSION.—Where the plaintiff is not in possession actual or constructive of the property, Court-fee must be paid *ad valorem* as for suit for possession and partition. 27 I.C. 465=21 C.L.J. 253=20 C.W.N. 51; 137 I.C. 519=36 C.W.N. 291=1932 C. 353; See also 1941 Rang.L.R. 249=1941 Rang. 297. But mere denial by the defendant of the plaintiff's title and possession does not convert a partition suit into one of declaration of title and recovery of possession. 12 C.W.N. 37=6 C.L.J. 651. See also 38 C. 681; 35 C.W.N. 942. S. 7 (iv) (b) makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Where a plaintiff never alleged that he was in actual or constructive possession but asked for delivery of his share to him and further asked for accounts and delivery to him of his share of the amount that might be found due to the estate, it clearly is not a case where a ten rupee stamp would be sufficient. 1941 Rang.L.R. 249=1941 Rang. 297. Taxing officers should be astute to see that a plaintiff should not avoid liability to pay Court-fee under S. 7 (iv) (c) or 7 (v) by merely omit-

For a declaratory decree and consequential relief;

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

ting to insert a prayer for possession in what was essentially a title suit in the guise of a partition suit. 18 P.L.T. 438=16 P. 491=1937 P. 514. If a suit for partition of joint family property is really or actually in the nature of a title suit, *ad valorem* Court-fees are payable, whether the suit be regarded as falling under S. 7 (iv) (o), 7 (iii) or 7 (v). But where in substance the relief sought is the partition of the property of which the plaintiff claims to be in joint possession, the suit falls under Art. 17 (vi) of Sch. II and *ad valorem* Court-fee is not leviable. The plaint has to be construed as it is and care should be taken not to import into it anything which it does not contain, either actually or by necessary implication. A relief not asked for cannot be imported so as to charge Court-fee thereon. 20 Pat. 780. Where on the face of the plaint the suit was in fact a suit by a purchaser of an undivided share to establish his title to recover possession of the same, a claim for partition being added to make the relief sought effectual, it was held that an *ad valorem* Court-fee was payable on the plaint and not a fixed fee. 28 A. 340. See also the Patna High Court decisions cited *supra* on the point. A co-owner is to be presumed to be in constructive possession on the ground that possession of one co-owner is possession on behalf of all. 79 I.C. 713=5 P.L.T. 655; 20 C. 762; 44 C. 524.

**VALUE FOR JURISDICTION—PARTITION SUIT.**—In a partition suit, it is the share claimed by the plaintiff which is the subject-matter of the claim and not the whole of the joint property which is sought to be divided. See 22 B. 315; 8 B. 31; 24 A. 381; 24 M.L.J. 233=18 I.C. 368 (F.B.); 20 M. 289=7 M. L.J. 90; (1941) 2 M.L.J. 567; see also 5 P.L.J. 540=58 I.C. 236; 1917 P.H.C.O. 301; 7 B. 164=1929 R. 211. But see the decision of the Calcutta High Court to the contrary in 10 C.W.N. 564=3 C.L.J. 257; 3 C.L.J. 197=10 C.W.N. 565 (footnote); 4 C.L.J. 509; 12 C.W.N. 37=6 C.L.J. 651; 8 C. 757; 52 C. 128=29 C.W.N. 76=1925 C. 320 (S. 8 of the Suits Valuation Act does not apply.) In 2 P. 432=1923 P. 342, a distinction is made between suits for partition pure and simple, where the plaintiff is in joint possession and suits where the plaintiff seeks adjudication of his title or extent of share and for partition. In the former case, the value of the entire property is the value for jurisdiction and in the latter case, the value of the plaintiff's share. In a suit to establish plaintiff's right to share in joint family property, the value of the action is the value of the plaintiff's interest. 1929 P. 615.

**WRITTEN STATEMENT CLAIMING SHARE.**—A defendant in a partition suit, asking for a decree for his share need not pay Court-fee

in order to make his claim effective. 55 M. 975=1929 Mad. 722=63 M.L.J. 845; I.L.R. (1940) Kar. 534=1941 Sind 50; 45 Bom. L.R. 1052. See also I.L.R. (1944) Nag. 856=1945 N.L.J. 361=A.I.R. 1945 Nag. 273 (Defendants sharers claiming accounts from stranger in possession of joint property).

**SEC. 7 (iv) (b) AND (c), (iv-A) AND (v) (AS AMENDED BY MADRAS ACT V OF 1922).**—Two Hindu sons filed a suit against their step brothers and step-mother for a declaration that the properties in suit were the undivided ancestral properties of the family and that a sale-deed executed by their father in favour of their step-mother was invalid, and they prayed for separate possession of their shares after a partition by metes and bounds. They also alleged that there was a prior registered partition deed and that the sale-deed in favour of the step-mother was intended merely for the purpose of concealing the properties from them at that partition. Held, that S. 7 (v) of the Court-Fees Act governed the suit and that it did not fall under S. 7 (iv) (b) and (c) or under S. 7 (iv-A). 43 L.W. 583=1936 M. 411=70 M.L.J. 398. On this point, see also 68 M.L.J. 755; 1935 P. 452; 1935 A. 667; 1935 L. 698; 1935 C. 805; 62 C. 479; 68 M.L.J. 369.

**SEC. 7 (iv) (c): CONSEQUENTIAL RELIEF.**—Consequential relief means a substantial remedy in accordance with the title of which declaration is prayed for. 24 I.C. 316=1 L.W. 398. See also 24 C.W.N. 33 (P.C.); 42 P.L.R. 364. The expression "consequential relief" in S. 7 (iv) (c) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. 139 I.C. 32=1932 A.L.J. 684=1932 A. 485 (F.B.). [5 A. 331 (F.B.) Overruled.]. See also 171 I.C. 900=1937 Sind 248; I.L.R. (1941) Lah. 451=43 P. L.R. 106=1941 Lah. 97 (F.B.); 23 Pat. 749=A.I.R. 1945 Pat. 81. One declaration may be consequential relief to another. 44 C. 352=21 C.W.N. 834; 47 Bom.L.R. 859. The question whether there is really a prayer for consequential relief must depend upon the substance of the claim and not the words which the plaintiff chooses to use. 20 M.L.J. 791=5 I.C. 927; 30 M. 18; 38 M. 922 (F.B.). See also 25 I.C. 797=21 C. W.N. 375; 3 P. 915=80 I.C. 544; 1925 M. 713=48 M.L.J. 688; 29 L.W. 584=56 M.L.J. 394; 116 I.C. 895=1929 L. 463; 32 P.L.R. 729; 16 L. 752=37 P.L.R. 860; 152 I.C. 847. When the first relief in the suit relates to a declaration as to the general title of the plaintiff to all the properties he inherited and the second to set aside a particular deed of transfer in respect of a parti-

cular properly inherited by her, *held*, the reliefs are separate and necessary and *ad valorem* Court-fee must be paid. 5 P. 496=1926 P. 453. The prayer for the appointment of a receiver in a suit by a Hindu reversioner for a declaration that an alienation by the widow is not binding on the reversion cannot be regarded as a 'consequential relief' since both the reliefs are unconnected and independent of each other. The proper Court-fee payable is for declaration under Sch. II, Art. 17-B (Mad. Am. Act) and for Receiver under Sch. II, Art. 17-B (Mad. Am. Act). 51 M.L.J. 67=96 I.C. 129=1926 M. 678. But *see* 38 M. 922; 19 I.C. 859=93 P.R. 1913; 1931 A.L.J. 837; 36 I.C. 831 (M.); 62 I.C. 36 (P.). Even in 51 M.L.J. 67, cited above, there is an observation that it may be quite conceivable that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts, in which case the second relief may be consequential upon the first. *See also* 45 L.W. 491=(1937) 1 M.L.J. 739. Consequential and substantial reliefs—Distinction—Suit for declaration that property is wakf and its alienation is void—*Ad valorem* Court-fee payable. 1941 Lah. 97 (F.B.).

**CLAUSE INAPPLICABLE TO SUITS FOR BARE DECLARATION.**—Under Sch. II, Art. 17, a fixed fee of Rs. 10 has to be paid on a plaint for a declaratory decree where no consequential relief is prayed for. 43 B. 507=46 I. A. 24=36 M.L.J. 437. *See also* 69 I.C. 577; 23 A.L.J. 344=47 A. 501=1925 A. 602. In such a case the Court need not go into the question whether the suit was bound to fail for not having prayed for consequential relief. 1932 A.L.J. 466=1932 A. 560. *See also* 20 P.L.T. 818=1939 P.W.N. 61=1939 P. 219. The question of Court-fee must no doubt be decided on the allegations in the plaint and the relief actually asked for. But it is a common fashion to attempt an evasion of Court-fees by causing the prayers in the plaint into a declaratory shape. The Court must therefore look into the substance of the relief claimed. When the allegations in the plaint clearly show that the plaintiff virtually seeks the cancellation of certain deeds, though in form the suit is declaratory, the suit, is one for a declaration with consequential relief, falling under S. 7 (iv) (c) of the Court-Fees Act and *ad valorem* Court-fee must be paid. 152 I.C. 312=11 O.W.N. 1292=1934 O. 505. *See also* 141 I.C. 798=1933 O. 116=10 O.W.N. 19; 27 C.W.N. 972=1924 C. 183; 131 I.C. 604=1931 A.L.J. 235=1931 A. 369; 32 P.L.R. 745; 140 I.C. 191=1932 A. 316=1932 A.L.J. 165; 142 I.C. 699=10 O.W.N. 133=1933 O. 127. A suit for declaration that a sale deed executed by the plaintiff is void and inoperative against him on the ground that he was made to execute it because of coercion, undue influence, and

fraud exercised upon him, need only be stamped with a Court-fee of Rs. 10. 138 I.C. 147=9 O.W.N. 440; 10 O.W.N. 133. But *see* 142 I.C. 705=1933 R. 40. (Arbitrary under-valuation not allowed). A suit for declaration that a certain alienation made by the plaintiff's father should not be binding upon their reversionary interest comes under Art. 17 of Sch. II. 5 L. 137=1924 L. 530=83 I.C. 332. So also a suit by reversioners to have certain alienations by widow declared invalid even though there is mention in the prayer about the grant of any other relief to which plaintiff may be entitled. 18 P. 756=20 P.L.T. 850=1940 P. 158. *See also* 23 Pat. 749=219 I.C. 453=(1943) P.W.N. 199=A.I.R. 1945 Pat. 81. [Declaration that the plaintiff is reversioner does not require a separate fixed fee or make the suit one for declaration and consequential relief falling under section 7, Cl. (iv) (c)]. So also a suit for a declaration that the plaintiff is the real owner of a decree obtained by defendants against a third party and praying for transfer of the decree to the plaintiff. 47 P.R. 1911=9 I.C. 673. Also a suit by a decree-holder to the effect that a deed of gift and a sale-deed executed respectively by his judgment-debtor and his judgment-debtor's wife are fictitious and void and that the property covered by them is capable of being attached and sold in execution of his decree. 130 I.C. 344=1931 O. 72. Also a suit for a bare declaration that a certain decree is ineffectual and not binding on the plaintiff. 30 C. 788. *See also* 164 I.C. 1029=1936 Pesh. 180; 1936 L. 703; 131 I. C. 604=1931 A.L.J. 235=1931 A. 369. (Plaintiff cannot be deemed to have asked for consequential relief when the studiously refrains from asking for it); 1933 N. 214. *See also* 37 L.W. 806=64 M.L.J. 24; 63 M.L.J. 764; 1929 M. 668. Also suit for a declaration that the plaintiffs were occupancy tenants and not tenure holders and that the survey entry describing them as tenants was wrong and not binding on them. 53 I.C. 298=4 P.L.J. 302. Suit by landlord for declaration that order of Revenue Officer fixing rent roll is wrong, illegal and not binding on plaintiffs and for enhancement of reduced rent to old rent—Court-fee is to be paid under Sch. II, Art. 17 (iii) and not under Art. 17 (iv). 22 P.L.T. 453=1941 P. 463. Where plaintiff sues for a declaration that his share in certain property is not liable to attachment and sale in execution of a decree against his father the suit is one for a mere declaration without consequential relief and *ad valorem* Court-fee need not be paid on the amount due under the decree. 11 O.W.N. 617=1934 O. 212 (2). Also a suit to declare will a forgery and for cancellation of the will and the Sub-Registrar's order registering the same. 29 L.W. 534=1929 M. 396. *See also* 58 M. 448=1935 M. 203=68 M.L.J. 95. Also a suit for a declaration

that a previous decree declaring certain wakfnamas invalid is not binding on the plaintiff. 34 C.W.N. 1129. *See also* 156 I.C. 13=1935 L. 611; 145 I.C. 206=1933 N. 214. A suit to set aside a decree for which plaintiff was not a party, the additional prayer for declaring order of attachment and sale as void being a surplusage. 1930 Lah. 755. *See also* 1929 Lah. 446. Suit for declaration that property is not liable to sale in execution of decree and for cancellation of sale—Where plaintiff is not party to decree. I.L.R. 1943 (Lah.) 565=46 P. L.R. 83=A.I.R. 1943 Lah. 348; 1 O.W. N. 582. Suit for declaration of right to a cheque where drawee is not a party. 119 I.C. 158=1929 M. 572. Where an *ex-minor* sued alleging that he was a minor at the time of the execution of a mortgage deed by him and that it was therefore void against him, held, that all that was necessary for the minor was to ask that the document be declared to be void against him and the suit need not be treated as involving a prayer for a consequential relief, namely, the setting aside of the document. 11 R. 66=143 I.C. 541=1933 R. 109. As to other suits for bare declaratory relief, *see* 1939 O.W.N. 152.

**SUITS WHICH FALL UNDER THE SUB-CLAUSE.**—Suits for declaration and injunction. 17 B. 56; 18 B. 100; 17 S.L.R. 15=80 I.C. 969; 36 A. 500=24 I.C. 679=12 A.L.J. 844; 1922 N. 264; 1930 M.W.N. 656; 133 I.C. 120=1931 Lah. 307; 1936 L. 166; 43 P.L.R. 337=1941 Lah. 307; I.L.R. (1942) Lah. 379=43 P.L.R. 305=1941 Lah. 284; 41 Bom.L.R. 425. But a futile and denounceable claim for injunction is not a consequential relief. 42 P.L.R. 364. If there are other consequential reliefs prayed for along with an injunction, they should be valued according to law and the proper Court-fee would depend upon the total value. 43 I.C. 995=1918 M.W.N. 40. In a suit for a declaratory decree where consequential relief is prayed the plaintiff is entitled to put his own valuation on the suit subject to Ss. 4 and 9 of the Suits Valuation Act and he must do so by putting down one single and entire sum as representing the value of the total reliefs sought by him. He cannot put one valuation for purposes of Court-fee and another for purposes of jurisdiction. 57 C. L.J. 465. In a suit for declaration with consequential relief plaintiff is entitled to place any value on the suit and the value for purposes of Court-fee and jurisdiction is the value of the relief; but the defendant is entitled to take objection to the valuation given in the plaint, both as affecting the question of jurisdiction and as affecting the question of Court-fee. And when objection is taken the Court is obliged to enter into the question of whether the value is correct. 149 I.C. 109=1934 P. 234. A suit for a declaration that plaintiff is the sole shebait, and for an injunction restraining the defen-

dant from interfering with his possession of the endowed properties, falls within S. 7 (iv) (c). 40 C. 245=16 C.L.J. 19=17 O.W.N. 591. *See also* 31 S.L.R. 442=1937 Sind 241 (S. B.); 1922 L. 236; 163 I.C. 277=38 P.L. R. 688=1936 L. 990; 1930 C. 41. Also a suit for a declaration of plaintiff's right to a jungle and for an injunction restraining defendants from cutting trees. 32 C. 734=9 C.W.N. 690. Also a suit for declaration that a tax is illegal and for injunction to restrain collection. 105 I.C. 80; 165 I.C. 106=1937 N. 14; 1937 A.M.L.J. 28. Also a suit for declaration that a will is a forgery and that plaintiff is the legal heir and for an injunction restraining the defendant from interfering with his property. 9 L.L.J. 579=29 Punj.L.R. 27. A suit was filed for a declaration, but pending the suit an injunction was obtained. The suit being dismissed, an appeal was preferred, the injunction subsisting at the time of appeal. Held, for purposes of Court-fees, the appeal fell within S. 7 (iv) (c) and *ad valorem* fee was payable on the consequential relief. 5 P. 211=94 I.C. 22=1926 P. 249. Where however an appeal is preferred only against the declaration it may be valued under Sch. II, Art. 17. 3 P. 640=2 P.L.R. 193=80 I.C. 563=1924 P. 582. Where provision for residence and maintenance of a female is made in a family arrangements a suit for declaration of such right and injunction comes under S. 7 (iv) (c) and not S. 7 (ii). 123 I.C. 240=1930 S. 198. A suit for partition and possession of half share alleged to be held adversely comes under this sub-clause. 58 M.L.J. 497. A suit by a husband for restitution of conjugal rights with a prayer for an injunction restraining the wife's parents from obstructing recovery of the wife falls under S. 7 (iv) (c) and Court-fee is payable *ad valorem* on the amount of valuation put by the plaintiff for purposes of jurisdiction—the value for Court-fee and for jurisdiction being the same. Art. 17 (vi) of Sch. II does not apply to the suit. 39 C.W.N. 131=60 C.L.J. 201. As to appeal questioning award in *land acquisition cases*, *see* 60 C.L.J. 216. A suit to declare an execution sale illegal and for an injunction restraining the auction-purchaser and puisne mortgagee from taking possession falls under this clause. 58 C. 281=1930 C. 686. A suit for declaration that a revenue sale is invalid and for confirmation or restoration of possession falls under the clause. 46 I. C. 385=3 P.L.J. 448. *See also* 165 I.C. 213=17 P.L.T. 677; 70 M.L.J. 542. Also a suit for declaration of title as adopted son, a challenge having been directly thrown on the title, and for possession. 1922 P.H. C.C. 6 (C.W.N.); 1923 P. 100; 56 I.C. 422=5 P.L.J. 339. Also a suit by reversioner, after the death of the widow for a declaration and possession against an alienee of the widow. 2 P.L.T. 607=61 I.C. 565



=6 P.L.J. 10; I.L.R. (1942) Kar. 358=205 I.C. 27=A.I.R. 1943 Sind 56. Also a suit to set aside an illegal sale held for arrears of revenue and a declaration of right and for possession. 6 C.W.N. 157. See also 115 I.C. 655. The following suits have been held to come within the sub-clause:—Suit for possession of Math properties as its Mahant. 152 I.C. 1003=1934 P. 641. Suit for injunction or possession against co-trustees by one claiming to be a joint trustee. (1939) 1 M.L.J. 317=49 L.W. 270=1939 M. 380. A suit for a declaration that a sale held in execution of a decree against some members of a Hindu family was null and void. 1 P. 197=1922 P. 404. A suit for assessment of rent and recovery of a specific sum of money as damages for use and occupation. 4 P.L.J. 561=51 I.C. 16. A suit under S. 104-H of the B.T. Act for a declaration that the plaintiff is a raiyat and not a tenure-holder, and for settlement of fair rent. 18 I.C. 188=17 C.L.J. 426. See also 11 C.L.J. 156=5 I.C. 141; 6 P. 17=100 I.C. 913=1927 P. 123. A suit for a declaration that the plaintiff is a raiyat and the defendants, his under-ryats, and for ejectment of the latter. 65 I.C. 240 (P.). A suit for a declaration that plaintiff is entitled to a certain annuity and to recover the same as an heir. 27 Bom.L.R. 247=87 I.C. 801=1925 B. 282 (1). A suit for declaration of right to administration of the estate and appointment of an interim Receiver. 27 C.W.N. 457=1923 C. 326. A suit by an insolvent to declare a sale-deed by Official Receiver not binding upon him and for appointment of another Receiver. 32 M.L.J. 447=40 I.C. 620. A suit for a declaration that defendant is the wife of the plaintiff and for the restitution of conjugal rights. 28 C. 567. A suit to set aside a lease and to have the buildings erected by the lessee demolished. 4 A. 320 (F.B.). See also 62 C. 417=1935 C. 279. A suit to set aside a trust deed and for recovery of trust-money. 10 C. 380. See also 156 I.C. 13=1935 L. 611. A suit for a declaration that the defendant was not entitled to execute a certain decree. 40 P.L.R. 204. The plaintiffs prayed to declare a prior partition and certain alienations not to be binding on them. They further prayed for a re-partition and for possession. Held, (1) that the suit has not to be valued on the value of the entire family property but only on the plaintiffs' shares; (2) that declarations sought were ancillary to the prayer for possession and the case fell within S. 7 (iv) (c) and not under S. 7 (iv-a); (3) that the valuation under S. 7 (v) should be adopted. 1932 M.W.N. 1322=140 I.C. 585=36 L.W. 793. See also 1930 M.W.N. 358=1931 M. 94=129 I.C. 824; 32 S.L.R. 124=1938 Sind 189. See also I.L.R. (1941) Kar. 102=1941 Sind 154 holding that Art.

17 (vi) has no application to the case. But when declaration is unnecessary and a person seeks partition ignoring a previous partition alleged to be a colourable transaction, to which plaintiff though a minor was made a party as if he were a major, Sch. II, Art. 17 (vi) applies and not this clause. 20 Pat. 780=23 Pat.L.T. 218=A.I.R. 1942 Pat. 60. In Bihar and Orissa so far as a partition suit happens to be actually in the nature of a title suit, *ad valorem* court-fee is payable by the plaintiff, whether the suit is regarded as governed by S. 7 (iii) or S. 7 (v). It makes no practical difference whether the suit is to be regarded as a suit for declaration with consequential relief falling under S. 7 (iv) (c), or a suit for possession of movable and immovable property governed by S. 7 (iii) and (v), since in the Courts in Bihar and Orissa, where the consequential relief sought is recovery of possession of land the plaintiff is not permitted to value the land at a lower rate than would be assessed under S. 7 (v). 13 P. 267=1939 P.W.N. 197=1939 Pat. 274.

SUITS NOT COMING UNDER THE SUB-CLAUSE. A suit for declaration and consequential relief *prima facie* comes within S. 7, Cl. (iv) (c) but if at the same time it comes within any of the other clauses of suits specified in the section, it must be so treated. 38 M. 922=28 M.L.J. 118. See also 38 M. 1184; 56 M. 212=63 M.L.J. 764; 41 L.W. 562; 1940 M. 273=68 M.L.J. 369=1935 M. 346; (1937) 1 M.L.J. 739=I.L.R. (1937) Mad. 672=45 L.W. 491=1937 Mad. 529. The decision in 61 M.L.J. 39=130 I.C. 449=1931 M. 24; 29 L.W. 760=1929 M. 329; 140 I.C. 462=63 M.L.J. 759 are not good law.

SEC. 7 (iv) (c), PROVISIO (AS AMENDED BY MADRAS ACT V OF 1922).—Applicability.—Suit for declaration of right to get water free of irrigation tax claiming refund of tax levied. 59 M. 962=160 I.C. 939=43 L.W. 192=70 M.L.J. 625. A suit for declaration and injunction about some customary rights to graze cattle etc., in defendant's forest does not fall within the proviso. 59 L.W. 41=1946 M.W.N. 80=(1946) 1 M.L.J. 61 (Meaning of the words "with reference to immovable property" discussed).

CASES UNDER CL. (v) AND (iv) (c).—See 45 L.W. 49=(1937) 1 M.L.J. 739; 1927 A.W.R. 417. If in a suit the principal relief claimed is one for possession and the relief for declaration is merely ancillary to it, it is enough to pay the Court-fee on the relief as to possession. On the other hand, if the principal relief is for a declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the Court-fee will be payable according to the



amount at which the relief sought is valued in the plaint or in the memorandum of appeal. If a case falls under the first class the Court-fee is payable on five times the Government revenue. In the latter class the plaintiff must pay Court-fee on the valuation put by him on the disputed property for purposes of jurisdiction. Where a Hindu son sued questioning the validity of certain alienations made by his father and claimed a decree for possession of his share and a declaration that the father had no right to make the alienations, *held*, that the suit was one for declaration with a consequential relief and not merely one for possession for purposes of Court-fee. 6 O.W.N. 1105=1930 O. 104. *See also* 1930 O. 368; 202 I. C. 174=44 P.L.R. 162=A.I.R. 1942 Lah. 209. In all cases where possession is claimed, the plaintiff has to establish his title before he can get a decree for possession. Where a suit is in reality one for possession, the fact that the plaintiff asks in his plaint for something in the nature of a declaration will not make it a suit for declaration and consequential relief for the purposes of Court-fee. The suit being really one purely for possession, Court-fee is payable only on that basis. 193 I.O. 538=21 P. 1068=1941 P. 167; 48 Bom.L.R. 193. Where a Hindu son seeks to recover possession of joint family properties which have been sold in execution of decrees on mortgages executed by his father from purchasers of those properties who are in possession thereof, he cannot ask for possession without getting a declaration that the debts covered by the mortgages were incurred for an illegal or immoral purpose, the son being bound by such sales unless he proves that the debts are illegal or immoral. Hence S. 7 (iv) (c) of the Court-Fees Act applies to the suit. But where the son sues for possession of properties conveyed by his father by private sales the position is different. He can treat such sales as not binding on him leaving it to the alienees to prove necessity or antecedent debts. It is open to him to treat such sales as null and void, and in a suit of that nature, S. 7 (v) of the Court-Fees Act would apply. 24 Pat. 334=1945 P.W.N. 327 (2)=A.I.R. 1945 Pat. 421. Where the essential claim made by the plaintiff is one for possession, the fact that the plaint attempts to anticipate a possible defence and says that the defendants will rely upon certain dispositions of the property falsely alleged to have been made, the suit is one for possession under S. 7 (v) and there cannot be any pretence that the claim is one for a declaration with consequential relief falling under S. 7 (iv) (c). Merely because the defendants challenge the title of the plaintiff, the suit does not become one for a declaration with consequential relief. 16 P. 766=18 P.L.T. 977=1938 P. 22 (S.B.). *See also* 21 P.L.T. 609; 1942 N.L.J. 372. Where a plaintiff asks for declaration and a consequential re-

lief, though it is enough for his purposes to merely ask for possession the suit must be treated as one falling under S. 7 (iv) (c). 1938 N.L.J. 180. *See also* 202 I.O. 174=44 P.L.R. 162=A.I.R. 1942 Lah. 209. In a suit by Hindu sons for a declaration that a decree obtained by the defendant against their father is not binding on them and the joint family property, Court-fee is payable not as on a mere declaration but *ad valorem*, because the obvious effect of the decree would be to save property from liability to the decretal amount. (24 O.O. 361; 10 M. 187; 5 P.L.J. 394; 8 L. 531, Foll.) 8 Luck. 668=150 I.O. 722=11 O. W.N. 488=1934 O. 212 (1). A prayer for confirmation of possession includes a prayer for recovery of possession if the Court thinks the plaintiff is out of possession. 2 P. 198=4 P.L.T. 71; 179 I.C. 586=1939 Pat. 254. Where a Magistrate passes an order under S. 146, Cr.P. Code, and interferes with possession, relief regarding possession should also be prayed for. 105 I.C. 351=1927 N. 316. A suit to set aside an execution sale of certain properties on the ground that the decree having been previously adjusted could not be executed, and that the sale was therefore null and void, is one substantially for possession and comes under Cl. (v) and not under S. 7 (iv) (c). 49 C. 880=27 C.W.N. 566=38 O.L.J. 74=1922 C. 506. *See also* 94 I.C. 179=13 O.L.J. 124=1926 O. 380. Where the prayer was that upon the determination of the plaintiff's proprietary interest in a house, the defendants who were merely tenants at will may be ordered to vacate the house, *held*, the suit was one for ejectment falling under S. 7, Cl. (v). 5 P. 631. The clause is not applicable to a suit for recovery of possession by cancellation of a document. 1929 O. 419. But in Madras there is a special Cl. (iv) which would apply. *See* 64 M.L.J. 127. As to a suit for the removal of the manager of a religious institution on the ground that it is a private one and that the plaintiff alone has the power to appoint and dismiss the manager, *see* 17 I.O. 270=216 P.L.R. 1912. Possession—Alternative relief for declaration that certain property was acquired with joint family funds and for joint possession also—Court-fees. 1937 A.W.R. 218=1937 A.L.J. 308=1937 A. 148. On the point, *see also* 12 M. 223; 15 M. 501. Partition suit—Allegation of joint possession in respect of estate and subordinate tenure—Allegation that defendant in joint possession for maintenance but had set up proprietorship—Finding that plaintiff had no title or joint possession—Appeal from—Court-fee payable *ad valorem*. 18 P.L.T. 438=16 P. 491=1937 P. 514.

SUITS FOR CANCELLATION OF A DECREE OF DOCUMENT.—*See* 152 I.C. 847. [Separately provided for, so far as Madras is concerned,

by Cl. (iv-a) inserted by Madras Act V of 1922.]

(1) DECREE.—S. 7 (iv) (c) is applicable to a suit in which, having regard to the substance of the plaint, it is incumbent upon the plaintiff to obtain a declaratory decree or order to perfect his right to the consequential relief that he claims; for instance, where the plaintiff seeks relief to which he is not entitled unless and until some decree or document or alienation of property is avoided, a suit in which a declaration in that behalf is claimed is within S. 7 (iv) (c). 9 R. 401=134 I. C. 1263=1931 R. 319. A suit to declare a decree or document to which the plaintiff was a party not binding on him falls within this clause. 38 M. 922=28 M.L.J. 118. See also 43 I.C. 962=3 P.L.J. 92; 118 I.C. 465=1929 N. 71. Where a party to a decree sues for a declaration that it is illegal and void, the granting of such a declaration in his favour has the effect of setting aside that decree and relieving him of the obligations thereunder. Even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included in the declaration prayed for. To such case it is S. 7 (iv) (c) which applies and not Art. 17 (iii), Sch. II and an *ad valorem* court-fee is payable. 13 Luck. 628=1938 O. 1 (F.B.). A suit in which the only prayer is to have the decree set aside as null and void is a suit for declaration without consequential relief falling under Art. 17 of Schedule II. 20 B. 736; 30 O. 788; 34 O.W.N. 1129; 150 I.C. 1030=1934 R. 152. See also under Art. 17 (3) of Schedule II. A suit to set aside a decree on the ground of fraud would fall under this sub-clause. 7 L.L.J. 15=86 I.C. 680=1925 Lah. 346; 16 N.L.R. 84=36 I.C. 360. See also 1934 Pesh. 109; 8 L. 531=9 L.L.J. 400=102 I.C. 46=1927 L. 399; 116 I. C. 895=1929 L. 463. A suit for a declaration that a decree was fraudulent and incapable of execution and that the family property should be released from execution falls under S. 7 (iv) (c) and is not a suit for possession under Cl. (iv). 40 C. 615=21 I.C. 404. See also 51 I.C. 536=24 M.L.T. 254; 56 I.C. 550. A person was a *bona fide* purchaser for value of lands which were found to be burdened with a charge of a maintenance decree. The person brought a suit for a declaration, "that the lands were not liable for the maintenance charge." Question was whether S. 7 (iv) (c) or Art. 17 (ii), Sch. II applied. Held, that although the relief asked for was a mere declaration yet it involved the consequential relief of amendment of the maintenance decree, and hence S. 7 (iv) (c) applied. A suit for a declaration that the decree obtained by the defendant is fraudulent and for an injunction restraining the defendant from

restraining with the plaintiff's possession of the property in suit falls under Cl. (iv) (c). 40 O.L. J. 150=79 I.C. 982=1924 C. 969; 137 I. C. 240=33 P.L.R. 488; 1930 M.W.N. 656. Suit by a minor on attaining majority to set aside a mortgage decree against him as void falls within Cl. (iv) (c). 65 I. C. 980=24 O.C. 361. See also 32 P.L.R. 729. In Madras such a suit would fall under Cl. (iv-a). 139 I.C. 317=1932 M. 605=63 M.L.J. 764; 141 I.C. 80=64 M.L.J. 124=1933 M. 430. A person not a party to the decree may sue to have it declared void without asking for any consequential relief and the suit is not governed by Cl. (iv) (c). 73 I.C. 767=1933 L. 373. A person who is not a party to a decree need not get the decree set aside. But a son is bound by a decree obtained against the father. So where a son sues for declaration that a decree debt against his father is not binding on him, or on the joint family property, there is involved in it a prayer for setting aside the decree and hence *ad valorem* court-fee is payable. I.L.R. 1943 Nag. 440=1942 N.L.J. 466=202 I.C. 643=A.I. R. 1943 Nag. 70. See also 46 P.L.R. 346=A.I.R. 1945 Lah. 13. The question whether a decree sought by a plaintiff is a mere declaratory decree without any consequential relief coming under Art. 17 (iii) of the second schedule of the Court-fees Act, or whether it is a decree with consequential relief governed by S. 7 (iv) (c) of the Court-Fees Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid, but whether or not the relief claimed comes under S. 42 of the Specific Relief Act. 177 I.C. 550=1938 O. W.N. 889=1938 O. 201 (F.B.). A suit brought by the legal representatives of a deceased debtor who is a party to an agreement registered under the C.P. and Bihar Debt Conciliation Act, having the force of a decree, to have that "decree" made unenforceable against him, requires an *ad valorem* Court-fee stamp. I.L.B. (1945) Nag. 5=1945 N.L.J. 431=A.I.R. 1946 Nag. 30.

(2) DOCUMENTS.—A suit for declaration of the invalidity of a mortgage deed, for cancellation and for an injunction restraining the defendant from enforcing its terms, would fall within sub-cl. (iv) (c). 13 I.C. 864=7 N.L.R. 190. See also 1937 L. 698. So also a suit to declare a gift deed executed by the plaintiff's husband in favour of the defendant void, as he was a lunatic, and praying that possession be delivered to plaintiff as manager on behalf of her lunatic husband comes under cl. (iv) (c). 22 A.L.J. 945=47 A. 78. Also a suit for declaration by a member of a joint Hindu family that a mortgage deed executed by a deceased co-parcener is not binding on him and also for possession of the property. 50 A. 610=26 A.L.J. 316=1928 A. 248.

Suit by a *bona fide* purchaser for value of lands, burdened with a charge under maintenance decree, for a declaration that the lands are not subject to the charge involved the consequential amendment of maintenance decree and hence S. 7 (iv) (c) applied. 174 I.C. 891=1938 N. 183. A suit for declaration that the decree obtained by the defendant is fraudulent and for an injunction restraining the defendant from interfering with the plaintiff's possession of the property in suit would fall under the sub-cl. (iv) (c) if the defendant holds the property under a document executed by the plaintiff and it is necessary first to obtain cancellation. 38 M. 321=24 M.L.J. 592. Where the suit was for the cancellation of a sale-deed executed by the plaintiff and for recovery of possession of the land and the plaintiff paid Court-fee for the cancellation of the sale-deed on the amount of the consideration specified in the deed. *Held*, that the claim for recovery of possession was merely ancillary to the main claim, namely, setting aside the sale-deed, and that separate Court-fee was not payable in respect of the prayer for possession. 64 M.L.J. 127=56 M. 401=1933 M. 231. A suit for cancellation of a registered instrument under S. 39 of the Specific Relief Act, is a suit for declaration and consequential relief. 45 I.C. 238=3 P. L. J. 194. *See also* 23 M. 490; 29 B. 207=6 Bom. L.R. 1125; 35 P.R. 1914=25 I.C. 435; 1929 O. 491; 43 P.L.R. 252=1941 Lah. 265. But *see* 139 I.C. 32=1932 A.L.J. 684=1932 A. 485 (F.B.). So also suit for cancellation of a will falls under the clause. 36 I.C. 95=87 P.R. 1916. Where a will is attacked not only on the ground that it is not genuine and not properly registered, but is also as being brought about by fraud, undue influence, etc., the plaintiff virtually asks for the cancellation of the will and it must be deemed to involve a consequential relief. The plaint has to be stamped *ad valorem* under S. 7 (iv) (c) of the Act. 14 Luck. 536=1939 O. 125. A suit for a declaration that a deed is inoperative is in substance one for its cancellation. 20 M.L.J. 791=5 I.C. 927. *See also* 118 I.C. 465=1929 N. 71. A suit though cast in the form of a declaratory relief only, but in substance aiming at setting aside a deed, formally executed and registered in accordance with law is governed by S. 7 (iv) (c) and not by Sch. II, Art. 17 (iii). 22 Pat. 783=24 P.L.T. 446=1944 M.W. N. 54=A.I.R. 1944 Pat. 17 (F.B.). *See also* 10 Pat. 432=1931 Pat. 78=130 I.C. 46. Persons who are not parties to a document need not sue for its cancellation. Thus a suit for a declaration that mortgage deed is not binding on the plaintiff who was not a party to the same, falls under Sch. II, Art. 17-A and not S. 7 (iv) (c). 87 I.C. 660 (2)=1925 M. 713=48 M.L.J. 688; 10 O. W.N. 19=1933 O. 116. *See also* 5 A. 331; 1924 M.W.N. 210=78 I.C. 118 (2)=1924 M. 611 (2). A claim to have a registered agreement entered into before a Debt Con-

ciliation Board, declared invalid, is equivalent to have it adjudged void or voidable and would therefore fall under S. 39 of the Specific Relief Act under which the Court may adjudge the document void or voidable and order it to be delivered up and cancelled. In such a case the plaintiff must be deemed to have asked for the relief which the Court can grant under S. 39 of the Specific Relief Act and this amounts to consequential relief and hence the suit would fall under S. 7 (iv) (c). 1940 N.L.J. 96. Where an ex-minor sued alleging that he was a minor at the time of the execution of a mortgage deed by him and that it was therefore void against him, *held*, that all that was necessary for the minor was to ask that the document be declared to be void against him and the suit need not be treated as involving a prayer for a consequential relief, namely, the setting aside of the document. 11 B. 66=1933 B. 109. Where the mother as the guardian of her minor sons executed a release deed on behalf of the minors, the release deed is not void but only voidable and must be set aside. Hence a suit for declaration by the sons after attaining majority that the release deed is invalid and for injunction must be treated as one for cancellation falling under cl. (iv-a). 1928 M. 668. Where however cancellation is specifically asked though unnecessarily, the suit would fall under this sub-clause. 44 A. 629=20 A.L.J. 587=1922 A. 358. A suit by a plaintiff for declaration of his title and injunction alleging the settlement deed relied on by defendant to be a sham one falls under Cl. (iv) (c) and the document need not be set aside. 1929 M. 478=120 I.C. 378=30 L.W. 796. A suit to declare a sale fraudulent and fictitious does not involve a consequential relief and *ad valorem* court-fee is not necessary. 1939 Cal. 363; 1941 O.W.N. 471. A suit for cancellation of a deed of adoption should be stamped, whether under S. 7 (iv) (c) or Sch. II, Art. 17 (v) at Rs. 10, for the Court-fee on a suit to declare an adoption invalid, where the consequential relief claimed is that of cancellation of the deed, cannot be more than the Court-fee to set aside an adoption, which is Rs. 10. 1937 R. 400. A plaintiff in possession suing for the cancellation of a sale deed alleged to have been obtained from her by fraud and undue influence could not be required prior to the passing of the U.P. Court-Fees Amendment Act of 1938 to pay *ad valorem* Court-fee on the market-value of the property, which is the Court-fee payable in a suit for possession. 15 Luck. 531=1940 O.W.N. 389=1940 O. 248.

WHAT DETERMINES THE VALUE IN A SUIT UNDER THE CLAUSE.—Where the plaintiff prays for a declaration and consequential relief, the value of the consequential relief determines the Court-fee. 3 P. 640=80 I.C. 563. *See also* 4 P.L.J. 297=46 I.C. 24=5 P.L.J. 394; 133 I.C. 687=12 P.L.T. 656; 131 I.C. 808=1931 P. 195. A suit for a declaration that a certain decree is not binding

on the plaintiffs or the properties in their hands and for possession of a portion of those properties which had been sold in execution of the decree is a suit for declaration and consequential relief and Court-fee is to be paid only on the relief for possession. 38 M. 1184=25 I.C. 683=1 L.W. 824. In a suit for a declaration and consequential relief, the plaintiff is bound to pay *ad valorem* fees in proportion to the loss from which he seeks to be relieved. 56 I.C. 316=4 P. L.J. 703. A suit by the next heir of an alienable estate for a declaration that would prevent the then holder's contemplated sale should bear *ad valorem* Court-fee on the sum of the intended sale. 1928 N. 243. In a suit for declaration of right to office of the shebait of a temple and also for permanent injunction restraining the defendant from interfering with that right, the plaint is to be valued for purposes of jurisdiction and Court-fee at the value of the debutter property. (28 B. 567, Dist.) 1930 Cal. 41. Such portion of the property only as is the subject-matter of dispute need be valued. (*Ibid.*) 89 I.C. 930=1925 M. 1143.

**VALUATION IN SUITS FALLING UNDER THE CLAUSE.**—There is considerable divergence of judicial opinion on the question whether in cases coming under sub-cls. (c) and (d) of Cl. (4) the plaintiff is absolutely at liberty to put his own valuation. The Calcutta High Court has recently held that he can give his own value and the remedy lies not in nullifying the words of the Act, but in the rule-making power of the High Court conferred on it by S. 9 of the Suits Valuation Act. See 34 C.W.N. 321=127 I.C. 665 =1930 C. 473; 58 C. 281=1930 C. 686=34 C.W.N. 870. See for the earlier decisions of that Court, 1928 C. 55=105 I.C. 80; 32 C. 734; 1922 C. 242; 79 I.C. 938=1924 C. 969. For decisions to the contrary, see 6 C.L.J. 427=11 C.W.N. 705; 40 C. 245=17 I.C. 162; 1941 C. 509. [In order to remove the doubts S. 8-C has been enacted in Bengal giving the Court power to revise value on enquiry, see 42 C.W.N. 504=I.L.R. (1938) 2 Cal. 64=1938 C. 865.] In a suit for declaration of title to a certain property and for an injunction falling within Cls. (c) and (d) of S. 7 (iv) the amount of Court-fee is, no doubt, computed according to the amount at which the relief sought is valued in the plaint. But where it is possible for the Court on the facts stated to question the plaintiff's valuation, it can exercise its powers of correction under S. 8-C of the Act. 175 I.C. 261=66 C.L.J. 462=1938 C. 302. Where a suit is instituted for a declaration of title of the plaintiff to a certain provident fund money and for injunction restraining the defendant from withdrawing that money, it cannot be said that there is no objective standard of valuation, and the correct valuation of the relief claimed is the amount of the provident fund. 177 I.C.

893=42 C.W.N. 192=1938 C. 161. In a suit for rectification of a *solenama* upon which a preliminary decree was made in a partition suit, on the ground of fraud or mutual mistake of parties, the value of the property which would be affected by the preliminary decree which would be made in the partition suit, if the plaintiff ultimately succeeded in his suit, cannot be taken as an objective standard for the purpose of determining the value of the relief in the suit. In the absence of any other satisfactory objective standard, the plaintiff's valuation must be taken as correct and final. 42 C.W.N. 614=68 C.L.J. 413. In a suit to obtain a declaratory decree with consequential relief the plaintiff can put his own valuation on the relief sought by him. But the Court is empowered under the law to revise the valuation put by the plaintiff, and if, on such revision, it is of opinion that the valuation is insufficient or arbitrary, it has jurisdiction to fix a right value. 22 Pat. 783=24 P.L.T. 446=1944 P.W.N. 54=A.I.R. 1944 Pat. 17 (F.B.). A Hindu widow brought a suit to cancel a deed of family settlement executed between her and her husband's brother alleging that she was induced to sign it by fraud and misrepresentation, and praying that a copy of the decree be sent to the registration office for a note being made that the document has been cancelled. She alleged in her plaint that her husband died separate from his brother and that on his death, she as his widow and heir got possession of his entire estate. The deed, however, recited that her husband and his brother were joint and that the plaintiff on her husband's death was entitled to maintenance in lieu of which she was given properties worth Rs. 20,000. She originally paid a Court-fee of Rs. 15 as on a declaratory suit but on being directed by Court to value the relief, she valued it at Rs. 5,100 on which amount Court-fees were paid. It was held by the lower Court that she should pay Court-fee on the market value of the properties involved, which came to about Rs. 41,000. *Held*, that the proper method of valuing the suit was according to the injury or loss from which plaintiff sought protection, and that loss could not be valued at the total value of the properties in suit, though such a value might be proper if the plaintiff were out of possession or if the document sought to be cancelled denied her any right and title whatsoever; in this case since the plaintiff came to Court for some more or better rights than what the document gave her, it was for her to value her relief in the suit. Since the valuation put by her was neither wholly unreasonable nor arbitrary, the Court should *prima facie* be disposed to accept the same, and was not justified in demanding Court-fee on the market-value of the properties in suit. 20 P.L.T. 638=1939 P. 531. In a suit for a declaration that a compro-

mise decree passed in a partition suit was obtained by fraud, and for partition, it is difficult to say that the value of the relief setting aside this decree can possibly be the total value of the joint property. There is really no objective standard of valuation at all, and in the absence of rules made under S. 9 of the Suits Valuation Act, it is impossible to say that the plaintiff's valuation of the relief is incorrect. 70 C.L.J. 158=44 C.W.N. 1038=1940 C. 552. In a suit for a declaration that a certain decree obtained by the defendant against the plaintiff is void and for an injunction restraining the defendant from executing that decree, it cannot be said that there is no objective standard for valuing the relief claimed, as such standard must be taken to be the value of the plaintiff's property which he would stand to lose if the decree against him is put into execution. It would follow, therefore, that if the value of the decree exceeds the value of the assets, the valuation should be based on the valuation of the assets, or, if the assets are of greater value than the decree, the valuation should be based upon the value of the decree. I.L.R. (1940) 1 Cal. 409=1940 Cal. 482. See also 44 C.W.N. 860. The Bombay High Court has always held that the plaintiff has the right to value his claim as he pleases. See 44 B. 331=56 I.C. 340 and other cases cited *supra* under the main Cl. (iv). So also the Lahore High Court. 137 I.C. 240=33 P.L.R. 488; 9 L. 366=1927 L. 890; 140 I.C. 73=33 P.L.R. 458; 9 L.L.J. 579=29 P.L.R. 27; 40 P.L.R. 204. Also the Peshawar Court. 197 I.C. 782=A.I.R. 1942 Pesh. 4. Also the Nagpur Judicial Commissioner's Court. 1927 N. 375. But see 110 I.C. 163=1928 N. 243; 165 I.C. 106=1937 N. 14. But according to the later rulings of the Nagpur High Court, the Court can interfere with any value put on a relief sought by a plaintiff in a suit under S. 7 (iv) (c), if the valuation appears to be arbitrary and unreasonable. But a Court should not endeavour to correct a plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all, but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated. I.L.R. (1938) Nag. 558=1938 N.L.J. 327 (F.B.). The plaintiff cannot put any arbitrary value on his consequential relief. Where a person in possession of an item of gifted property sues for a declaration and consequential reliefs of cancellation of the gift and possession of the remaining items, he has to pay a Court-fee only on the value of the properties, possession of which is asked for. 1938 N. L. J. 130. Where a plaintiff sues for a declaratory decree and asks for consequential relief and puts his own valuation upon that consequential relief, then for the purpose of court-fee and also

for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both. It is not however open to the plaintiff to put an arbitrary value of his claim. 1937 N. 316. The Allahabad High Court expressed the opinion that the plaintiff cannot give an arbitrary value. See 36 A. 500. See also 50 A. 610=1928 A. 248; 142 I.C. 705=1933 R. 40. But see 3 Bur.L.J. 128=1924 R. 378 (2). According to the Oudh Chief Court there is no direct authority for the Court to interfere with the valuation set by the plaintiff unless the Court can take advantage of S. 151, C.P. Code. See 1928 O. 260=107 I.C. 330 (The case is of over-valuation and not under-valuation). In Sind it has been held that a suit for injunction to restrain enforcement of a money decree should be valued according to the amount of the decree. 130 I.C. 445=1931 Sind 15. The Patna High Court has uniformly held that the plaintiff cannot give an arbitrary value. See 2 P. 198; and other cases cited under Cl. (iv). See also 24 Pat. 334=1945 P.W.N. 327=A.I.R. 1945 Pat. 421. Although it is for the plaintiff to state the amount at which he values the relief sought, it is open to the Court to determine the question as to the true valuation of the suit if such question is raised. 1931 P. 195=131 I.C. 808. Where in order to succeed in a suit for possession, it is necessary for the plaintiff to obtain a declaration that a document or decree is void or inoperative, the Court-fee to be paid must be calculated on the actual value of the property. 43 I.C. 962=3 P.L.J. 92; 179 I.C. 586=1939 P. 254. P brought a suit for setting aside a sale held in a certificate case. The property had been found to be worth at least Rs. 12,000 in another proceeding *inter partes*, but it had been purchased by the certificate holder for one pice. P however was in possession. In the suit he prayed that the sale might be held to be illegal and might be set aside and that a permanent injunction should issue restraining the auction-purchaser from taking possession on the basis of the said auction sale. P framed the suit under S. 7, Cl. (iv), sub-cl. (e), Court-Fees Act, and put the valuation at the price for which it had been purchased, *viz.*, one pice and paid Court-fee thereon. Held, that as no objective standard of valuation was available in so far as P's claim was concerned he was entitled to put his own valuation. 184 I.C. 206=1939 Cal. 278. In a suit for permanent injunction restraining a decree-holder from executing his decree on the ground that the same was obtained by fraud and collusion and was incapable of execution, the plaintiff must value his suit according to the amount of the decree and to pay *ad valorem* Court-fee. 182 I.C. 188=1939 Pat. 572. In Madras, the plaintiff was at liberty to value the relief arbitrarily prior to the amendment

for an injunction ;

(d) to obtain an injunction,

for easements ;

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

of 1922. See 27 M. 480. Now under the proviso a suit for declaration and consequential relief regarding immovable property should be valued at one half the value computed under Cl. (v). See 1930 M. W. N. 656. A suit for cancellation of a document or a decree has to be valued under Cl. (iv-a). Where the plaintiff is interested only in a portion of the property in respect of which the decree was passed the suit must be valued only according to the extent of the plaintiff's claim. 42 C. 370=36 I.C. 111=19 C.W.N. 895; 4 P.L.J. 191=44 I.C. 891. In a suit to set aside a partition deed, so far as the plaintiffs are concerned, Court-fee is payable only on the value of the plaintiff's share of the property. 138 I.C. 303=1932 M. 491=62 M.L.J. 712. As a general rule the amount at which the plaintiff values the relief sought by him for purposes of Court-fee is to be taken despite anything to the contrary in the plaint as the value for purposes of jurisdiction. 140 I.C. 73=33 P.L.R. 458. Under S. 8, Suits Valuation Act, the value for jurisdiction follows value for the Court-fee and not *vice versa*. 58 C. 281=1930 Cal. 686. But where a person values his claim at a certain figure for purposes of jurisdiction and he is subsequently called on to pay Court-fee on the footing that the suit falls under S. 7 (iv) (c), it is not open to the plaintiff to modify the valuation for purposes of Court-fee. 32 P.L.R. 729; 40 P.L.R. 938=1938 Lah. 647. See also 36 A. 500 on the point. But see 1930 M.W.N. 353=129 I.C. 824=1931 M. 94; 58 C. 281=1930 C. 686.

Sec. 7 (iv) (c) AND SCH. II, ART. 17 (iii).—Sch. II, Art. 17 (iii) only applies when no consequential relief is sought. Where consequential relief by way of injunction is asked for then S. 7 (iv) applies and *ad valorem* Court-fee on the value of the claim has to be paid, a single valuation covering both declaration and injunction. 1939 A. M. L. J. 80. The relief originally prayed for was a declaration that the plaintiff was the owner of certain property. A Court-fee of Rs. 10 was paid. Subsequently the prayer was sought to be amended thus: "On account of that, (a particular) decree is null and void, and ineffectual; it may be declared, etc." *Held*, that the effect of the amendment was to add to the original relief a prayer for a further declaration for which a further Court-fee of Rs. 10 should be paid and that the second relief asked for was not consequential relief within the meaning of S. 7 (iv) (c) so as to necessitate the payment of *ad valorem* fees. 55 A. 274=1933 A.L.J. 311=1933 A. 350; 1935 A. 817. Suit for injunction in respect of easement as occupier of property situate in Hyderabad. The plaintiff can place any valuation which he chooses. 1941 M. 91=52 L.W. 610=I.L.

R. (1941) Mad. 157=(1940) 2 M. L. J. 655.

Sec. 7, Cl. (iv) (d).—See 45 B. 567=59 I.C. 777=46 I.C. 884=63 P.R. 1902. The valuation of the relief sought in a suit for an injunction is left entirely to the discretion of the plaintiff or appellant as the case may be and the Court is not entitled to question the correctness of the amount so declared. (43 B. 376 and 31 Bom.L.R. 841, Foll.) 12 B. 335=1934 B. 268. In a suit for injunction, relief cannot be valued differently for Court-fees and jurisdiction. 22 Bom.L.R. 1450; 99 I.C. 863; 92 I.C. 730=1926 M. 591; 1929 L. 566=116 I.C. 908. (See Suits Valuation Act, S. 8.) As to the effect of Rule 4 of Rules framed by Lahore High Court under S. 9 of the Suits Valuation Act, see 47 P.L.R. 436 (F. B.). Plaintiff can put his own valuation and where the lower Court finds that the valuation is reasonable, the High Court will not interfere with it. 94 I.C. 103 (2)=100 P.L.L.C.O. 102=1926 P. 334. As to declaratory suits where the plaintiffs asked for injunction, see 21 I.C. 771=19 O.L.J. 15; 11 N. 100; 31 C.W.N. 1045=1927 C. 775; 48 A. 412=94 I.C. 951=1926 A. 423. See also the cases noted under Cl. (iv) (c). A suit for rent and for declaration of title with injunction falls under S. 7 (1) (iv) (d) as the injunction is a distinct and independent relief. 17 I.C. 44=6 S.L.R. 114; 19 A. 60. See also 4 A. 329 on the sub-clause.

Sec. 7 (iv) (d) AND BEN. AM. ACT, S. 8-C.—In a suit for permanent injunction restraining the defendant from executing a decree obtained by him against property in possession of the plaintiff, the plaintiff cannot place his own valuation on the relief claimed by him, nor can the relief be valued according to the value of the property which would be affected by the injunction. In a case of this sort the objective standard of valuation must be taken to be represented by the extent to which the plaintiff will be benefited if he succeeds in his suit. It would be necessary during the course of an enquiry under S. 8-C of the Court-Fees Act to estimate the value to the plaintiff of the property without the permanent injunction and also on the assumption that a permanent injunction could be obtained. The difference in the amounts of these two estimates would be the measure of the value of the relief sought by the plaintiff and it would be according to the figure thus obtained that the plaintiff's suit should be valued. I.L.R. (1940) 2 Cal. 33=44 C.W.N. 591=1940 Cal. 566.

Sec. 7, Cl. (iv) (e).—This sub-clause would apply to suits in respect of a right of way, right to light and air and other rights



for accounts ;

(f) for accounts—

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal ;

of easements over immovable property. In a suit for injunction restraining municipality from demolishing thara, the plaintiff can put any valuation and R. 4, Cl. 10 (Vol. 3, Rules and Orders) of Lahore High Court are not applicable. 116 I.C. 908=1929 L. 566.

SNC. 7, CL. (iv) (f) (CL. (iv) (b) IN U.P.): ARBITRARY VALUATION, IF PERMISSIBLE.—The provisions of the Court-Fees Act are controlled by O. 7, R. 1 (2) and R. 11 (b), C.P. Code, and where the Court finds that the relief has been valued arbitrarily or improperly the Court can compel the plaintiff to revise valuation and pay proper Court-fee thereon. 1933 Sind 322. See also 31 S.L.R. 442=1937 S. 241 (F.B.); 150 I.C. 1090=1934 A.L.J. 643=1934 A. 807; 163 I.C. 822=1936 M. 525=43 L.W. 300=70 M.L.J. 292. Where a plaintiff brings a suit for recovery of a sum of Rs. 900, the mere fact that he adds a prayer for relief for any other sum that may be found due, cannot have the effect of converting the money suit into a suit for accounts, and S. 7, Cl. (iv) (f) of the Court-Fees Act will not apply. 17 Luck. 246=196 I.C. 441=1941 O.W.N. 1095=1941 Oudh 622. It cannot be laid down as an absolute rule of law that the right of a plaintiff in a suit for accounts of a partnership to put a notional value upon the relief he claims extends throughout the whole course of the proceedings up to second appeal and that it extends to appellants or respondents who file cross-objections. The Court is not bound in every case to accept the valuation put by the appellant upon the relief sought by him. As the suit proceeds and circumstances change and the preliminary decree is followed by a final decree, the relief claimed by an appellant in an appeal from the final decree is no longer tentative and uncertain, but is ascertained and can be accurately valued; and the Court therefore is not bound to apply in such an appeal the principle of notional valuation applied or accepted at the beginning of the suit when everything was uncertain. If the appellant is able to ascertain the amount then remaining in dispute, he must pay Court-fee on the value of the relief he seeks in his appeal and cannot be allowed to put a mere notional value. 31 S.L.R. 37.

SCOPE AND APPLICABILITY OF SECTION.—The value of a suit for accounts is the approximate value stated in the plaint, which determines the Court-fees as well as the forum. 6 C.L.J. 225; 100 I.C. 632=8 P.L.J. 145; 37 B.L.R. 148; 1936 L. 978. A suit for accounts of the rent recovered by the defendants falls under S. 7 (iv) (f) and the plaintiff is at liberty to value it as he pleases. The fact that the plaintiff issued, prior to the institution of his suit, a notice claiming a definite sum does not have the

effect of making the suit fall under S. 7 (4). 162 I.C. 227=38 Bom.L.R. 218=1936 B. 166; 1936 M. 525. The fact that the plaintiff had on an earlier occasion filed a suit on accounts against the same defendant claiming a larger amount than the plaint valuation is no reason for pinning him down to his original estimate. 1942 N.L.J. 197. The plaintiff is entitled to value the relief at any figure he chooses and the stamp will have to be made up subsequently if relief of greater value is granted to him. 8 L.L.J. 78=94 I.C. 650=1926 L. 242 (1); I.L.R. 1944 All. 133=213 I.C. 412=1944 A.L.J. 70=A.I.R. 1944 All. 84. It is open to the plaintiff to value a suit for account as he likes, even though such valuation may be arbitrary and even if during the course of the trial he should make admissions that far larger amounts are due to him, it is not open to the Court to require him to revise the valuation and pay additional Court-fee. 139 I.C. 105=1932 M. 656. See also 156 I.C. 424=1935 B. 212; 156 I.C. 718=1935 L. 639; 1936 B.D. 237. The plaintiff is entitled to pay Court-fee on the value he has thought fit to give to the relief sought notwithstanding that he has through mistake or inadvertence stated the value for purposes of jurisdiction at a different figure. 35 L.W. 358=137 I.C. 871=1932 M. 565. (25 C.W.N. 768; 15 Bom.L.R. 1123 and 58 C. 281, Foll.) The Court trying such suit does not lose its jurisdiction because the amount found due exceeds the jurisdiction of the Court. 9 N.L.R. 112=20 I.C. 928; 25 M. 543; 40 M. 1=32 M.L.J. 221; 16 A. 286; 33 A. 97; 56 B. 23=34 Bom.L.R. 44=137 I.C. 702=1932 B. 111. The Calcutta High Court has however held that the Court can only award a sum up to the limits of its pecuniary jurisdiction. 13 C.W.N. 493. S. 11 provides the means of recovery of excess Court-fee due on the excess decreed. 46 I.C. 165=22 C.W.N. 669; 45 C. 634. In a partnership suit, the subject-matter would be the severance of the final relationship and determination of the relative shares of the partners. The aggregate of the specific amounts will represent the value of the subject-matter of the suit, even though the plaintiff's tentative value be less or more. 1930 L. 725.

SCOPE OF THE SUB-CL. (iv) (f).—The sub-clause would cover all suits which involve accounting between parties. Thus a claim for accounts in a partnership suit would fall under the sub-clause. 46 I.C. 165=22 C.W.N. 669; 15 Bom.L.R. 1123=22 I.C. 71; 7 B. 125; 13 C.L.R. 160; 64 M.L.J. 576. Suit for dissolution of partnership at will and for accounts falls under this clause. I.L.R. 1944 Mad. 271=(1943) 2 M.L.J. 130=56 L.W. 391=1943 M.W.N. 470=



A.I.R. 1943 Mad. 689. So also a suit for administration and accounts. 39 B. 545=29 I.C. 940=17 Bom.L.R. 574; 45 C. 634=22 C.W.N. 115; 48 Bom.L.R. 110. See also 100 P.R. 1914=26 I.C. 342; 55 I.C. 258=12 Bur.L.T. 207; 44 C. 890=24 C.L.J. 448=21 C.W.N. 310; 24 I.C. 648=7 O.L.J. 281; 1941 Rang.L.R. 512=1941 Rang. 322 (F.B.); 1939 Rang.L.R. 134=1939 Rang. 115; 12 B. 512; 222 I. C. 139 (Sind). But see the case below. An administration suit is not merely a suit for accounts and ought not to be so regarded for any purpose relating to Court-fee; especially where the suit is not one by a creditor for the administration of the assets of a deceased but one where a division of properties may have to be made, it should be valued under Art. 17-B of Sch. II of the Court-Fees Act. (Judgment of Wadsworth, J., in C.M.A. No. 235 of 1938, Foll.). The jurisdiction is to be determined by the market-value of the property. I.L.R. 1942 Mad. 455=A.I.R. 1942 Mad. 247=54 L. W. 668=(1941) 2 M.L.J. 962. In an appeal from a decree in a suit for administration the appellant is entitled to value his relief for purposes of court-fee at such figure as he may fix. He is not bound to pay court-fee on the *ad valorem* value of the appeal. 42 P.L.R. 101. The claim of the creditor in pursuance of the notification of Court after a preliminary decree in an administration suit cannot be deemed to be a 'plaint' so as to require court-fee to be paid thereon. 134 I.C. 1137 (2)=1931 M. 683=61 M.L.J. 933. But see 222 I.C. 139 (Sind), which has reference to the explanation added to sec. 11 in Sind. In order that a suit which does not expressly ask for accounts may be treated as one for accounts in essence, the substance of the allegations in the plaint may legitimately be looked into and these allegations must show that the plaintiff is asking for accounts against the defendant as an accounting party. Where a plaint does not indicate that the plaintiff is asking for accounts as accounting party and that accounts should be taken to ascertain the amount due from him, and the relief claimed by him and granted to him is one purely of a declaratory character and no money decree is passed, the suit is not a suit for accounts. 1943 O.W.N. 480 (2)=211 I.C. 125=A.I.R. 1944 Oudh 101. A claim for mesne profits is not a claim, the value of which cannot be ascertained, and *ad valorem* court-fee is to be paid thereon and plaintiff cannot recover anything in excess of the valuation put by him. 40 I.C. 579=3 P.L.J. 67. A suit for partition and accounts against a karta of a joint family is not a suit for account and would not fall under this sub-clause. 10 Pat.L. T. 491=1930 Pat. 1. In a suit for partition by metes and bounds after division in status, a prayer for accounts is leviable to court-fee under this clause. 64 M.L.J. 576=1933 M. 431=143 I.C. 755.

**DUTY OF PLAINTIFF.**—Where the plaintiff brings a suit for accounts he is bound to value his suit tentatively by doing his best

to give a fair estimate of the relief which he hopes to obtain and he must not fix the valuation arbitrarily in order to avoid payment of the proper court-fees or overvalue it. 22 Pat. 114=206 I.C. 126=A.I.R. 1943 Pat. 218. Where a suit by a ward who has attained majority is for accounts against his former guardian, he need not specify the amounts he expects to receive; it is sufficient to pay court-fees on the relief of accounting and to pay court-fees later on on the amount found due. Where accounts had already been furnished by the guardian to the Court and examined by auditors, the ward cannot sue for accounts but can sue only on the accounts already furnished for recovery of what is payable after surcharging and falsifying. The suit really is to surcharge and falsify accounts already furnished and to recover specific sums, and therefore, the plaintiff must value and stamp his plaint on an *ad valorem* basis. (1945) 2 M.L.J. 460; 1929 P. 626.

**APPEAL IN CASE FALLING UNDER THE SUB-CL. (iv) (f).**—An appellant against a decree dismissing a suit for an account cannot in appeal change his valuation when the subject-matter of the appeal is the same as in the trial Court. The scheme of the Court-Fees Act does not allow the plaintiff to change in appeal the valuation adopted by him in the plaint in the trial Court. I.L.R. (1938) Mad. 1031=1938 Mad. 887=(1938) 2 M.L.J. 557 (F.B.). A plaintiff in a suit for accounts is no doubt entitled to place his own valuation on the relief claimed. If his suit fails and he appeals against the refusal to take an account, the appeal would relate solely to a right to an account, and the appellant might place his own value on the memorandum of appeal. But if the suit results in a decree for a certain amount against the plaintiff, his appeal against such decree is not merely in relation to an account, but is really an appeal against a money decree and he must pay *ad valorem* of court-fee on the amount of the decree. He cannot be permitted to place an arbitrary value on his appeal for purposes of court-fee. I.L.R. (1941) Bom. 477=43 Bom.L.R. 475=1941 Bom. 242. Where a person appeals from a preliminary decree in a suit for account, he is allowed the option of placing his own valuation upon the memorandum of appeal and he is not bound by the valuation put upon the claim in the plaint. 44 A. 542=20 A.L. J. 416=1922 A. 228; 47 A. 756=23 A.L. J. 725=89 I.C. 122; 3 P. 146=1924 P. 161; 91 I.C. 32=1926 L. 189; 141 I.C. 277=1933 N. 127; 9 Rang. 165=133 I.C. 91=1931 B. 146 (F.B.). But see contra 1921 M.W.N. 558=70 I.C. 392; 39 M. 725=33 I.C. 602=30 M.L.J. 402 (F.B.); 23 M. 490=20 I.C. 328=9 N.L.E. 112; 79 I.C. 923 (Sind); 7 P.R. 1925=28 I.C. 262; 14 P. 658=159 I.C. 4=16 P.L.T. 433=1935 P. 396; 31 S.L.R. 37. See also 50 I.A. 232 cited below. In an appeal against a preliminary decree in a suit for the taking of accounts, the defendant-appellant is not

bound by the valuation of the relief made in the plaint; and is at liberty to make a fresh valuation for the purposes of the appeal. But in an appeal against a final decree deciding that a specific sum of money is due by the defendant to the plaintiff, the only valuation which the defendant-appellant can be permitted to put upon his appeal is the amount of the decree which he seeks to have set aside. 1937 Rang.L.R. 369. A defendant appealing from a preliminary decree for an account has to stamp his memorandum of appeal according to the plaintiff's valuation and cannot value his appeal at whatever may seem to him to be approximately correct. Where a defendant appeals against a final decree, he should pay court-fee on the amount of the decree passed against him, except in cases where he appeals only against a portion of the decree. Sec. 7 (iv) (f) applies to appeals by a defendant. I.L.R. (1938) Mad. 598=47 L.W. 488=1938 M. 435=(1938) 1 M.L.J. 628 (F.B.). This rule does not apply to an appeal by plaintiff against a final decree making him liable for a particular amount and the appeal may be valued at the notional value originally stated by him in the plaint. (1943) 2 M.L.J. 347=56 L.W. 510=1943 M.W.N. 817=A.I.R. 1943 Bom. 685. In an appeal from a preliminary decree passed in a suit for accounts, the valuation once fixed by the plaintiff must be adhered to in appeal unless the subject-matter of the appeal is not identical with that of the suit, in which case, it is open for the appellant to value the subject-matter of the appeal differently and to pay the court-fee thereon. 21 S.L.R. 377=98 I.C. 909=1927 Sind 100. See also on the point. 11 Pat.L.T. 629; 131 I.C. 337=1931 L. 143; I.L.R. 1943 Nag. 17=1942 N.L.J. 557=A.I.R. 1943 Nag. 13. On an appeal against the preliminary decree for winding up a partnership, a court-fee of Rs. 10 is sufficient, other questions relating to allowing or disallowing certain items being incidental. 1 L. 6=19 P.L.R. 1920=57 I.C. 185. See also 1936 L. 453; 31 S.L.R. 37; 1937 A.L.J. 480=1937 A. 465 (Suit for accounts by principal against agent—Appeal by defendant from preliminary decree—Court-fee). See also 1938 N.L.J. 341=1938 Nag. 527; I.L.R. (1941) Nag. 344. In a suit for dissolution of partnership and accounts a decree was passed in favour of the plaintiff for a sum of Rs. 10,000. The defendant appealed against the decree, claiming a decree in his favour for such sum as may be found due and valued the appeal at Rs. 1,000 and paid court-fee of Rs. 107-8-0. Held, that the valuation was arbitrary and could not be accepted; and that the subject-matter of the appeal being the decree for Rs. 10,000 and interest, *ad valorem* court-fee must be paid on that amount. 150 I.C. 1090=1934 A.L.J. 643=1934 A. 807. But see also 141 I.C. 277=29 N.L.R. 34=1933 N. 127; 31 S.L.R. 31; 18 Lah. 196=39 P.L.R. 884=1937 Lah. 694. Where in a suit for accounts a party appeals from a preliminary decree paying *ad valorem* fee

on the amount mentioned in the plaint and before the decision of that appeal appeals from the final decree, he need not pay *ad valorem* court-fee on the entire amount awarded by the final decree but only on the amount, if any, in excess of that on which court-fee was already paid. 55 M. 664=1932 M. 453=62 M.L.J. 624. The mere fact that in such a case the plaintiff will have to pay fee under sec. 11 of the Court-Fees Act to enforce the liability under the decree does not relieve the defendant-appellant from paying fee on the entire amount decreed. 33 C. W.N. 743=1929 C. 815. Art. 17 of the Act could not apply to such a case, where a person seeks to set aside a decree for a particular sum of money. (*Ibid.*) Where there was a claim for Rs. 3,000 and a cross-claim for Rs. 29,000 and plaintiff's claim was dismissed but cross-claim allowed for Rs. 19,000 and the plaintiff valued his appeal at Rs. 19,991 it was held that the valuation applied for the appeal in its entirety both to reverse the decree passed against him and to grant a decree in his favour inasmuch as he can fix his own valuation in appeal. 56 I.A. 232=57 M.L.J. 281=1929 P.C. 147 (P.C.). Where a plaintiff definitely fixes a certain sum as the amount of his claim, this must be considered as the value of the original suit as well as the appeal. But when he fixes a certain sum as the amount of his claim only approximately, the amount found due by Court determines the forum of appeal. 34 C. 954=11 C.W.N. 1133=6 C.L.J. 255; 31 C. 365; 9 L. 23; 52 B. 904=115 I.C. 391; 1933 Sind 322. But see 40 M. 8=32 M. L. J. 221. In a suit for accounts the determination of the forum of appeal from the preliminary decree depends upon the valuation of the suit for purposes of jurisdiction. 31 P.L.R. 536=1930 L. 332. On this clause, see also 144 I.C. 559=1938 L. 633; 38 Bom.L.R. 754=1936 B. 353 (Suit to declare will null and void and for administration of estates).

SEC. 7 (iv) (a) AND (iv-B) (U.P.).—Where a suit was filed for a declaration that certain persons were the duly elected office-bearers of a certain committee and not the defendants and for an injunction to restrain the defendants from acting as such office-bearers held, that the words 'relief sought' in sec. 7 (iv) (a) of the Court-Fees Act meant the whole relief which was prayed for in the suit and that as the relief for injunction could not be treated as an independent relief, it could not be valued under sub-sec. (iv-B) of sec. 7 of the Act. I.L.R. (1944) All. 214=213 I.C. 227=1944 O.W.N. (H.C.) 40=1944 A.L.J. 95=A.I.R. 1944 All. 113.

U. P. COURT-FEES AMENDMENT ACT, 1938, SEC. 7 (iv-B).—Sec. (iv-B) applies to a suit in which the only relief claimed is one to obtain an injunction. 15 Luck. 415=1940 Oudh 24. See also 1941 O.W.N. 379 (Appeal in suit under sec. 33 (3), Agri. Rel. Act; U. P. Court-fees). 1940 A.L.J. 689 (F.B.); I.L.R. (1940) All. 93=1940 A.L.J. 30=1940 All. 189 (Suit under sec. 33, U. P. Agri. Rel. Act, to declare amount payable).

In all such suits, the plaintiff shall state the amount at which he values the relief sought [\* \* \* \*];

#### LEG. REF.

<sup>1</sup> The words "and the provisions of the Code of Civil Procedure, section thirty-one shall apply as if for the word 'claim' the words 'relief sought' were substituted" were repealed by the Repealing and Amending Act (XII of 1891).

Where a plaintiff sued as a universal legatee of a certain *E* for recovery of property bought by *E* *benami* in the name of the defendant who was styled as the adopted son of one *M* a nephew of *E* and also asked for a declaration that the defendant was not the adopted son of *M*, it was *held*, that what had to be considered for the purpose of determining the court-fee was, what was the property that might be diverted by that adoption, that the property which might be diverted, would be that property which at the date of the death of *E* was joint and which the defendant or *M* himself as the case might be would have taken by survivorship and not the separate property of *E*. 1942 A.L.W. 192.

SEC. 7 (*iv-B*), PROVISIO: CONSTRUCTION OF WORDS.—The words "involved in or affected by the relief sought" in sec. 7 (*iv-B*), proviso must be strictly construed. They clearly exclude all properties which are not involved in or affected by the relief sought. I.L.R. (1944) All. 133=213 I.C. 412=1944 O.W.N. (H.C.) 25=1944 A.L.W. 57=1944 A.L.J. 70=A.I.R. 1944 All. 84. See also 1945 O.W.N. (C.C.) 404.

SEC. 7, CL. (*iv-A*) ('U. P. AMENDMENT').—As a 'will' is no more than a mere declaration of an intention it cannot possibly be described as an instrument securing any property. Hence a 'will' cannot fall within the meaning of sec. 7 (*iv-A*). I.L.R. (1944) All. 133=213 I.C. 412=1944 O.W.N. (H.C.) 25=1944 A.L.J. 70=A.I.R. 1944 All. 84. The words 'a decree for money' as used in sec. 7 (*iv-A*) of the Court-Fees Act does not necessarily mean a 'simple money decree'. Even in a mortgage suit money is decreed. In a suit to set aside a mortgage decree, the sale thereon and possession, the basis of valuation should be the amount of the decree and not the value of the property; court-fee is chargeable on the claim for cancellation of decree and not for possession only; the relief of setting aside the sale would follow the setting aside of the decree and hence no separate court-fee is necessary 12 Luck. 54=A.I.R. 1944 Oudh 118; 1943 A.W.R. (C.C.) 33 (3)=1943 O.W.N. 148. Where a substantive relief is really involved which falls under sec. 7 (*iv-A*) but only a declaration is prayed for, court-fee should be charged on the substantive relief. The Court should not be entirely guided by the language used by the plaintiff. It should look at the substance of the relief claimed. I.L.R. (1944) All. 336=1944 O.A. (H.C.) 128=1944 A.L.J. 256=A.I.R. 1944 All. 271. See also I.L.R. (1944) All. 388=1944 A.

L.J. 304=A.I.R. 1944 All. 208. Where a suit for declaration of right is based on a gift executed by a donor who had derived his title under a will and the defendant not only impugns the validity of will but also in the alternative questions the nature of interest conveyed by it and both his pleas are rejected and the appeals raising the same contentions, *ad valorem* court-fee must be paid under sec. 7 (*iv-A*) (2) and not a fixed fee under Art. 17 (*iii*) of the same Act. 1943 O.W.N. 250=A.I.R. 1944 Oudh 29. Where the plaintiffs in a suit pray that certain sale deeds be declared invalid and ineffectual and that the possession of the property should be delivered to them, they must pay court-fee both on the relief for possession and on the relief for adjudging the deeds of sale to be void or voidable. I.L.R. (1945) All. 51=1945 A.L.J. 244=1945 O.W.N. (H.C.) 162=A.I.R. 1945 All. 290. A suit for declaration under r. 103 of O. 21, C. P. Code, necessitated by an order of the executing Court under r. 99 of that order is in substance not one for avoiding the decree under execution but in reality is a suit which seeks the reversal of the order of the execution Court. Hence it would be governed by Art. 17 (1) of Sch. II of the Court-Fees Act. Even if the reliefs fall under sub-sec. (*iv-A*) of sec. 7 of the Act, the special provisions for suits of this nature contained in Art. 17 (1) of Sch. II would override the general provisions contained in sub-sec. (*iv-A*) of sec. 7 of the Court-Fees Act. I. L.R. (1945) All. 68=219 I.C. 335=1945 A.L.J. 109=1945 O.W.N. (H.C.) 30=A.I.R. 1945 All. 111.

AS AMENDED BY MADRAS ACT (V OF 1922), SEC. 7 (*iv-A*) AND (*v*).—Where the suit was for the cancellation of a sale-deed executed by the plaintiff and for recovery of possession of the land and mesne profits, and the plaintiff paid court-fee for the cancellation of the sale-deed on the amount of the consideration specified in the deed and also paid court-fee on the mesne profits: *Held*, that the claim for recovery of possession was merely ancillary to the main claim, namely, setting aside the sale-deed, and that separate court-fee was not payable in respect of the prayer for possession. 56 M. 401=142 I.C. 29=64 M.L.J. 127. See also 42 L.W. 860=1935 M. 863=69 M.L.J. 458; 42 L.W. 217=1935 M. 671=69 M.L.J. 45. An order of the liquidator under sec. 42 (2) (b) of the Co-operative Societies Act is not a "decree for money" within the meaning of sec. 7 (*iv-A*) of the Court-Fees Act, as amended by Madras Act V of 1922, not having been passed by any Court in a suit. Sec. 7 (*iv-A*) cannot therefore apply to a suit for a declaration that an order of a liquidator determining the amount of contribution payable by the plaintiff under sec. 42 (2) (b) of the Co-operative Societies Act is null and void. The suit is governed by Art. 17-A of Sch. II of the Court-Fees Act as amended in Madras. 169 I.C. 698=1937 M. 604=

(1937) 1 M.L.J. 640. The worshippers of a temple representing the temple, sued for a declaration that a decree obtained against the temple properties by a grocer in a suit on a promissory note executed by the hereditary trustee for goods supplied by the grocer, was not binding on the temple. Both the temple and the trustee for the time being were put in the array of defendants. It was held that the plaintiffs were in substance praying on behalf of the temple for cancellation of the decree obtained against the temple, and the suit was therefore liable to court-fee under sec. 7 (iv-A). I.L.R. (1941) Mad. 708=1941 Mad. 493=(1941) 1 M.L.J. 414. Suit to declare right to properties by survivorship as joint family properties and for possession—Allegation that will execute by deceased member is forgery—Claim for return of pronote on the ground of discharge—Court-fee payable. 163 I.C. 837=43 L.W. 696=70 M.L.J. 542. The proper prayer in a suit under sec. 53 of the Transfer of Property Act is for a declaration that the alienation is not binding upon the creditors to the extent of their debts and not for the cancellation of the deed of alienation. The suit therefore falls under Art. 17-A of Schedule as amended in Madras and not under sec. 7 (iv-A). 50 L.W. 248=1939 M. 894=(1939) 2 M.L.J. 400. I.L.R. (1940) Mad. 73. So also a suit for declaration that a document purporting to be executed by plaintiff is a forgery. 58 M. 448=68 M.L.J. 95=41 L.W. 90=A.I.R. 1933 Mad. 203; or has been tampered with by substitution of a spurious sheet. 59 L.W. 165=(1946) 1 M.L.J. 239. The documents which require to be set aside are documents whereby rights are transferred or released such as sales, gifts, mortgages, leases, releases, etc., and to fall under sec. 7 (iv-A), the document ought to be set aside must of itself have secured the property, i.e., there must have been a conveyance of the said property or a release of right thereunder which would operate to extinguish the rights of the person conveying or releasing, and not merely a confirmation of an already existing right. 48 L.W. 623=1938 Mad. 824. A plea that a document purporting to be executed by another person in favour of the plaintiff does not amount to a due fulfilment of the contract entered into by that other with the plaintiff is certainly not what in law will be spoken of as a prayer for 'cancellation' of that document. 161 I.C. 184=1936 M.W.N. 510=1936 M. 266. A suit by a minor after attaining majority to set aside an alienation made by his guardian during his minority and for possession is governed by sec. 7 (iv-A) of the Court-Fees Act as amended in Madras. The plaintiff has to pay the court-fee based on the actual value of the property as shown in the sale deed which he seeks to avoid; and not the artificial value prescribed by sec. 7 (v) of the Act. 1938 M. 921=48 L.W. 277. But see (1943) 1 M.L.J. 249=204 I.C. 278=1943 M.W.N. 175=56 L.W. 158=A.I.R.

1943 Mad. 427, holding that a partition deed in which a minor plaintiff was represented by his father as guardian need not be set aside and that a suit for re-partition is governed by sec. 7, cl. (v) and not sec. 7, cl. (iv-A). It was alleged in the plaint that the plaintiff executed a sham and nominal gift deed for the purpose of screening his property from his creditors. He was subsequently dispossessed of the property and he therefore sued for a declaration that he was still the owner of the property; despite the execution of the gift deed and for possession. Held that the suit must be looked upon as being merely for a declaration and consequential relief and cannot be regarded in substance as one for cancellation of the deed within the meaning of sec. 7 (iv-A). 57 L.W. 392=A.I.R. 1944 Mad. 408 (2)=(1944) 1 M.L.J. 497. Razinama decree—Suit to declare null and void—Plaintiffs minors in prior suit represented by defendants as guardians—Court-fee payable. 71 M.L.J. 383=1936 M. 470=43 L.W. 715; 141 I.C. 80=64 M.L.J. 24 (Suit for declaration that prior decree is not binding on plaintiff). (1944) 2 M.L.J. 35=57 L.W. 432=A.I.R. 1944 Mad. 478=1945 M.W.N. 27. See also on the clause. (1942) 2 M.L.J. 658=58 L.W. 747=1942 M.W.N. 792=A.I.R. 1943 Mad. 106; (1945) 2 M.L.J. 582.

**SUIT FOR PARTITION BY MINOR HINDU CO-PARCENER—DECREES ALSO IMPEACHED AS NOT BINDING.**—In respect of the decrees passed in suits in which plaintiff had been *eo nomine* impleaded as a party, he has to pay court-fee according to sec. 7 (*iv-A*) as he must be held to have impliedly asked for a cancellation of the decree. He must pay *ad valorem* court-fee on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount though limited to the extent of his share in the family assets. It makes no difference that the plaintiff was a minor or merely a junior member. I.L.R. (1940) Mad. 259=1940 M. 113=(1940) 1 M.L.J. 32 (F.B.). In a suit for partition and possession of their shares by the members of a malabar tarwad against a karnavan of a tarwad, challenging the validity of certain decrees passed against the karnavan as such, the plaintiffs have to ask for cancellation of the decrees, because the decrees are against the tarwad represented by the karnavan, and each member of the family is as much bound by the decrees as if he had been specifically impleaded by name in the suit. I.L.R. 1944 Mad. 430=56 L.W. 549=A.I.R. 1944 Mad. 19=(1943) 2 M.L.J. 396. But if the plaintiffs allege that the decrees were against a person who was not the karnavan or manager, it may be unnecessary to set aside the decree and it would be sufficient if they pray for a declaration that the decrees were not binding on the family as they were obtained against a person who did not represent the family. (*Ibid.*); see also 56 L.W. 255=1943 M.W.N. 265=A.I.R. 1943 Mad. 474=(1943) 1 M.L.J. 296. There is a distinction between an obligation imposed on a party by a decree and an obligation imposed by his personal law in pursuance of

(v) In suits for the possession of lands, houses for possession of lands, and gardens—according to the value of the subject-matter ; and such value shall be deemed to be—

a decree. In one case he seeks to get rid of the obligation existing under the decree; in the other he seeks to have it declared that he or his interest in the property or estate, which is sought to be made liable, cannot be rendered liable under the decree by virtue of the said personal law. In the latter case he is not bound to sue for cancellation of the decree; in the former he is so bound. Where a Hindu reversioner brings a suit to have it declared that a decree obtained against the widow of the last male-holder is a collusive decree and does not affect the plaintiff or his vested remainder interest in the properties of the last male-holder, and that the decree-holder should be restrained by a permanent injunction from bringing to sale in execution the interest of the plaintiff in the estate, the suit does not fall under sec. 7 (iv-A) of the Act. 45 L.W. 380=1937 M. 449. Suit to reduce rate of maintenance awarded by a decree does not fall under this clause. 59 M. 159=69 M.L.J. 202=1935 M. 655=42 L.W. 42.

COMPUTATION OF VALUE UNDER SEC. 7 (IV-A) (MADRAS).—In a suit for cancellation of a deed of conveyance and for possession of the property, falling under sec. 7 (iv-A) as amended in Madras, the proper method of calculating the value of the subject-matter is the market value of the property on the date of the plaint. The valuation should not be in accordance with sec. 7 (v). I.L.R. (1939) Mad. 764=1939 M. 462=(1939) 1 M.L.J. 702 (F.B.).

(AS AMENDED IN MADRAS), SEC. 7 (IV-A) AND (IV) (c).—Suit to declare usufructuary mortgage deed sham and nominal—Prayer for injunction to restrain defendant from interfering with payment of rents by tenants to plaintiff—Sec. 7, cl. iv (c) proviso applies and not sec. 7, cl. (iv-A). (1943) 1 M.L.J. 316=(1943) M.W.N. 272=A.I.R. 1943 M. 49.

SEC. 7, CL. (v): APPLICABILITY.—See 45 L.W. 541; 45 L.W. 491=(1937) 1 M.L.J. 73. The distinction which is drawn in sec. 7 between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses' and therefore a mill assessed to land revenue should be assessed for purposes of court-fee on its market value. 1941 Pesh. 69. In a suit for possession of land and buildings against the defendant alleging that the plaintiff is a Mahant of a temple and that the plaintiff property is owned by the idol and that the defendant has taken illegal possession of the property, and for an injunction restraining defendant from interfering with the plaintiff's management, the plaintiff must pay *ad valorem* court-fee on the market value of the property. This, however, is subject to the proviso that where the properties are not capable of being valued owing to the character of the user to which they are put court-fee under Art. 17 (vi) is payable in respect thereof. Such properties ordinarily are the materials

and the site of the temple and the materials and the sites of such buildings as are adjuncts to the temple and are not directly productive of any income for the temple. 40 P.L.R. 113. Where a plaintiff sues for possession of a temple on the strength of an agreement for management by rotation the court-fees are payable according to Sch. II, Art. 17 (6) of the Court-Fees Act. The temple so long as it stands as a temple remains the property of the deity and has no market value within the meaning of sec. 7 (v) (c) of the Act. 1938 N.L.J. 214=1938 Nag. 481. A suit which does not fall under sec. 92, C. P. Code, and which is not for the administration of any trust but is in substance one for the administration of the property of a caste, wherein all the members of the caste are interested, after ejection of persons who are in exclusive possession thereof and who refuse to have the same administered for the common benefit, falls directly under sec. 7 (v) of the Court-Fees Act and must be valued for purposes of court-fee as a suit for possession. Recovery of possession being a necessary and substantial relief in such a suit, and being sought on behalf of all the members of the caste, the suit comes within the purview of sec. 7 (v). 1937 M.W.N. 217=45 L.W. 510. A suit for declaration of title as adopted son and for possession is a suit that comes within cl. (4) (c) and not within cl. (5). 1923 P. 100; 5 P.L.J. 339=56 I.C. 422. See also 38 M. 1184=1 L.W. 824=25 I.C. 683. (Suit for declaration that a decree is void and for possession of properties sold in execution thereof). Where the declaration as to validity of adoption was neither claimed nor necessary the suit fell under cl. (v) and not under cl. (iv) (c). 9 R. 401=134 I.C. 1273=1931 R. 319. See also 1929 N. 276. Where the suit is by a junior member for partition of the Thavazhi properties, for determining the court-fee payable, the point to be considered is whether on the date of suit the defendant's possession was possession on behalf of the Thavazhi. If he is not in such possession, court-fee should be paid under sec. 7 (v). 1938 M.W.N. 131=1938 Mad. 474. Suit for possession—Defendant challenging plaintiff's title, and plaintiff anticipating possible defence on that ground—Suit, if one for possession or falls under sec. 7 (iv) (c). 18 P.L.T. 977=1938 Pat. 22 (S.B.). In a suit for declaration that a decree obtained against the plaintiff was void on the ground that the plaintiff then a minor was not properly represented, and for recovery of possession of the properties covered by the decree, the main relief is recovery of possession and the suit falls under cl. (v). 139 I.C. 317=1932 M. 605=63 M.L.J. 764. If a person is out of possession of property to which he considers he is entitled on the strength of any right title or interest that he claims, and seeks to obtain possession from the person who is keeping it back from him,

where the subject-matter is land, and—

there being no jointness of possession or title between the two his suit is one for possession, bare and simple to which the provisions of sec. 7 (v) of the Act apply and no occasion arises to invoke Art. 17 (vi) of Sch. II. I.L.R. (1938) Lah. 240=1938 Lah. 275. Where in a suit for partition and possession among co-sharers the plaintiff alleges his exclusion from possession of the property, the court-fee payable is *ad valorem* under sec. 7 (v). I.L.R. (1938) Mad. 309=1938 M. 278=(1938) 1 M.L.J. 29. Where the purchaser of the interests of a Hindu coparcener in the joint family properties brings a suit for partition of joint family property in which he has no co-parcenary interest, he asks for a declaration of the entire share of his vendor and then seeks possession of what he has purchased. The separation or declaration of the vendor's share is a relief independent of the relief of possession and separate court-fees have therefore to be paid for the two reliefs. 47 Bom.L.R. 350=A.I.R. 1945 Bom. 336. Suit to avoid claim order—Court-fee payable—Value of suit for purposes of jurisdiction—Mode of determining value of land. 56 M. 716=1933 M. 439=64 M.L.J. 568. A suit for possession by a trustee or manager of a religious endowment falls under this clause and not Art. 17 (vi) of Sch. II. 1932 A.L.J. 773=1932 A. 593. In such a suit immovable property has to be valued under cl. (v) but the temple should be left out of account as having no market value (*ibid.*) The Madras Government Notification No. 5791 dated 17-5-44, reducing court-fee in a suit by a trustee applies only where the status of the defendant as trustee either at the time of the suit or previously is undisputed. I.L.R. 1945 Mad. 584=(1944) 2 M.L.J. 383=57 L.W. 615=(1944) M.W.N. 702=A.I.R. 1945 M. 102. Where the only dispute in a suit is as to whether the plaintiff was entitled to the management of certain trust property as a *Sarbarahkar* or the defendant was entitled to the management as a *Sarbarahkar*, it can hardly be deemed to be a suit for possession of the property because both naturally admit that the possession is with the principal. Hence sec. 7, cl. (v) cannot apply to such a case and the provision applicable is really Sch. II, Art. 17 (iv) of the Act. I.L.R. 1944 All. 564=1944 A. L. J. 408=A. I. R. 1944 All. 279. A suit by a landlord against his tenants occupying a holding under him, to eject them from a tank-bed which they are alleged to have encroached upon, praying for an injunction restraining them from interfering with his possession and for a mandatory injunction directing them to remove the mud thrown by them on the land to make it cultivable, is governed by Art. 17-B of Sch. II of the Court-Fees Act, as the tank-bed claimed has no market value. Sec. 7 (v) has no application to the case. 40 L.W. 718=1934 M. 714=67 M.L.J. 688. The plaintiff, an inamdar, claimed that he was entitled to both warams in the inam land though he had no proof of actually letting

the defendants into possession he claimed the right to eject them after due notice by virtue of his title to the kudivaram. The defendants did not dispute the plaintiff's right to melwaram but asserted occupancy rights in the land. *Held*, that court-fee was payable on the plaint under sec. 7 (iv) (c) and not under sec. 7 (v) or (xi) (cc) of the Act. 140 I.C. 462=93 M.L.J. 759. But see 41 L.W. 562; 58 M.L.J. 369=1935 M. 346; I.L.R. (1937) Mad. 672; (1937) 1 M.L.J. 739=45 L.W. 491=1937 Mad. 529. A suit by Hindu reversioners to recover possession of property gifted by a Hindu widow after her death falls under cl. (v) though the prayer was for declaration and consequential relief. 3 P.L.T. 704=1922 P. 615 (F.B.). See also 57 I.C. 494=18 A.L.J. 903. A suit by a tenant against the landlord and other tenants is governed by sec. 7 (v) not cl. (xi). 25 I.C. 507=19 C.L.J. 418. See also 17 N. L.J. 478; 31 M. 14. Suit for possession and arrears of rent from a tenant, including a tenant holding over, falls under cl. (xi) (cc) and not this clause. 33 Bom.L.R. 263=1931 B. 234. But a suit for possession against a tenant holding over in defiance of a notice to quit, is one against a trespasser and is governed by this clause and not by cl. (xi) (cc). 1923 N. 310=8 N.L.J. 63. See also 1933 O. 363. Also a suit to eject a licensee at will from a house with an incidental prayer for determining plaintiff's title. 5 P. 631=1927 P. 140. A suit for possession questioning the validity of a certain compromise and a decree passed on the basis of such compromise. 1929 O. 419. A suit for possession and also for an order to compel defendant to execute and register a sale deed, the plaintiff alleging that the land had been sold to him and that the defendant had received part of the consideration is a suit for possession only within the clause and not also for specific performance. 60 I.C. 512; 14 C.L.J. 159. In a suit to enforce a mortgage by a decree for sale, cl. (v), (vi), (ix) and (x) of sec. 7 have no application and court-fee is payable on the *ad valorem* scale. 58 C. 829=130 I.C. 876=1931 C. 159. A suit by a mortgagee to recover possession under the terms of the deed of mortgage is one under cl. (ix) and not under this clause and the court-fee is payable on basis of the principal. 1929 O. 321 (1). But a suit by a mortgagee for possession from prior mortgagees was held to be governed by this clause and not clause (ix). 134 I.C. 597=1931 O. 366. Valuing lands as per charts issued by District Judge setting out minimum value of lands in different parts of the district is improper. 1930 Cal. 65. Trees standing on specific items of land claimed need not be separately valued. They are included in the valuation of the items themselves. 105 I.C. 881=1927 M. 1002; 54 M.L.J. 67=40 M. 824=39 I.C. 254; where they were on *oram-bokes* and the only rights claimed in them being accessory to ownership of other plots in the village. (*Ibid.*) In a suit for posses-



- (a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue, and such revenue is permanently settled—  
ten times the revenue so payable :
- (b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid ;  
and such revenue is settled, but not permanently—  
five times the revenue so payable :

sion of paddy lands the plaintiff is entitled to pay court-fee only on five times the land revenue due on the paddy fields. 1934 R. 313. See also 142 I.C. 195=1933 M. 367; 1935 Pesh. 30 (Partition suit).

A suit by a person, alleging that he was a tenant dispossessed by his landlord, against the landlord and a third person who is in possession of the property, is not one between landlord and tenant and court-fees should be paid according to sec. 7 (v), (32 C. 268, Foll.) 29 N.L.R. 367=1933 N. 312. See also 1938 O.W.N. 453=1938 O. 139. In a suit for possession against a mortgagor who had not delivered possession of property mortgaged, an *ad valorem* court-fee on the market-value must be paid as the defendant is in possession and as there is no special provision in the Court-Fees Act as regards suits of this kind. 1940 A.M.L.J. 49.

**APPEAL.**—An appeal by an alienee defendant against a decree setting aside a sale of joint family property on condition that plaintiff paid a certain sum of money, should be stamped under sec. 7 (v). 47 M.L.J. 919=48 M. 652=1925 M. 323. An appeal claiming that the appellant must be appointed trustee of durgas in suit in the place of plaintiffs appointed by the Court falls under sec. 7 (v) and not under Art. 17-B, Sch. II, 88 I.C. 209=1925 M. 804=48 M.L.J. 571. See also 1930 M. 597. In a suit for declaration of jote right and for possession, a decree was passed in trial Court. The appeal by the defendant was dismissed. The second appeal was governed by sec. 7 (v) of the Court-Fees Act. 34 C.W.N. 217. Where in a suit for recovery of possession of certain property on payment of the necessary court-fees on the value of the property, the claim is decreed and the defendant appeals against the decree, he is bound to pay the same court-fee though he is in possession of the property. 1929 Sind 161. In a suit for partition claiming one third share of a house which the plaintiff alleged was joint family property, the trial Court held that not only the suit house but also another house in the possession of the plaintiff constituted joint family property and ordered that unless the plaintiff amended his plaint and chose to bring into hotchpot the house in his possession his suit would be dismissed. On appeal by plaintiff, it was held that court-fee was payable only in respect of the suit-house and not also in respect of the other house which never formed any part of the subject-matter of the litigation. 45 Bom.L.R. 880=A.I.R. 1943 Bom. 441.

**SEC. 7 (v) (a).**—A share in an under-proprietary tenure in a village is a definite share within sub-cl. (a). 24 O.C. 29=58 I.C. 132. See also 7 O.W.N. 956. As to a suit by a subordinate tenure holder, see 8 C. 192.

**SEC. 7 (v) (b).**—'Definite share' of an estate means an undivided tangible fraction of an estate. 19 M.L.T. 206=33 I.C. 683. As to the meaning, see also 3 P.L.T. 511; 16 A. 286; 1937 N. 100; 167 I.C. 909=1937 A.L.J. 88=1937 A. 206; 55 A. 531=1933 A.L.J. 398=1933 A. 414. Individual field plots forming part of a holding but not separately assessed not a definite share. 2 Bur.L.T. 39=75 I.C. 217. On the point, see also 46 M.L.J. 345=77 I.C. 781=1924 M. 646; 34 M.L.J. 558=47 I.C. 543. The words "fractional shares" in Government notification No. 358, dated 10th September, 1921 cover also a case where the plaintiff claims a definite area within the survey number forming a complicated fraction of the whole. See 54 M.L.J. 67=105 I.C. 881=1927 M. 1022. But see *contra* 16 A. 493; 35 M.L.J. 558; 33 A. 630=11 I.C. 816; 1 R. 492=75 I.C. 217=1923 R. 246; 116 I.C. 209=1930 L. 182. It is settled law in the Punjab that whenever a person sues for possession of a plot of land which can be arithmetically worked out as a proportion or a fraction of the property that has been assessed to land revenue and is so noted in the *jamabandi*, the provisions of sec. 7 (v) (b) and not (v) (d), are applicable. 46 P.L.R. 350=219 I.C. 425=A.I.R. 1945 Lah. 15. Where the share claimed is situated in khatas separately assessed by Government to land revenue and the claim in appeal relates to only one-third of the land originally claimed in the khatas in dispute, the court-fee on appeal is payable on only one-third of five times of land revenue payable on the land originally claimed. A.I.R. 1943 Pesh. 96. A suit for partition and separate possession of the interest of the plaintiff in an Izara Village in Berar falls under sec. 7 (v) (b) and not under sec. 7 (v) (c) of the Court-Fees Act. I.L.R. (1943) Nag. 802=1943 N.L.J. 445=A.I.R. 1943 Nag. 315. Remissions of revenue granted in any particular year cannot be taken into account in calculating the value of land for purposes of court-fee under sec. 7 (v) of the Court-Fees Act; the calculation should be based on the revenue fixed at the settlement. The words "the revenue so payable" and the words "such revenue is settled" undoubtedly refer to the revenue.



(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and nett profits have arisen from the land during the year next before the date of presenting the plaint—

fifteen times such nett profits :

but where no such nett profits have arisen therefrom—the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood :

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned—the market-value of the land :

Proviso as to Bombay Presidency ;

Provided that, in the territories subject to the Governor of Bombay in Council the value of the land shall be deemed to be—

#### LEG. REF.

<sup>1</sup> See para 8 of the A.O. In view of this provision the expression "Governor of Bombay in Council" has been left unmodified.

fixed at the settlement and cannot refer to the revenue less remissions in any particular year. 1937 A.L.J. 828=1937 A.W.R. 747=1937 A. 657. Suits for possession of inam lands wrongly classed as ryotwari may be valued as such under cl. (b). 41 I.C. 167 (Mad.). On this sub-clause; see also 1933 O. 505; 156 I.C. 884=1935 L. 331.

Sec. 7 (v) (c).—"Such revenue" means an annual revenue payable to Government on an entire estate or defined share thereof, fixed permanently or not. Laps subject to fluctuating assessment are within this sub-clause and not within sec. 7 (v) (d). 40 P.R. 1919=50 I.C. 142. "The year next before the date of presenting the plaint"—Meaning. See 3 A.L.J. 244=28 A. 411. In construing the words "nett profits", the Court must have regard to the subject-matter. In fixing the value of kudivaram right in a land, deduction should be made of the rent payable by the owner of kudivaram. (1946) 1 M.L.J. 190=59 L.W. 141=(1946) M.W.N. 138. As to revenue free land, see 155 I.C. 668=1935 A. 642. If the subject-matter of the suit is land paying no revenue and has produced no profits during the year next preceding the suit, the valuation should be made with reference to similar land in the neighbourhood, irrespective of the fact that the land is 'religious land'. 60 I.C. 5=(1920) 3 U.B.R. 236. Sec. 7 (v) (c) does not give the Court any option to consider whether or not the nett profits for the year preceding the presentation of the plaint are exceptional or unusual. Such profits cannot be excluded from consideration for purposes of court-fee on the ground that they partake of the nature of a windfall. 52 L.W. 146=1940 Mad. 821=(1940) 2 M.L.J. 176. Under sec. 7 (v) (c), the plaintiffs must pay court-fee on fifteen times the nett profits arising during the year immediately preceding the institution of the suit. If the amount of the nett profits stated by the plaintiff in his valuation statement is accepted by the Court the matter ends. But if the Court sees reason to think that such profits have been wrongly estimated then it has to proceed to make en-

quiries on the two heads mentioned in the concluding portion of sub-cl. (a) of sec. 7 (v). It must proceed to ascertain (1) the nett profits of the land, building or garden as the case may be in the year immediately preceding the presentation of the plaint; and (2) its market-value. If the nett profits are not readily ascertainable or assessable it is to ascertain the market-value, but if the nett profits are readily ascertainable or assessable it is under the obligation to direct its enquiry on both the heads—on the market-value also. It can then only require the additional court-fee to be paid (if payable) on the lower of the two figures arrived at such enquiry. The Court cannot merely ascertain the amount of nett profits and assess court-fee on fifteen times such profits without determining the market-value. I.L.R. (1940) 2 Cal. 450=44 C.W.N. 822=1940 Cal. 438. A defendant is not estopped from valuing the appeal correctly, simply because he did not object to the valuation of the plaintiff in the suit. The plaintiff paid court-fee on the market-value. The suit was decreed. The defendant in appeal paid court-fee on fifteen times the nett profits. Held: It was proper. 49 A. 398=25 A.L.J. 258=1927 A. 308. On this section, see also 159 I.C. 636=42 L.W. 765.

Sec. 7 (v) (d).—A suit for possession of a plot of land but not a definite fractional share, sold out of a holding is not governed by sec. 7 (v) (d) and the court-fee should be calculated on the market-value of the land where it is impossible to find out the actual revenue on the said plot. 33 A. 630=8 A. L.J. 798. See also 55 A. 531=1933 A.L.J. 398=1933 A. 414; 1 R. 492=1923 R. 246; 6 P.R. 1883; 16 A. 493; 1930 L. 182=116 I.C. 209; 1937 N. 100; 167 I.C. 909=1937 A.L.J. 88=1937 A. 206. But see 54 M.L.J. 67, cited under sub-cl. (b). So also a suit for a portion of a Survey number not separately assessed. 34 M.L.J. 558=47 I.C. 543=8 L.W. 88; and a suit for a land forming an indefinite share of an estate. 41 C. 812=18 C.W.N. 659. Suit for declaration of title as ghatwali and for recovery of possession of ghatwali did not fall within Art. 17, cl. (vi) of Sch. II, that as the ghatwali was part of an estate paying revenue to Government but not a definite share of such an estate and not separately assessed to Government revenue, the court-fee ought to be

(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government—a sum equal to five times the survey assessment ;

(2) Where the land is held on a permanent settlement or on a settlement for any period exceeding thirty years, and pays the full assessment to Government — a sum equal to ten times the survey-assessment ;

(3) where the whole or any part of the annual survey-assessment is remitted— a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted :

*Explanation.*—The word “estate” as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue :

(e) Where the subject matter is a house or garden  
For houses and gardens ; —according to the market-value of the house or garden :

calculated on the market-value of the land under sec. 7 (v) (d) and not under sec. 7 (v) (a). 13 P.L.T. 590=1932 P. 319. As to Khewat Kheta in U. P., see 1933 A.L.J. 398. A suit to recover land granted as building site on which a house has been built should be valued according to the market-value of the land and the buildings thereon. 1931 S. 6. See also 1928 L. 852. A ryoti land on which no buildings can be put up without the consent of the landlord cannot be valued as a building site. 142 I.C. 195=1933 M. 367. Basis of taxation under the Act is the actual value of the property and not its probable value under more efficient management. 62 I.C. 513=6 P.L.J. 411.

SEC. 7 (v) (e).—For purpose of computing valuation of the subject-matter in a suit for possession, the legislature had drawn a distinction between land and house or garden. If the subject-matter in suit is a garden, it would come under cl. (e), sub-sec. (v), sec. 7 and court-fee will have to be paid on the market-value of the garden and not on the basis of annual revenue of land. 14 I.C. 810=1936 C. 264. As to the meaning of the word ‘garden’, see 40 M. 824=39 I.C. 254=2 L.L.J. 362; 68 I.C. 345; 30 I.C. 845=18 M.L.T. 243. A suit for possession of garden land, though assessed to land revenue is governed by cl. (v) (e). 71 P.R. 1914=25 I.C. 545; 146 P.R. 1908. See also 117 I.C. 781=1930 Sind 15. A person claiming under-proprietary rights in land by virtue of a permanent lease brought a suit for possession of the land and the building and a guava grove thereon. The building was not a tenant’s house or any other building necessary for the enjoyment of the land but a substantial structure used as a tannery. Similarly the trees were not self-grown but were planted. Held, that the buildings and grove could not be said to be appurtenant to the land and hence a separate court-fee under sec. 7 (v) (e) should be paid on the market-value of the building and the grove. 1938 O.W.N. 23=1938 O. 40. There is no market-value for a temple and a suit for recovery of possession of a temple falls under Sch. II, Art. 17 (b) and not under sec. 7 (v) (e). 46 M. 782=45 M.L.J. 274 (F.B.). Easement over land or building—

—Suit to establish right of—Court-fee. 100 I.C. 263=1927 M. 348=52 M.L.J. 121.

SEC. 7 (v) AND SCH. II, ART. 17-B (AS AMENDED IN MADRAS).—Mahomedan co-sharers—Suit by one for share of properties as his share—Claim to properties alienated by defendant co-sharer impeaching alienation is inoperative—Court-fee payable—Alienated and unalienated properties—Distinction. (1937) 1 M.L.J. 572=45 L.W. 720=1937 M. 402; 50 L.W. 154=1939 M. 776= (1939) 2 M.L.J. 226 (Suit for possession of office of member and manager of school committee); 49 L.W. 196=I.L.R. (1939) Mad. 367=1939 Mad. 360= (1939) 1 M.L.J. 268 (F.B.) (Suit for possession against stranger to contract alleged to be in wrongful possession). 1939 M. 506= (1939) 1 M.L.J. 531.

SEC. 7 (v) AND (x).—In a suit for specific performance of a contract for conveyance of immovable properties, there is no question of primary and secondary relief; both the execution of the conveyance and delivery of possession are essential reliefs. In such a suit the purchaser seeks to enforce his contract. The fact that the purchaser claims possession in the suit will not make the suit one for possession, as the specific provision in cl. (x) of sec. 7 for specific performance will exclude the applicability of the general provision in sec. 7 (v) relating to suits for possession. Where the claim to possession is involved in the claim to specific performance, the suit remains one for specific performance and must be dealt with on that basis. 1937 M.W.N. 236=1937 M. 831. See also 1936 A.M.L.J. 114.

(U. P. AMENDMENT), SEC. 7, CL. (v) 1, (d) AND (vi).—Where in a suit for pre-emption the test laid down by sec. 7 (v) (1) (d) could not apply owing to the absence of evidence of rental value of the land, it cannot be said that the market-value means pre-emptive value and that this value should be deemed to be the cash paid after deducting the value of the encumbrances. Market-value must be determined upon the state of things existing at the time of the sale. The amount paid to the vendor plus the value of the encumbrances, must for the purpose of court-fee, be taken to be the value of the subject-

(vi) In suits to enforce a right of pre-emption—  
to enforce a right of pre-emption. according to the value (computed in accordance with paragraph v of this section) of the land, house or garden in respect of which the right is claimed :

(vii) In suits for the interest of an assignee of land-revenue fifteen times his nett profits as such for the year next before the date of presenting the plaint :

(viii) In suits to set aside an attachment of land or of an interest in land to set aside an attachment ; or revenue—according to the amount for which the land or interest was attached :

Provided, that where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest.

matter. 1944 A.L.W. 634=1944 O.W.N. 501=A.I.R. 1945 Oudh 135.

SEC. 7 (vi).—The court-fees in a pre-emption suit in respect of a sale of land paying revenue should be calculated according to sec. 7 (v). 15 P.R. 1919=49 I.C. 358. See also 1934 L. 424. In a suit for pre-emption in respect of separate plot of land which does not constitute any definite fraction of a distinct revenue paying area and is not separately assessed to revenue, the court-fee should be paid on the market-value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. 1933 O. 533. In a suit for pre-emption the court-fee payable is to be calculated on ten times the land revenue assessed on land and the amount of court-fee has nothing to do with the consideration of the sale or the amount of encumbrance on the property. 1933 L. 676; 32 A. 19=6 A.L.J. 905; 3 A.L.J. 244=28 A. 411. The market-value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale and not with reference to its value at the date of the institution of the suit. 1924 L. 380. See also 1937 L. 239=39 P.L.R. 511.

APPEAL IN CASES COMING UNDER THE CLAUSE.—Where appeal is by the vendees objecting that plaintiff is not entitled to the land, the court-fee to be fixed will be in accordance with sec. 7 (vi). 76 P.R. 1913=19 I.C. 961. See also 6 A. 488; 1929 L. 879; 1944 O.W.N. 238=A.I.R. 1944 Oudh 276. But where the objection is only to the amount to be paid by the pre-emptor, it should be calculated *ad valorem* on the difference between the amount awarded and that claimed or admitted. 32 A. 19; 1929 L. 190=113 I.C. 538; 117 I.C. 480=1929 O. 240 (2). See also 40 A. 353=44 I.C. 666=16 A.L.J. 174. The plaintiff in a suit for pre-emption offered Rs. 700 as the actual price when the house was ostensibly sold for Rs. 1,200. The Court Amin fixed the market-value at Rs. 750. The suit was dismissed but the price paid was held to be Rs. 1,200. On appeal, *held*, that court-fee both in the trial Court and in appeal was to be paid only on the market-value and that it could not be said that since the appeal was also for reduction of price the court-fee should be paid on Rs. 1,200. I.L.R. (1944) All. 181=212 I.C. 431=1944 O.W.N. (H.C.) 39

=1944 A.L.J. 97=A.I.R. 1944 All. 83.

U. P. (AMENDMENTS), SEC. 7 (vi-A) AND SCH. II, ART. 17 (vi).—In the case of an appeal from a decree in a suit for partition the court-fee payable should be on the value of that share of the appellant which is in dispute in the appeal. Where no share is in dispute sec. (vi-A) has no application. Where the dispute is only to the allocation of the different properties it is impossible to attach any pecuniary value to the dispute and the fixed fee under Sch. II, Art. 17 (vi) should be paid. I.L.R. (1943) A. 507=209 I.C. 411=1943 A.L.J. 247=A.I.R. 1943 A. 281. The meaning of the word 'possession' used in sec. 7 (vi-A) cannot be restricted to actual possession. Where a co-owner brings a suit for partition of a share in the joint property and he is in actual possession of some portion of the joint property, a presumption of constructive possession in respect of the property of which he is not in actual possession can arise and the suit would be governed by the first portion of sec. 7 (vi-A). 209 I.C. 442=1943 O.W.N. 356=A.I.R. 1943 Oudh 456. The words "his claim to be a co-owner on such date is denied" occurring in sec. 7 (vi-A) as amended in U. P., should be interpreted to mean both when it is denied in its entirety or even when only the extent of the share claimed is in dispute. 1944 A.L.J. 367=1944 O.W.N. (H.C.) 82=1944 A.L.W. 327=A.I.R. 1944 All. 199.

SEC. 7 (viii).—A suit to set aside a sale on the ground that the attachment was not binding is virtually a suit to set aside the attachment within the clause. 14 M.L.J. 144. As to suit by unsuccessful claimant of property attached, see 35 C. 202=12 C. W. N. 169 (P.C.). See also 80 P.R. 1886. A suit by decree-holder for restoration of attachment falls under this clause. U.B.R. (1897-1901), Vol. II, p. 355. Sec. 7 (viii) is not confined to attachments under O. 21, C. P. Code. Hence a suit for a declaration that the plaintiff is the owner in possession of certain properties attached in proceedings under secs. 87 and 88, Cr. P. Code, against the plaintiff's husband as an absconder and an appeal against the decision therein, would fall under sec. 7 (viii). 20 Luck. 254=1944 O.W.N. 516=1944 A.W.R. (C.C.) 320=A.I.R. 1945 Oudh 104.

(U. P. AMENDMENT), SEC. 7 (viii).—The words used in cl. (viii) of sec. 7 of the

to redeem;

(ix) In suits against a mortgagee for the recovery of the property mortgaged,

Court-Fees Act (as amended in U.P.) *viz.*, "including suits to set aside an order passed under O. 21, rr. 60, 61 or 62 of the C. P. Code, are of sufficient amplitude to embrace a suit to challenge an order dismissing a claim as being filed too late. For the purposes of cl. (viii) it is immaterial whether the order was right or wrong. 210 I.C. 191 = 1943 O.W.N. 378 = A.I.R. 1943 Oudh 422.

SEC. 7 (ix).—See 69 M.L.J. 45; 154 I. C. 550 = 1935 B. 693; 1935 Pesh. 8; 63 C. 657. In a second appeal from a decree in a suit against a mortgagee for the recovery of the mortgaged property the court-fees must according to sec. 7 (ix) of the Court-Fees Act, be calculated *ad valorem* on the principal money expressed to be secured. Though the result may seem to be somewhat extraordinary the Act has to be construed as it stands. I.L.R. (1941) All. 469 = 1941 A.L.J. 409 = 1941 All. 357. The phrase "recovery of property mortgaged" in cl. (ix) of sec. 7 does not mean recovery of possession of the mortgaged property from the mortgagee, but is a phrase convertible with the word "redeem", the ordinary significance of the term to "redeem" being to recover a pledge, to get property freed from a charge or mortgage, 63 C. 657. The court-fee payable in a suit to redeem *kanam* is in accordance with the provisions of this clause. 23 L.W. 758 = 95 I.C. 26 (1) = 1926 M. 667. Where in a suit for redemption of a *kanom*, the plaintiff seeks to deduct from the *kanom* amount certain damages to which he claimed to be entitled, he is not bound to pay court-fee on the amount of damages till after it is ascertained and a set-off is allowed. 50 M.L.J. 493 = 1926 M. 764.

SUITS FOR REDEMPTION, FORECLOSURE, ETC.—In such suits court-fee is payable only upon the principal amount secured by the mortgage. 57 I.C. 673. The plaintiff is not bound to pay court-fee upon the surplus amount claimed as *mesne profits*. 45 A. 154 = 1923 A. 261. See also 60 M.L.J. 698 = 132 I.C. 317 = 1931 M. 479; 19 M. 16; 29 A. 471. But see the observation to the contrary in 17 I.C. 442 = 12 M.L.T. 493. See also 13 O.C. 32 = 5 I.C. 444; 1924 N. 346; 31 A. 44; 113 I.C. 34 = 1929 N. 1. Nor on interest due on the mortgage. 13 A. 94; 14 M. 480. The jurisdiction value in a redemption suit is also the principal amount though sec. 8 of the Suits Valuation Act does not apply. 60 M.L.J. 698 = 1931 M. 479, relying on 5 M. 284 (F.B.) and 39 M. 447; 31 A. 44. But see 1927 R. 304 holding that it is the value of the mortgaged property. See also 13 B. 489; 51 C. 737 = 1924 C. 783. Suit for sale on the mortgage is not governed by the clause. 7 B.L.R. 194; 58 C. 829 = 1931 C. 159. Also a suit for possession brought after a decree for foreclosure has been obtained. 1 C.L.R. 473. See also 134 I.C. 597 = 1931 O. 366. The proper valuation of a suit for redemption is the amount of the mortgage admitted by the plaintiff to

be binding on him and not that of the mortgages set up by the defendant. 37 M. 420 = 15 I.C. 587. In a suit for redemption by a co-mortgagor of his share of the mortgaged property, the court-fee is to be calculated on the amount of the mortgage debt charged on his share of the property. 45 I.C. 300 = 5 O.L.J. 43. See also 6 B. 324. A suit by a mortgagee to recover possession of the mortgaged property under the terms of the deed is one under cl. (ix) and court-fees on the principal amount secured should be paid. 1929 Oudh 321. But in a suit by a mortgagee with possession for recovery of the mortgaged property from prior mortgagees it was held that cl. (v) and not this clause was applicable. 134 I.C. 597 = 1931 O. 366. On this section, see also 63 C. 657; 40 C.W. N. 90.

APPEAL FROM MORTGAGE DECREE DISPUTING ONLY PERSONAL LIABILITY—COURT-FEE.—Where, in an appeal from a mortgage decree ordering the sale of the mortgaged property and enabling the plaintiff to apply for a personal decree for any balance left after the sale, the appellant does not dispute the liability of the property but disputes only his personal liability, the value of the subject-matter of the appeal is not the whole mortgage amount but the excess of the mortgage amount over the nett sale proceeds for which alone he is by the decree likely to be made liable. 1933 M.W.N. 1408.

APPEALS IN SUITS FOR REDEMPTION AND FORECLOSURE.—There is a conflict of rulings on the question whether the clause is applicable to appeals and whether the fee in such appeals should also be calculated on the principal amount under the clause or on the amount in dispute under Art. I, Sch. I. According to the Allahabad High Court, the court-fees should be calculated on the value of the subject-matter of the appeal. 35 A. 94 = 18 I.C. 365; 30 A. 547; 36 A. 40 = 21 I.C. 723 (F.B.); 31 A. 295; 47 A. 926 = 88 I.C. 888 = 1925 A. 734 (13 A. 94 not now good law). See also 1946 A.W.R. (H.C.) 55 (Court-fee should be paid on the principal amount). So also according to the Punjab High Court. 14 I.C. 78 = 54 P.R. 1912; 1 L. 234 = 3 L.L.J. 370. So also in Oudh. 1930 O. 329; 2 O.L.J. 257 = 30 I.C. 322. (54 I.C. 733 = 22 O.C. 289, *contra*). The Madras High Court also was of the same view in 29 M. 367 = 16 M.L.J. 287; but in a later case (20 M.L.J. 121 = 3 I.C. 459) it was held that, where there is a denial of the right to redeem, the fee should be computed according to the principal amount secured by the mortgage. This view is to be found also in earlier cases (14 M. 480 and 16 M. 326). The position in Madras is well summed up in I.L.R. 1943 Mad. 819 = (1942) M.L.J. 785 = 1943 M.W.N. 14 = 56 L.W. 778 = A.I.R. 1943 M. 146. In Bombay it was held that the court-fee should be calculated on the principal debt as in original suits. 10 B. 44. See also under Art. I, Sch. I. In an appeal from a decree in a redemption suit, when the right to re-

and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute—

according to the principal money expressed to be secured by the instrument of mortgage;

for specific performance.

(x) In suits for specific performance—

(a) of a contract of sale—according to the amount of the consideration;

demption is no longer in dispute, and the appellant merely seeks to reduce the liability imposed upon him by the trial Court, the court-fee payable on the memorandum of appeal is the fee on the amount in respect of which he seeks to avoid liability under Art. 1, Sch. I. Sec. 7 (ix) does not apply to such an appeal. 47 Bom. L. R. 400 = A.I.R. 1945 Bom. 504. In an appeal, where the question raised is the right to redeem or foreclosure for an adjudged sum, court-fee is payable on the principal mortgage money. 54 I.C. 733=22 O. C. 289; 67 I.C. 130=3 Lah.L.J. 156. See also 20 I.C. 257=9 N.L.R. 86; 6 N.L.R. 164=8 I.C. 1125; 1933 L. 155; 134 I.C. 124 = 1931 L. 633; 134 I.C. 604=1931 O. 353. Thus if a suit for redemption were dismissed, the plaintiff-appellant can prefer an appeal paying court-fee under cl. (ix). 134 I.C. 124=1931 O. 633. But in an appeal by the mortgagor against a decree for redemption, seeking reduction of the decretal amount, *ad valorem* court-fee must be paid on the amount of the mortgage. 1 L. 234=57 I.C. 215; 1923 L. 309; 58 P.R. 1915=30 I.C. 104; 55 I.C. 177=156 P.W.R. 1910 (Second appeal against enhancement of the amount by the appellate Court). See also 30 I. C. 322=2 O.L.J. 257; 5 N.L.R. 130=3 I.C. 920; 1930 L. 601=122 I.C. 736; I.L.R. (1937) Nag. 49=1937 Nag. 295 (F.B.); 222 I.C. 194=1946 N.L.J. 110. So also where the respondents in an appeal by the mortgagee, file cross-objections to the same effect. 134 P.W.R. 1911=11 I.C. 198=213 P.L. R. 1911. So also where enhancement of amount is sought, fee is to be paid on the amount sought to be recovered. 54 I.C. 733 = 22 O.C. 289. See also 25 O.C. 30=1932 O. 82; 11 N.L.R. 83=29 I.C. 609; 1931 N. 180; 134 I.C. 124=1931 L. 633. Where the plaintiffs in a redemption suit file appeals both from the preliminary decree and final decree, claiming a reduction of amount fixed as payable by them the appeal against the final decree is only of a formal nature and it is enough if a court-fee of Rs. 2 is paid thereon, if *ad valorem* court-fees are paid in the other appeal. 4 L. 406=1923 L. 632. See also 39 A. 452=41 I.C. 346=15 A.L.J. 464. Where the mortgagee in an appeal against a decree in a redemption suit contests not only the finding of the lower Court as to the amount payable by the mortgagor before he can redeem the mortgage but also that the transaction is a sale and not a mortgage as held by the lower Court, the court-fee on the appeal is payable on the principal sum secured on the mortgage and not on the amount claimed. 1933 L. 155. The expression "suits" used in cl. (ix) of sec. 7 means "appeal" as well, as the ex-

pression has been used to cover the entire litigation from its beginning to the end. 167 I.C. 577=1937 N. 6. In a suit for redemption, or for foreclosure or for enforcement of a mortgage by conditional sale, the claim cannot be properly valued in accordance with the value of the property, but an artificial value has to be fixed in accordance with sec. 7 (ix), Court-Fees Act, and the value so fixed cannot vary, but must remain constant throughout all stages of the litigation, because the word 'suit' in cl. (ix) covers both the claim in the Original Court, as well as that in appeal. 167 I.C. 577=1937 N. 6. In an appeal from a decree for redemption of a mortgage and surplus profits, where the appellant challenges *bona fide* both the right of redemption and the amount of profits, the appellant is liable to pay court-fees under sec. 7 (ix) of the Court-Fees Act only on the principal sum secured by the mortgage. I.L.R. 1937 N. 49 (F.B.). No doubt in the case of a mortgage where the right to redeem or foreclose is challenged, the amount of court-fee payable on appeal is provided for in sec. 7 (ix), for "suit" there includes "appeal". But when none of these is challenged as where only the amount of the price fixed for redemption is challenged, such a relief is neither for foreclosure nor for sale, nor is it for redemption. The only dispute is with reference to the difference between the amount fixed in the lower Court and the amount claimed in appeal. Such a claim does not come under sec. 7, cl. (ix), nor does it fall under any other provision in the Act. It is therefore not "otherwise provided for" and so court-fee must be paid on the memorandum of appeal in accordance with the Art. 1, Sch. I, that is, the fee must be paid *ad valorem* on the value of the subject-matter in appeal. 167 I.C. 577=1937 N. 6.

SEC. 7 (x) (a).—See 40 C.W.N. 90=62 C.L.J. 405; 63 C. 657. Sec. 7, cl. (x) (a) applies to a suit for specific performance of a contract to sell, in which the plaintiff seeks to force the vendor to execute and register a sale-deed and also to hand over possession of the property. 38 A. 292=14 A.L.J. 434; 45 M.L.J. 431=47 M. 150=1924 M. 360. See also 1937 M.W.N. 236=1937 M. 831; I.L.R. 1945 Bom. 32=46 Bom.L.R. 731=220 I.C. 439=A.I.R. 1945 Bom. 81. But in Punjab such suit was held to fall under sec. 7 (v) and not under sec. 7 (x) (a). 128 P. W.R. 1918=46 I.C. 534; 60 I.C. 512; 107 P.W.R. 1916=34 I.C. 192. But now in Punjab also such suits are held to fall under sec. 7, cl. (x) (a). 1923 L. 456; 1924 L. 439=5 L. 75; 1928 L. 635. In Calcutta such a suit falls under cl. (v). 14 C.L.J. 159=11 I.C. 228. So also in Patna. 118 I.

- (b) contract of mortgage—according to the amount agreed to be secured ;
  - (c) of a contract of lease—according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term ;
  - (d) of an award—according to the amount or value of the property in dispute ;
- between landlord and tenant (xi) In the following suits between landlord and tenant :—

- (a) for the delivery by a tenant of the counterpart of a lease,
- (b) to enhance the rent of a tenant having a right of occupancy,
- (c) for the delivery by a landlord of a lease,
- <sup>1</sup>[ (cc) for the recovery of immoveable property from a tenant, including a tenant holding over after the determination of a tenancy,]

## LEG. REF.

<sup>1</sup> Inserted by sec. 2 (1) of the Court-Fees (Amendment) Act (VI of 1905).

C. 134=1929 P. 645. Court-fees are payable on both the reliefs according to 60 I.C. 654 (O.). The clause covers also exchange. 1923 L. 456. But *see* (1944) 1 M.L.J. 187=57 L.W. 130=A.I.R. 1944 Mad. 252 holding that a suit for specific performance of a contract of exchange is governed by Sch. I, Art. 1 and not sec. 7, cl. (viii) or Sch. II, Art. 17-B. Where the contract of sale was in discharge of a mortgage debt, the consideration must include the debt as due on the date of the contract and not the debt that may be subsequently claimed as scaled down under the Madras Agriculturists' Relief Act in the event of the contract of sale not being enforced. (1943) 1 M.L.J. 12=56 L.W. 91=A.I.R. 1943 Mad. 372.

Sec. 7 (x) (c).—A suit for specific performance of a contract of lease should first be valued for court-fees under sec. 7 (x) (c) and the same is the value for purposes of jurisdiction. 34 C.L.J. 94=66 I.C. 268=25 C.W.N. 768. As to suits falling under the clause, *see* 17 C.W.N. 160=15 I.C. 46; 25 C. 46; 25 C.W.N. 768=34 C.L.J. 94; 1939 A.M.L.J. 80; I.L.R. (1939) Mad. 367=1939 Mad. 360=(1939) 1 M.L.J. 268 (F. B.); 1936 A.M.L.J. 114. A suit for possession by lessee is not a suit for specific performance but one falling under cl. (v). 16 C.L.J. 375=16 I.C. 963; 5 A.L.J. 586; 14 L.R. 539 (Rev.)=1933 O. 363. A executing lease of property in favour of B—Death of A—Court of Wards taking superintendence leasing same property to C and D—Suit by B for possession is one for specific performance and court-fee payable as such. 1937 Sind 93. *See also* 1936 A.M.L.J. 114.

Sec. 7 (xi).—A suit for fixation of rent under sec. 45 of the Agra Tenancy Act has to be valued for purposes of court-fee at the annual rent asked for by the plaintiff, as required by sec. 7 (xi). 1936 R.D. 390. In a suit for assessment of rent, there being no rent previously, cl. (xi) does not apply. 1927 P. 123.

Sec. 7 (xi) (b).—A tenure-holder is a tenant within the meaning of sec. 7 (xi) and the words "right of occupancy" used in cl. (b) of the section are to be understood in the popular and more general sense of a right by virtue of which a tenant remains in ac-

tual and physical possession as it were of the tenancy and so does not include the rights of a tenure-holder. 61 C. 513=38 C.W.N. 527=1934 C. 674.

Sec. 7 (xi) (cc).—Holding over after determination of tenancy. *See* 154 I.C. 615=1935 P. 90. Where a fiscal distinction is made between two causes of action, they can properly be regarded as two distinct causes of action. 1935 A.M.L.J. 4. This section is not confined to cases where the defendant is clearly estopped from denying the plaintiff's title. 99 I.C. 981=1927 M. 331=52 M.L.J. 100. *See also* 116 I.C. 374. The word "tenant" means a person who was a tenant but had ceased to be so. 33 C.W.N. 769=1930 C. 42. In a suit for ejectment of an under-ryayat, the court-fee payable is one year's rental. 133 I.C. 689=54 C.L.J. 68. The words "including a tenant holding over" are sufficient to indicate that the provision is meant to cover even those cases where a person was a tenant before but his tenancy has been determined since. 14 P.L.T. 616=1933 P. 664; 42 P.L.R. 784=1941 L. 39. *See also* I.L.R. (1940) Nag. 391=1938 Nag. 162 (Suit against former tenant who set up an adverse title himself). 220 I.C. 227=A.I.R. 1945 Pesh. 16. Where a person claimed to be on the land on payment of rent and it appeared that his father had during his lifetime held over the land for a number of years after the expiration of the lease, and the landlord instituted a suit in ejectment. *Held*, that the suit was governed by sec. 7 (xi) (cc). 1933 C. 822. Tenant holding over—Assignee from lessor—Suit by for possession—If one by landlord against tenant—Jurisdiction—Determination. 44 L.W. 800=71 M.L.J. 342. Suits between landlord and tenant have to be valued for court-fees upon the rent for the previous year and the same is the value for jurisdiction. 25 I.C. 975=12 A.L.J. 933. A suit to recover possession of land from a tenant is valued according to a year's rental next before date of presenting the plaint under sec. 7 (xi) (cc) and not under sec. 7, cl. (v) (d). 39 M. 873; 29 M.L.J. 572; 27 P. R. 1910=5 I. C. 910; 2 P. 260=4 P.L.T. 662; L.R. 5 A. 709; 83 I.C. 1=1925 A. 142. *See also* 38 M. 795=24 I.C. 374=26 M.L.J. 573; 99 I.C. 438 (2)=1927 N. 156; 93 I. C. 291. This is so even where plaintiff is in possession of part of a house and wants to recover another part from his alleged tenant. 104



- (d) to contest a notice of ejectment,  
 (e) to recover the occupancy of <sup>1</sup>[immoveable property] from which a tenant has been illegally ejected by the landlord, and  
 (f) for abatement of rent—

according to the amount of the rent of the <sup>1</sup>[immoveable property] to which the suit refers, payable for the year next before the date of presenting the plaint.

8. The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the <sup>2</sup>acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant.

#### LEG. REF.

<sup>1</sup> Substituted for the word "land" by sec. 2 (2) of the Court-Fees (Amendment) Act, (VI of 1905).

<sup>2</sup> See now the Land Acquisition Act, (I of 1894).

I.C. 412=1927 Sind. 248. In such a case court-fee is payable on proportionate rent. 139 I.C. 95=1932 Sind. 73. A suit by a landlord against his tenants holding over after the period of their tenancy, for recovery of possession also falls under this clause. 55 I.C. 178=24 C.W.N. 151; 33 Bom.L.R. 263=1931 B. 234. But where the tenant holds over in spite of notice to quit, he is a trespasser and a suit for possession against him falls under sec. 7 (v). 1923 N. 310=8 N.L.J. 63; 20 N.L.R. 124; 84 I.C. 202=1925 N. 131. See also 1928 C. 753. Where a relief against a trespasser is claimed along with a relief against a tenant, the former portion does not fall under the clause. 91 I.C. 488=1926 C. 504. In suits under the clause, the Court will not go into the question of title. 27 I.C. 162=27 M.L.J. 475; 5 P. 208=1936 P. 251. But see 91 I.C. 488=1926 C. 504. Where in a suit for ejectment there was an additional prayer for declaration of plaintiff's title as owner, the court-fee is payable under sec. 7, cl. (iv) (c) and not under this sub-clause. 29 L.W. 760=1929 M. 529. See also 5 P. 208=94 I.C. 19=1926 P. 251. But where in an ejectment suit the question of title was raised by the defendant, the suit should be valued under this sub-clause. 33 C.W.N. 769=1930 C. 42. See also 138 I.C. 88=1932 M. 409. A suit for declaration of kudiwaram right and ejectment of tenant falls under cl. (iv) (c) and not under this clause. 63 M.L.J. 759=140 I.C. 462. In suit for possession of properties from tenants, if a decree is passed conditional on the plaintiff paying a certain sum of money for value of improvements due to the defendants, the plaintiff appealing against the decree awarding compensation there being no question about possession must pay court-fee on the value of improvements. The subject of the appeal is the value of improvements and not possession of land as in the suit in the lower Court, and it is not therefore enough if the appeal be valued as a suit for possession. 48 L.W. 661=(1938) 2 M.L.J. 840.

Sec. 7 (xi) (d).—In a case to contest a

notice of ejectment the relief claimed may be in the alternative (a) non-ejectment, as (b) compensation, but the suit is valued on the rental of the land without any regard for compensation claimed, the claim for compensation being regarded as ancillary. If ejectment were decreed with compensation and the tenant appealed claiming still non-ejectment and in the alternative more compensation, he would still pay on the original subject-matter that is the rent. But where the landlord defendant appeals and he desires to get rid of the amount of the compensation, he should pay *ad valorem* court-fee. 11 L.L.T. 116. See also 20 L.L.T. 155.

Sec. 7 (xi) (e).—A suit for possession by a tenant against his landlord falls within sec. 7, cl. (xi) (e). 16 C.L.J. 375. The clause should not be limited to suits where the landlord and tenant alone are parties. It applies to cases where to avoid delay, etc., other persons also are impleaded. 87 I.C. 1002=1925 S. 275. But see 32 S. 268 where the clauses have been held not to apply to such cases. A suit for possession by a tenant against the landlord and persons claiming only melwaram rights is not governed by this clause but by cl. (5). 31 M. 11=17 M. L.J. 478. The value for purposes of jurisdiction also is the same as that for court-fee. 39 M. 873=29 M.L.J. 572=31 I.C. 104.

Sec. 8: SCOPE AND APPLICABILITY.—Sec. 8 is a special provision applicable to appeals against all orders of awards relating to compensation under the Land Acquisition Act, and overrides the general provision contained in Art. 17 (iv) of Sch. II, 21 M. 269; 159 I.C. 274=1935 L. 448. See also on the section, 21 A. 354; 21 M. 309; 39 C. 906; 17 I.C. 724=17 C.W.N. 933; 35 C.W.N. 1103. An appellant is bound to include in the valuation of his appeal the amount of 15 per cent. of the excess market-value and pay court-fee thereon. 57 M.L.J. 357=1930 M. 45. Section inapplicable to appeal by the Crown on the ground that the award is excessive. 46 M.L.J. 150=1924 M. 489 (2); 1928 R. 197=6 R. 281; 138 I.C. 199=1932 O. 224. The memorandum of appeal by a claimant to land acquired in a Land Acquisition proceeding should bear a court-fee stamp *ad valorem* on the value of the land claimed. 45 Bom. 277=64 I.C. 582 (584)=23 Bom. L.R. 148. In appeals against orders passed in references under sec. 30, Land Acquisition



9. If the Court sees reason to think that the annual nett profits or the market-value of any such land, house or garden as is mentioned in section 7, paragraphs 5 and 6, have or has been wrongly estimated, the Court may, for the purpose of computing the fee payable in any suit therein mentioned, issue a commission to any proper person directing him to make such local or other investigation as may be necessary, and to report thereon to the Court.

10. (i) If in the result of any such investigation the Court finds that the nett profits or market-value have or has been wrongly estimated, the Court, if the estimation has been excessive, may, in its discretion refund the excess paid as such fee; but, if the estimation has been insufficient, the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market value or nett profits been rightly estimated.

(ii) In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

(iii) 1[\* \* \* \* \*]

#### LEG. REF.

<sup>1</sup> Cl. (iii) was repealed by the Repealing and Amending Act, 1891 (XII of 1891). The clause was as follows:—"Sec. 180 of the Code of Civil Procedure shall be construed as if the words 'the market-value of any property or' were inserted after the word 'ascertaining' and as if the words 'or annual nett profits' were inserted after the word 'damages'".

Act, *ad valorem* court-fee is payable under Art. 1, Sch. I, and sec. 8 is inapplicable. 56 M.L.J. 337=1929 M. 223. See also 60 C.L.J. 216. Where the appellant definitely claims a share in the compensation awarded for the land acquired by Government under the Land Acquisition Act, court-fee is payable on the *ad valorem* scale on the value of the appellant's claim. 134 I.C. 127=1931 L. 343. Where the compensation money is in *custodia legis* and the question in the appeal merely is, which of the rival claimants is entitled to it, a mere declaration by the appellate Court will be sufficient and court-fee is therefore payable only on that basis. 55 M. 641=1932 M. 438=62 M.L.J. 541. The court-fee payable in respect of a memorandum of appeal against an award by a tribunal constituted under the U. P. Town Improvement Act, is under sec. 8 of the Court-Fees Act which applies to the case, on the difference between the claimed and awarded amount. The appeal will not come under Sch. II, Art. 17 (iv). I.L.R. (1939) All. 142=1938 A.L.J. 1124=1939 All. 127. As to appeal against an award under sec. 19 (i) of the Defence of India Act for compulsory acquisition of land, see 47 Bom.L.R. 327=A.I.R. 1945 Bom. 348, cited under Sch. II, Art. 11.

(BENG. AMENDMENT), Sec. 8-D (2).—The Court has jurisdiction to direct the plaintiff to deposit the costs of a local investigation as to the valuation of a property under sec. 8-D (2), held at the instance of the defendant. It can make the defendant responsible for such costs if the result is in favour of the plaintiff. 47 C.W.N. 373.

SEC. 9.—The Court is not bound to appoint a commissioner to hold an enquiry. It may itself hold an enquiry. 29 A. 749=4 A.L.J. 636. The decision of the Court as to the market-value of immovable property passed after objection made, is final, even though no enquiry was made under a commission. 14 W.R. 451. The commission may issue at any stage of the suit. 2 M. 308=4 Ind. Jur. 285. If a commission is ordered under sec. 9 not at the instance of the plaintiff, there is no power to make the plaintiff deposit the costs of the commission. 33 C.W. N. 952=50 C.L.J. 164=1930 C. 65. Where the question of deficit court-fees was not apparent on the face of the record, payment of court-fees cannot be made a condition precedent to the filing of appeal. The proper course is to order judicial enquiry under this section after the appeal is filed. (*Ibid.*). See also 1929 C. 717.

SECS. 9 TO 11: SCOPE AND APPLICATION.—Secs. 9 to 11 do not relate to appeals. 12 A. 129 (F.B.). The sections are not in conflict with sec. 28. (*Ibid.*) As to the effect of dismissal of a suit under the section, see 12 A. 129; 8 A. 282.

SEC. 10: SCOPE AND APPLICATION.—See 12 A. 129. The specific provisions of sec. 28 are not cut down by the section. (*Ibid.*) The Court has no jurisdiction to order the deficit court-fee to be paid by the plaintiff after the dismissal of his suit and on his default, to order, the attachment of his properties. 46 C. 520; 52 I.C. 435. See also 152 I.C. 799=1935 L. 75; 32 I.C. 534=9 Bur.L.T. 43; 1925 L. 131; 142 I.C. 225=1933 M. 321. If the Court finds that sufficient court-fee has not been paid it is bound to stay the suit and to fix a time within which the additional fee can be paid, without any regard to the fact, whether that be a time within or beyond, the period of limitation. 4 A.L.J. 636=29 A. 749. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance. 29 A. 749. See also 34 C. 20 (F.B.). A plaintiff who fails to pay additional court-fee within the time

11. In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been

payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

allowed by the Court, is liable to have his suit dismissed under sec. 10 and not to have his plaint rejected under O. 7, r. 11, C. P. Code. 26 I.C. 746=16 Bom.L.R. 763; 29 A. 749. But only a Court having jurisdiction to try the suit can so dismiss it. 51 B. 236=29 B.L.R. 280=101 I.C. 343=1927 Bom. 257. The dismissal, however, has the same effect as rejection. 12 A. 129. It could not operate as *res judicata*. 8 A. 282. An order rejecting a memorandum of appeal for deficient court-fee is not a decree or final order and does not preclude the appellant from presenting a fresh memorandum on proper court-fee. 59 C. 388=138 I.C. 643=1932 C. 482. A suit can be dismissed under the section at any stage of the case. 2 M. 308. See also 56 I.C. 316=4 P.L.J. 703. Once a Court finds that the market-value of the property is different to that alleged in the plaint, the plaintiff should be at once called upon to make up the proper court-fee as determined, before the trial of the suit takes place. It is obviously improper for the Court to hold up the decision on the question of court-fee until the end of the suit and incorporate the order passed in the decree which is perfectly useless. (1935 L. 75 Rel. on.) 40 P.L.R. 88=1938 Lah. 311. The plaintiff can abandon a portion of the claim and retain that part for which he had already paid court-fee. 27 A. 151. But see *contra*. 16 Bom.L.R. 763=26 I.C. 746. Where a Court returns a plaint for presentation to a proper Court, the latter Court to which the plaint is presented should give credit to the fee already paid. 51 B. 236=29 Bom. L.R. 280=1927 B. 257; 35 M. 567=21 M. L.J. 533.

SEC. 11: SCOPE AND APPLICATION.—See 12 A. 129. Sec. 11 of the Court-Fees Act casts a duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint. The power of the executing Court in this behalf does not depend on any direction in the final decree. The executing Court has also the power to determine whether this amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors as costs relating to execution. 38 L.W. 572=1933 M. 787=65 M. L.J. 526. See also (1942) 2 M.L.J. 673=55 L.W. 786=1942 M.W.N. 713=A.I.R. 1943 Mad. 145. Sec. 11 refers only to suits for mesne profits of immovable property or for accounts and does not apply to mortgage suits where on account of the interest *pendente lite* a decree for a much larger amount

than was claimed is passed. 3 P.L.T. 146=1922 P. 59. See also 105 I.C. 395=1 P.L.T. 331. Additional court-fee is not assessable by reason of the accrual of interest *pendente lite*. 1927 P. 230; 1928 P. 58; 17 B. 41; 1928 P. 58. In cases within the first paragraph of sec. 11 of the Court-Fees Act non-payment of the balance of court-fee merely postpones the date on which the decree can be executed while the second paragraph under which the Court has power to dismiss the suit is only applicable "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree". Where the account directed by a decree is not an account of mesne profits nor is it so described, and it involves among other things an account of the sums received from a money-lending business, and the amount due to the plaintiff thereon is not "left to be ascertained in the course of the execution of the decree", the case does not fall within the second paragraph and the Court has, therefore, no jurisdiction to dismiss the suit for non-payment of the additional court-fee. 64 I.A. 191=18 Lah. 502=(1937) 2 M.L.J. 1=1937 P.C. 163 (P.C.). The section only says that the decree shall not be executed until the court-fee is paid. It in no way requires the Court to postpone the passing or the drawing up of the decree. 21 Pat. 366=109 I.C. 818=A.I.R. 1942 Pat. 410=23 Pat.L.T. 202. The penalty mentioned in the final provisions of sec. 11 does not apply to the cases coming under the first para. 11 I.C. 73 (C.). The Court has no power to fix any time for payment, in such cases; only the decree cannot be executed until the additional fee is paid. 59 I.C. 385 (M.). See also 30 M. 82. If the appellate Court grants a decree for an amount larger than that claimed in the Court below, court-fee must be paid on the difference and unless this is done the decree cannot be executed. 3 P.L.T. 813=1923 P. 28. The word 'decree' in sec. 11, para. 2 as applied to a suit for partition and mesne profits means the final and not the *interim* decree. 59 I.C. 385 (M.). Where the value of the reliefs is ascertained after trial, the Court-fee on the difference between the plaint valuation and the amount decreed should be paid, under the 2nd paragraph. 24 I.C. 643=1 O.L.J. 281. A Court has discretionary power under S. 11 to enlarge the time originally fixed for the payment of the Court-fees in such cases, even when application to enlarge the time is made after the expiry of the time originally granted. 10 I.C. 268=13 C.L.J. 432. Where a plaintiff claimed mesne profits from a certain date till delivery of possession of property, but no Court-

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

fee was paid on that claim but a statement was made that Court-fee on that relief would be paid when ordered by the Court. *Held*, that the plaintiff ought to have given a tentative valuation for the claim for mesne profits and on that valuation Court-fees ought to have been paid, and that an amendment of the plaint so as to remove that technical defect could be permitted even in appeal. 72 C.L.J. 14=1941 Cal. 1.

**MESNE PROFITS.**—A decree for mesne profits does not become operative till after the amount has been ascertained, and the Court-fee under S. 11 paid. 27 I.C. 300 (P.). The second part of S. 11 applies only to a claim for mesne profits accruing subsequently to the date of suit of which the plaintiff is unable to calculate the approximate value because he cannot say for how long a period he is likely to be kept out of possession. 13 P.L.T. 810=12 P. 188=1933 P. 81. The Court-fee payable is an *ad valorem* fee. 55 I.C. 24=1 P.L.T. 235. On this point, see also 50 M. 488=52 M.L.J. 128. The mere fact that court-fee had not been paid on a decree granted does not prevent the decree-holder from making an application for execution and all that S. 11 provides is that the decree should not be executed (34 Bom. 189 and 1930 Nag. 241, Rel. on.) 178 I.C. 202=1938 Lah. 326. The plaintiff can obtain execution of a portion of the decree granting reliefs other than mesne profits without paying Court-fee on such mesne profits. 12 B. 98. See also 24 C. 174; 54 M. 98=1931 M. 717=61 M.L.J. 424. The term 'suit' is to be construed as confined to that part of the suit which relates to mesne profits. 12 B. 98. So in case of default, the claim in respect of mesne profits along is to be dismissed. 24 C. 173=1 C.W.N. 243. After such dismissal, application for execution of the decree for mesne profits cannot be entertained. 24 C. 173. Approximate amount to be stated for mesne profits accrued due before suit. 24 I.C. 232 (1). The plaintiff in a suit having omitted to claim future mesne profits, subsequently applied for permission to amend his plaint by including a claim therefor, but the application was rejected. Against the decree for possession the defendant appealed to the High Court and the plaintiff filed a memorandum of objections claiming future mesne profits, but, his contention that no Court-fees was payable on the claim for mesne profits was overruled by the Taxing Officer, who held that *ad valorem* Court-fees was payable on the amount claimed. At the time of the hearing of the appeal, plaintiff questioned the decision of the Taxing Officer and claimed refund of the amount of Court-fee paid by him. *Held*, (1) that under S. 11 of the Court-fees Act, as amended in Madras, no Court-fee is payable in respect of future mesne profits before the final decree is passed, a claim to mesne profits being in respect of a cause of action not arising at the date of the suit. (2) that under S. 5 of the Court-Fees Act, the decision of the Taxing Officer had become final and could not

be impeached at the hearing of the appeal. 165 I.C. 972=44 L.W. 763=71 M.L.J. 677.

**COURT-FEES IN APPEAL.**—Where in a suit for partition and mesne profits, the Court awarded in the preliminary decree mesne profits for three years before suit but made provision for its subsequent determination, in the appeal therefrom the defendant need not pay any Court-fees in respect of this decree for mesne profits. 58 M.L.J. 497=1930 M. 597 (52 M.L.J. 128 to the contrary not approved). But see 8 P. 906=1929 P. 731. Where the applicant for the recovery of mesne profits appeals from the decision of the trial Court awarding him a smaller amount than what he claimed he is not bound to pay *ad valorem* Court-fee on the amount of his claim. No Court-fee apart from the fixed fee can be claimed from him until the amount of mesne profits actually due to him has been ascertained. 11 P.L.T. 703.

**FUTURE MESNE PROFITS.**—As to whether Court-fee is payable on future mesne profits under the section, there is a conflict of rulings between the various High Courts. See 20 M.L.J. 98=5 I.C. 880; 15 B. 416; 17 B. 41; 6 O.C. 351; 13 C.W.N. 815; 24 I.C. 232; 21 M. 317 (appeal); 2 A. 642; 3 C.L.J. 94; 16 C.L.J. 564; 15 I.C. 572; 1938 M. 727=(1938) 1 M.L.J. 750. A direction in a decree for payment of extra-fee in respect of such mesne profits does not form part of the decree. The execution of the decree is not conditional upon the payment of the extra-fee. 30 M. 31=16 M.L.J. 543. See also 33 C. 1232. The law on the subject has been made clear so far as Madras is concerned. See para. 3 of S. 11 substituted by Madras Act V of 1922. See I.L.R. (1938) Mad. 1050=1938 M. 727=(1938) 1 M.L.J. 750. Court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry and the Court has no jurisdiction to dismiss such an application for non-payment of Court-fee in advance. 5 P. 361=93 I.C. 939=1936 P. 218 (F.B.). See also 108 I.C. 801=9 P.L.T. 657; 1930 R. 246. Where the decree directs payment of future mesne profits at a certain rate, Court-fee should be paid on the amount accrued due when execution is applied for. I.L.R. (1945) Kar. 31=A.I.R. 1946 Sind 19; I.L.R. (1935) Kar. 313. Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L.B.R. 276=62 I.C. 175; 1929 L. 753. Collection of excess Court-fee. See 152 I.C. 608=1935 L. 40.

**ACCOUNT SUITS.**—The plaintiff has a right to value his claim on estimate and the Court has power to decree larger amount. 24 O.C. 209=64 I.C. 101. See also 25 M. 543; 12 M.L.J. 35; 9 B. 22; 27 Punj.L.R. 187=94 I.C. 650=1926 L. 242 (1).

**ADMINISTRATION SUIT.**—Though adminis tra-

12. (i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter

Decision of question as to valuation. on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

tion suit is analogous to an account suit up to a certain stage, the two are not identical for all purposes, at least so far as the ultimate decision of the Court is concerned. Hence where in a suit by a creditor for administration of the estate of a deceased debtor, other creditors are impleaded as party defendants before the preliminary decree and they set out in their written statements their claims against the estate of the deceased but the Court has allowed certain dividends upon the amounts found to have been due to them, those creditors cannot be ordered to pay Court-fees upon the entire amount of their claims, irrespectively of what are being actually paid to them as dividends. 43 C.W.N. 52=68 C.L.J. 345=1938 Cal. 785. See also 54 L.W. 663=(1941) 2 M.L.J. 692; 1941 Rang.L.R. 512=1941 Rang. 312; 42 P.L.R. 101. It is the practice in the moffussil to demand payment of Court-fees from defendants who come in under a preliminary decree in administration suits, and they cannot obtain relief under the decree without payment of the proper Court-fee. 1939 Rang.L.R. 134=1939 Rang. 115. See also 17 Pat. 542; 222 I.C. 499 (Sind) with reference to the explanation added to the section in Sind.

POWER OF COURT TO PASS DECREES FOR SUMS BEYOND PECUNIARY JURISDICTION.—In suits for accounts and mesne profits, even if the sum found due exceeds the pecuniary jurisdiction of the Court, it is competent to the Court to give a decree for such amount. 40 M. 1=32 M.L.J. 221=39 I.C. 439 (F.B.); 33 A. 97; 28 Bom.L.R. 1461=1927 B. 83; 89 I.C. 353=1925 Sind. 324. But see the decisions of the Calcutta High Court to the contrary. 13 C.W.N. 493; 21 C.W.N. 310; 43 C. 650=15 C.W.N. 506=13 C.L.J. 132. See also 1929 L. 107; 49 P.R. 1906=94 P.L.R. 1906; 2 R. 408. The case of future mesne profits stands on a different footing from a suit for accounts, see 53 C. 14=1925 C. 1076 (F.B.).

SEC. 12: CONSTRUCTION OF SECTION.—The provisions of section are to be strictly construed. The additional fees should be levied in exact conformity with the words of the statute. 39 C.L.J. 217=82 I.C. 292=1924 C. 953. The question of the sufficiency of the stamp on the memorandum of appeal should always be regarded as open until the appeal is finally heard and disposed of. 14 P.L.T. 180=12 P. 694=1933 P. 234. When a Court has passed a judicial order fixing the correct Court-fee payable on a memorandum of appeal, it is not open to that Court to vary it afterwards either at the instance of a party or of its own motion. [(1937) 1 M.L.J. 89 and (1935) 69 M.L.J. 439, followed.] 48 L.W. 461=(1938) 2 M.L.J. 647. After the suit is decided, the Court is no longer seized of the case and has no jurisdiction to require the plaintiff to make good the alleged deficiency in Court-fee. (82 I.C. 588 and 52 I.C. 435, foll.) 34 P.L.R. 84=1933 L. 208. See also

18 P.L.T. 864. Once the Court holds that the Court-fee paid was sufficient and correct, the decision is final under S. 12 (1) and the Court has no power to revise the valuation. Nor can the High Court, in revision against an order of the lower Court from the later order passed in supersession of the first order, act under S. 12 (2) of the Act, because the suit itself is not before the High Court. The condition precedent to the exercise of powers under S. 12 (2) is that the suit, i.e., the subject-matter of the suit, should be before the Court of appeal, reference or review. 45 L.W. 206=1937 M. 325=(1937) 1 M.L.J. 89. The expression "every question relating to valuation" in S. 12 (1) cannot be construed in the restricted sense of a question relating to appraisal of Court-fee as distinguished from the question of category; I.L.R. (1937) Mad. 275=1937 M. 81=(1937) 1 M.L.J. 1 (F.B.).

SCOPE OF THE SECTION.—A decision on the question of Court-fee in the Court of First instance is final between the parties under S. 12 (1) but can be reopened by an appellate Court under S. 12 (2) in the interest of revenue. 25 I.C. 506 (M.). See also 60 C.L.J. 201=39 C.W.N. 131; 43 B. 507 (P.C.); 40 I.C. 904=106 P.W.R. 1917; 90 I. C. 321 (2)=1925 P. 488. The valuation made by the Court of the first instance for the purpose of assessing Court-fee is final and cannot be challenged in appeal, when there is no question as to the class in which the suit falls and the question is merely of valuation in that class. I.L.R. (1940) 2 Cal. 166=44 C.W.N. 745=1940 Cal. 451. Though there is no appeal against a decision as to the correct valuation for any particular class of suits, still there is an appeal against a decision that any particular suit falls within a particular class. 162 I.C. 227=38 Bom.L.R. 218=1936 B. 166. It cannot be held that a decision would be final under S. 12 (1) only if it has been finally arrived at after both parties have been heard. The object of S. 12 (1) is to ensure that the Court at as early a stage as possible should finally determine the amount of the Court-fee before the subject-matter of the suit was to be embarked upon. 1941 M.W.N. 406=53 L.W. 740=1941 M. 626=(1941) 1 M.L.J. 796. The decision is not final within the meaning of S. 12 unless it is reached after both sides have had a chance to be heard. After a plaint is filed and summons is issued to the other side, it is open to the other side to contend that the Court-fee paid is insufficient. It is on deciding such a plea that the Court would come to a "decision" which under S. 12 of the Act would be final as between the parties. I.L.R. 1942 Nag. 432. Where on the report of the Munsarim a Civil Judge decides that the Court-fee paid on an appeal is sufficient it is not such a final order within the meaning of S. 12 (1) as to preclude a District Judge going into the question once again either on the report of the Inspector of Stamps or on

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, paragraph ii, shall apply.

the preliminary objection of the opposite side. 200 I.C. 223=1942 O.W.N. 338=A.I.R. 1942 Oudh 385; 1941 N.L.J. 303=1941 Nag. 217. If the Court holds under S. 7 (2) (a) that a certain amount is the net profit in the year immediately preceding the institution of the suit or investigates the question of market value and arrives at a certain figure, its finding is final and conclusive under S. 12 (1) only as regards the amount or figure so arrived at. I.L.R. (1940) 2 Cal. 450=44 C.W.N. 822=1940 Cal. 438. Appeal requiring *ad valorem* Court-fee filed as miscellaneous appeal and allowed—Application by respondent after remand for stay of proceedings until payment of proper Court-fee—Order rejecting—Revision—High Court would not interfere if the order is manifestly correct. 18 P.L.T. 864=1937 P.W.N. 983. The section does not bar a reconsideration of the decision on the question of valuation if jurisdiction will be affected on a correct valuation. (1942) 1 M.L.J. 400=202 I.C. 65=55 L.W. 173=A.I.R. 1942 Mad. 502.

**FINALITY OF DECISION UNDER SUB-SEC. (1).—**An appeal would lie from the decision of a Court in respect of the class in which a suit ranks but no appeal would lie from a decision in respect of the valuation of the suit in that class. 28 A. 411; 23 B. 486. *See also* 1935 L. 698; 1935 A. 455; 27 B. 140; 17 B. 56; 15 B. 82; 16 I.C. 963=16 C.L.J. 375; 6 C. 249; 23 C. 723; 28 C. 334; 51 C. 516=28 C.W.N. 683=1924 C. 731; 14 M. 169; 1925 M. 713=48 M.L.J. 688; 90 I.C. 321 (2)=1925 P. 488; 3 P. 930=1924 P. 673; 87 I.C. 911=1925 N. 4; 49 I.C. 442; 16 P.R. 1919=49 I.C. 711; 16 I.C. 773; 2 S.L.R. 72; 105 I.C. 610; 106 I.C. 817; 130 I.C. 643=1931 Lah. 378; 33 Bom.L.R. 263=1931 Bom. 234. Nor is such an order revisable. 1927 M. 1021. An order accepting Court-fee paid on a memo. of appeal is revisable in view of S. 12 (2). 222 I.C. 194=1946 N.L.J. 110. S. 12 makes the valuation for the purposes of Court-fees final. It has got nothing to do with the question of valuation for the purposes of jurisdiction. If, therefore, a trial Court comes to the conclusion that the value of the subject-matter of a suit is beyond its jurisdiction and returns the plaint under O. 7, R. 10, in an appeal from that order the appellate Court can enter into the question of valuation and if it finds that it is within the jurisdiction of the trial Court it should direct it to entertain the suit. 44 C.W.N. 394. *See also* 1938 A.L.J. 214=1938 Nag. 481. Where, in a suit for declaration that a certain revenue sale is illegal and *ultra vires*, the plaintiff values the suit as one for a declaration only and pays a Court fee of Rs. 200, and the Court decides the question of Court-fee as a preliminary issue and decides that that Court-fee paid is sufficient, no appeal lies against such decision. Nor is the order holding that the Court-fee paid was

correct an appealable decree. 63 C.L.J. 16=1936 C. 784. Where an order rejecting a plaint necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation the order is appealable. 49 I.C. 442=4 P.L.J. 57. If the dispute involves questions of principle as to the nature of the suit and the retrospective operation of statutes an appeal against an order for payment of Court-fee is maintainable. 51 C. 216=28 C.W.N. 683=1924 C. 731. The section does not also apply where the question relates to the competency of the Court of first instance to entertain the suit. 17 C.W.N. 503=16 I.C. 575=16 C.L.J. 371; 3 P. 930=1924 P. 673. Thus an order returning a plaint for representation on the basis of the valuation made by the Court is appealable. 52 I.C. 1001=1919 M.W.N. 599. *See also* 47 I.C. 7=151 P.W.R. 1918. The decision to be final must be a decision made before the parties on the record after plaint is filed. 20 A. 11 (F.B.).

**SEC 12 (ii) : SCOPE OF.—**The appellate Court has power to require a party to make good the deficiency in the Court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of Court-fee, but which decision is, in the opinion of the appellate Court, erroneous. I.L.R. (1937) M. 275=1937 M. 81=(1937) 1 M.L.J. 1 (F.B.). S. 12 (2) gives an appellate Court power when an appeal comes before it to correct a mistake made below, and has jurisdiction to require payment of the difference between the Court-fee actually paid and the proper Court-fee payable, although no question was raised when the case was in that Court. I.L.R. (1940) Mad. 647=1940 Mad. 383=(1943) 2 M.L.J. 425. The words "any such suit" in S. 12 (i) cannot be construed to mean the entire suit and not a part of the suit. S. 12 (ii) therefore applies not only when the whole decree has been appealed against but also when the appeal is only with regard to a portion of the claim in suit. 63 C. 720=40 C.W.N. 406. Where only a part of the subject-matter of the suit is the subject of appeal and is before the appellate Court, that Court acting under S. 12 (ii) of the Court-Fees Act can realise the deficit Court-fee only in respect of that part and not on the entire subject-matter of the suit. I.L.R. (1938) Mad. 309=47 L.W. 70=1938 Mad. 278=(1938) 1 M.L.J. 20. There is nothing in S. 12 (2) of the Act to justify the view that a Court may not reconsider an order which it has already passed under the subsection. 53 L.W. 740=1941 Mad. 626=(1941) 1 M.L.J. 796. There is no warrant for holding that S. 12 (2) applies only to cases where the plaintiff is the appellant. Applying S. 10 (2) to appeals and reading it with S. 12 (2), the

word "suit" should be deemed to include an appeal. The actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit. 51 L.W. 434 (2)=1940 M.W. N. 348=1940 M. 674=(1940) 1 M.L.J. 478 (2). The jurisdiction of the Taxing Officer is limited to cases in which it is alleged that a document filed, exhibited or received in the High Court is not sufficiently stamped. It does not extend to cases in which it is alleged that a party paid insufficient Court-fee on his plaint or memorandum of appeal in the lower appellate Court. To this class of cases, S. 12 (ii) is clearly applicable. 1934 A.L.J. 957=1934 A. 805. An appellate Court cannot under S. 12 (ii) order payment of additional Court-fee stamps, unless the first Court has decided the question of valuation. 36 I.C. 957=10 Bur.L.T. 242. But see *contra* 31 C.W.N. 1045=1927 C. 775. But where the Court proceeds to the trial of the suit, it must be assumed that the Court has tacitly decided that the fee paid is correct. 109 P.R. 1912=15 J.C. 463. The act of the chief ministerial officer entrusted with the duty of receiving plaints and seeing that proper Court-fee is paid thereon, in accepting the plaint amounts to such decision. 1926 M. 96=49 M.L.J. 608. The question of deficit Court-fees should be dealt with by the appellate Court as soon as it is discovered, though it may be postponed at the Court's discretion in exceptional cases. 62 I.C. 43=6 P.L.J. 293. If the question arises on appeal, the appeal should first be admitted so as to remove doubts as to jurisdiction and this point should be decided before other issues, and appeal should be stayed till the deficit is paid. 62 I.C. 43=6 P.L.J. 293. See also 58 I. C. 271=5 P.L.J. 508. Until the appeal is admitted, it is not competent to the appellate Court to pass an order dismissing the suit for non-payment of Court-fee. 1 M.L.J. 528. So also where deficit Court-fee was not paid on a document in the lower Court, the same cannot be recovered as a condition precedent to the filing of the appeal. The proper procedure is to allow the filing of the appeal and thereafter take steps to recover the deficit Court-fees. 33 C.W.N. 952=50 C.L.J. 164=1930 C. 65. See also 31 C.W.N. 1045=1927 C. 775. It is the duty of the High Court to see that proper Court-fees are paid to the High Courts as well as in the Courts below. 43 I.C. 489=3 P.L.J. 101. See also 235 P.L.R. 1913=19 I.C. 856. If the appellant has failed to pay sufficient Court-fees in the Court below, his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in default no decree shall be executed in his favour till the deficiency has been made good. 3 P.L.J. 443=44 J.C. 53. The appellate Court may refuse to prepare or sign its decree until the deficiency is made up. 41 P.L.R. 491. See also 1939 Sind 279. In 44 Bom.L.R. 117=A.I.R. 1942 Bom. 151, it was held that the appeal should be stayed until payment of Court-fee by respondent and that the appellants might pay the Court-fee on behalf of the respondent and include it in costs. One effective way of enforcing payment of deficiency of Court-fees is to refuse in second appeal

to hear counsel of that party. 1929 A. 577=27 A.L.J. 808. See also 58 I.C. 271=5 P.L.J. 508. If a plaintiff respondent fails to make good a deficiency in the Court-fee paid on the plaint, it is competent to the appellate Court to call upon him to pay the deficit; and in the event of his failure, dismiss the suit. 56 I.C. 316=4 P.L.J. 703; 60 I.C. 654=23 O.C. 388; the procedure prescribed in S. 10 (2) being applicable. 20 A. 362. The Court cannot dismiss the appeal for non-prosecution in such a case. 33 C.W.N. 845=1929 C. 717. Where there was deficiency in the Court-fee paid on cross-objections in the lower appellate Court, the High Court can insist on the payment of the same even though the second appeal does not relate to the subject-matter of such memorandum of cross-objections. 1 P. 471=1922 P. 284. Once an appeal has been dismissed, the High Court ceases to have seisin of the appeal or case and is power less to call upon the respondent to pay any deficiency. 4 P.L.J. 472=51 I.C. 756. See also 58 I.C. 271=5 P.L.J. 508; 1925 L. 131 (1); 7 A. 528; 18 M. 415; 142 I.C. 25=1933 M. 321. Nor can an appellant be required to pay additional Court-fees after the disposal of the appeal. 1929 O. 483 (1). See also 141 I.C. 175=1933 L. 208. Once the decree in a suit has been signed and sealed, the Judge making that decree becomes *functus officio* and cannot thereafter make order for payment of deficient Court-fee, but if the matter comes to the High Court in revision, the High Court has power, if it considers that the question as to Court-fees has been wrongly decided to require payment of such additional fee as would be payable. I.L.R. (1939) Kar. 469=1939 Sind 279. See also 41 P.L.R. 491. Where a plaint is returned for presentation to the proper Court and an appeal is preferred against that order, it is open to the appellate Court to go into the question relating to the Court-fee and decide that the lower Court had jurisdiction to entertain the suit. S. 12 of the Court-Fees Act is no bar. It only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee. It does not apply where there is a dispute as to the class in which the suit falls. If there is any doubt as to what section would apply to a suit, then it raises a question of principle, the jurisdiction to determine which is not impaired by S. 12 of the Court-Fees Act. 178 I.C. 97=1938 N.L.J. 214=1938 Nag. 481. See also 44 C.W.N. 394. The Act does not apply to decided cases but applies only to pending cases. 32 I.C. 534=9 Bur.L.T. 43; 1925 L. 131.

An order under section 12 (2) is not final as an order under section 12 (1), and can be reconsidered. (1941) 1 M.L.J. 796=198 I. C. 597.

WHETHER APPELLANT CAN ABANDON A PORTION OF CLAIM.—The appellant who has not properly stamped the appeal and is unable to do so may leave a part of the claim retaining only that much as is covered by the stamp. 10 I.C. 207=11 P.R. 1912; 29 Punj.L.R. 64; 1926 L. 477. There is nothing to prevent,



13. If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil

Refund of fee paid on Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in S. 35<sup>1</sup> of the same Code for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal :

#### LEG. REF.

<sup>1</sup> This reference should now be read as applying to the corresponding provision of Act V of 1908, O. 41, r. 23.

an appellant from attacking only a portion of the decree by paying Court-fee only thereon, though the reason for the attack might cover the whole decree. 38 M. 18=16 I.C. 877. A defendant appealing on the ground that the suit ought to have been dismissed *in toto* as time barred must appeal on the whole case and pay stamp duty on the whole claim. 44 I.C. 890=14 P.W.R. 1918. Whether an appellate Court has power to allow a valuation of claim in the Court below to be reduced in order to relieve a party from liability to pay the proper Court-fee, *see* 23 I.C. 489=3 P.L.J. 101.

SECS. 12 (ii) AND 28.—Where a written statement claiming a set-off is accepted by the trial Judge through mistake or inadvertence, although not stamped, and the trial Judge, although he subsequently directs the party to pay the Court-fees, does not realise the full Court-fees, the High Court can in second appeal under S. 12 (ii), and S. 149, C. P. Code, direct the payment of the additional Court-fees. 1936 C. 277.

SEC. 13 : SCOPE OF SECTION.—The Court has the power under S. 151 to grant a certificate for refund of Court-fee, in cases not covered by Ss. 13, 14 and 15 of the Court-Fees Act. The discretion of the Court is not barred by the fact that the excess fee was paid by the mistake of the party and not in consequence of any direction by the Court. (55 M. 641, Foll.) 38 L.W. 983=66 M.L.J. 35. *See also* I.L.R. (1937) Nag. 519=1937 N. 268; 1939 M.W.N. 1143=(1939) 2 M.L.J. 867; 41 P.L.R. 96=1939 Lah. 257; 1940 Mad. 208; 18 P.L.T. 804; 1937 P.W.N. 893. S. 13 of the Court-Fees Act is not exhaustive; the High Court in suitable cases may exercise its inherent powers vested in it by S. 151, C. P. Code, and order refund of Court-fees paid. Where therefore, the memorandum of appeal was not registered as out of time and the delay was due—not to any negligence on the part of the plaintiff but to some gross negligence on the part of his legal adviser, *held*, it was a fit case for refund. 152 I.C. 215=38 G.W.N. 185=1934 C. 615. *See also* 39 G.W.N. 1074. If a remand can be deemed to have been made on any of the grounds mentioned in O. 41, r. 23, C. P. Code, the appellant is entitled to a refund certificate under S. 13 of the Court-Fees Act, although the appellate Court erroneously purports to make the remand under S. 151, C. P. Code. 40 L.W. 372=1934 M. 643.

APPLICABILITY OF THE SECTION.—The section applies where a decree in favour of the respondents is set aside and the case is sent

back for a second decision. Where the decision in favour of the respondents is set aside *qua* a portion only of the subject-matter of the suit, the proviso applies. 39 I.C. 28=14 A.L.J. 671. But where the decree is set aside against some respondents only and the case remanded, the successful appellant cannot get a refund of Court-fee. (*Ibid.*) Where the plaintiff appealed to the High Court only against the order in favour of some of the defendants and the High Court remanded the case to the Court of first instance only to that extent, *held*, that the certificate to be granted under S. 13 should authorise the appellant to receive only so much of the fee as would have been originally payable on the part of the subject-matter of the suit remanded. 54 A. 523=140 I.C. 466=1932 A.L.J. 320=1932 A. 550. *See also* 14 R. 173 (F.B.). The words of S. 13 do not appear to contemplate the grant of a certificate in respect of Court-fee paid in the lower appellate Courts. 47 L.W. 300=1938 M. 479. If an appeal is remanded, the Court is bound to grant a certificate under S. 13. Refusal to grant such certificate is a material irregularity within S. 115, C. P. Code. 42 B. 363=45 I.C. 552; (1945) 1 M.L.J. 205=58 L.W. 232=1945 M.W.N. 283=A.I.R. 1945 Mad. 351. Where the High Court reverses the decision of the first Court on a preliminary point, an order under S. 13 for refund of fee should be made. 15 I.C. 610=15 C.L.J. 658; 54 A. 523=1932 A. 550. Where the Court of second appeal remands a case to the lower appellate Court on any of the grounds mentioned in O. 41, r. 23, C. P. Code, the appellant is entitled to claim a refund of the Court-fee paid on the memorandum of appeal. 140 I.C. 56=1932 A.L.J. 745=1932 A. 641 (F.B.). Where an appellate Court remands a case for re-trial in a case not coming within O. 41, r. 23, C. P. Code, no order for refund of Court-fee can be passed. 42 I.C. 304. *See also* 36 I.C. 241=12 N.L.R. 126; 3 P.L.J. 116=43 I.C. 855; 18 P.L.T. 864; 100 I.C. 49=1927 L. 196; 1927 C.W.N. 761. (But *see the cases cited below*). Where an order of remand does not cover the whole of the subject-matter of the suit, an order directing refund of the whole Court-fees paid is wrong according to the provisions on the proviso to S. 13. I.L.R. (1940) Nag. 538=1940 Nag. 349. Where a Court remands a case under its inherent powers it can also order refund of Court-fee under the same inherent powers. 34 P.L.R. 270; 141 I.C. 400=1933 L. 135; 136 I.C. 559=1932 L. 219. Where a remand is made under the inherent powers, the refund of the stamp duty is discretionary while in the case of a remand under O. 41, r. 23, the refund is mandatory under S. 13. 1930 L. 441. *See also* I.L.R. (1937) Nag. 519=1937 Nag. 268. A certificate under this rule should be granted when the suit is dismissed because a document



Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded.

14. Where an application<sup>1</sup> for a review of judgment is presented on or after

LEG. REF.

<sup>1</sup> As to refund of fees paid on applications to the Chief Court or the Court of the Financial Commissioner of the Punjab for the exercise of its revisional jurisdiction under the Code of Civil Procedure—See the Punjab Courts Act (XVIII of 1884), S. 72 as amended by the Punjab Courts Act (XXV of 1829), P. and N. W. Code. As to application for review of judgment, see the Code of Civil Procedure, 1908 (Act V of 1908).

relied upon is inadmissible. 102 I.C. 298 (1)=1927 L. 592. S. 13 does not apply to the case of an appeal against a preliminary decree. 3 P.L.J. 116=43 I.C. 855. The trial Court dismissed the suit against defendants 4, 5 and 6 and decreed the claim against defendants 1, 2 and 3. The plaintiffs appealed to the District Judge claiming that a decree should be passed in their favour against defendants 4, 5 and 6 also. They made defendants 1, 2 and 3 *pro forma* respondents. The District Judge dismissed the appeal. On second appeal against the same parties, the High Court allowed the appeal and set aside the decree of the lower appellate Court as well as that of the first Court and sent the case back to the first Court. *Held*, that the plaintiff was entitled to a refund of the Court-fee paid in the High Court but not in the lower appellate Court. 56 A. 526=1934 A.L.J. 41=1934 A. 106 (F.B.). As to the scope of the proviso, see 6 W.R. 65. An application under S. 13 for refund of Court-fee is covered by S. 19, Cl. (xx) and no Court-fee is chargeable on it. 1932 A.L.J. 601=1932 A. 590.

REFUND IN GENERAL.—Where counsel stamps the memorandum of a time-barred appeal and is heard on the point of limitation and the appeal is dismissed, he cannot set up the plea of the failure of the Court Clerk to inform him of the practice about stamping appeal memoranda as a ground of claiming refund of the Court-fee paid. 22 I.C. 884=7 L.B.R. 90. Where excess Court-fee is paid, credit for the excess paid in the Original Court may be allowed in appeal to the plaintiff-appellant. 1886 A.W. N. 228. The Court has power to make an order for refund of excess Court-fee paid under a *bona fide* mistake. 107 I.C. 320=9 P.L.T. 240; 102 I.C. 193 (1)=1927 Sind 192; 40 C. 365=20 I.C. 498. See also 1928 P. 35; 107 I.C. 825 (P.). The High Court can under its inherent powers assist an appellant who has erroneously paid excess Court-fee on his memorandum of appeal. What it does judicially in such a case is to decide what is the proper Court-fee and then issue a certificate to the party that excess Court-fee has been levied. It still lies with the revenue authorities to decide whether or not they will refund the excess in the circumstances. 55 M. 641=62 M.L.J. 541=1932 M. 438. See also 40 C. 365; 57

I.C. 26. The High Court has no power to issue a certificate authorizing the Collector to refund the excess stamp duty paid by a suitor by reason of over-valuation of his suit. 20 W.R. 106; 102 I.C. 193=1927 S. 192. So also with regard to excess fee paid according to the wrong decision of the taxing officer. 39 P.R. 1907. See also 1925 P.H.C.C. 359=92 I.C. 626 (1)=1926 P. 147. But see 3 P.L.J. 452=46 I.C. 27; 40 C. 365=20 I.C. 428. Government however may order such refund, notwithstanding the absence of any special provision in the law authorizing them to do so. 39 P.R. 1907. Where owing to an erroneous order of the lower Court the defendant had to pay Court-fee in excess and though ultimately he succeeded in second appeal, the High Court did not include the excess Court-fee paid by the defendant in his costs, and the lower Court held it had no power in the matter, *held*, that justice should be done and the excess should be refunded. 36 C.W.N. 190=1932 C. 450=137 I.C. 791. Court-fees paid on appeal from final decree during pendency of appeal from preliminary decree should be refunded. 83 I.C. 829=1925 O. 39. Where appeal is dismissed for non-payment of additional Court-fee, Court-fee already paid cannot be refunded. 105 I.C. 742=6 P. 602. Whether High Court can order refund of Court-fee when second appeal is dismissed for want of jurisdiction, see 6 Pat. 599. The Chief Court has jurisdiction to order a refund of Court-fee even in cases which do not fall within Ss. 13, 14 and 15. Where the appeal was found to be wholly unnecessary and no proceedings except the admission of the appeal had taken place in respect thereof, *held*, that an order for refund of Court-fee might be passed. 7 Luck. 588=1933 O. 170. Loss of original certificate for refund—Court has power to issue a duplicate. 56 L.W. 56=(1943) 2 M.L.J. 377.

SECS. 13, 14 AND 20.—Custody fees though paid in Court-fee stamps as a matter of convenience are not Court-fees paid for any particular document under the Court-Fees Act. The money is legally payable in advance and hence no question of mistake or inadvertence comes in Ss. 13 and 14 of the Act do not apply to this case. The payment is contingent payment and if contingency does not happen the person depositing the fees is entitled to return. Apart from any rules, the Court has inherent jurisdiction to grant a refund of the custody fees when lying unspent. 64 C.L.J. 492=1937 C. 86=I.L.R. (1937) 1 Cal. 624.

SECS. 13 TO 15.—The Court has no power, after the appeal has been disposed of, to recover the deficient Court-fee on the memorandum of objections. [140 I.C. 191; 46 C. 520; 82 I.C. 588; 51 I.C. 756 (F.B.), Foll.] 142 I.C. 25=37 L.W. 300=1933 M. 321. In cases not falling under Ss. 13, 14 and 15 of the Court-Fees Act, the Revenue Authorities are

Refund of fee on application for review of judgment.

the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may, in its discretion, grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before<sup>1</sup> such day.

15. Where an application for a review of judgment is admitted, and where,

Refund where Court reverses or modifies its former decision on ground of mistake.

on the rehearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector so much of the fee paid on the [application]<sup>2</sup> as exceeds the fee payable on any other application to such Court under the second schedule to this Act, No. 1, clause (b) or clause (d).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing.

16. [*Additional fee where respondent takes objection to unappealed part of decree.*] *Rep. by Act V of 1908.*

17. Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Multifarious suits.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section 9.<sup>3</sup>

#### LEG. REF.

<sup>1</sup> See Sch. I, Nos. 4 and 5, *infra*.

<sup>2</sup> The word "application" was substituted for the original words "plaint or memorandum of appeal" by the Court-Fees Amendment Act (XX of 1870), S. 1 (amending this Act).

<sup>3</sup> The reference to S. 9 of C. P. Code, 1889, should be read as applying to O. 2, R. 6 of Act V of 1908.

not bound to make a refund even if a certificate of the Court is given. In such cases the Court has no power to order refund or to give a certificate to say that a party is entitled to it. All that the Court can certify is that he has paid excess Court-fee. 38 L.W. 983=66 M.L.J. 35. See also 39 C.W.N. 1074.

SEC. 14.—In calculating 89 days referred to in Art. 5, Sch. I, the time during which the Court is closed for vacation cannot be excluded. 9 M. 134. The apparent intention of S. 14 is to require full stamp in every case of delay after the 89th day from the date of the decree and to permit refund at the discretion of the Judge when the delay is not due to the appellant's laches. (*Ibid.*) See also 9 C.L.R. 479. On the section, see also 39 C.L.J. 344=80 I.C. 794=1924 C. 994.

The requirements of S. 15 are (1) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission; (2) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. A delay of six months in making the application was considered to be no bar to the

relief under section. 10 P. 649. When a case came clearly within O. 47, R. 1, C. P. Code and conditions requisite under S. 15 of the Court-Fees Act were present, refund was ordered though the Court proposed to act under S. 151, C. P. Code, instead of O. 47, r. 1. 1924 C. 1054=28 C.W.N. 928. See also 7 R. 88=1929 R. 158, where the Court ordered refund for the ends of justice and to prevent the abuse of the process of the Court although S. 15 was not applicable to the case. See also I.L.R. (1937) Nag. 519=1937 Nag. 268.

SEC. 17: SCOPE AND APPLICATION OF SECTION.—The object of the section is to prevent loss of revenue to the State. 6 I.C. 715. This section applies to cumulative relief for several distinct causes of action and has no application to distinct reliefs arising out of the same cause of action. 2 B. 219; 21 A. 200. See also 78 I.C. 415=1924 P. 596; 50 I.C. 470=4 P.L.J. 195. The words 'distinct subjects' are synonymous with distinct causes of action. 5 L.B.R. 95 (F.B.). See also 16 A. 401; 158 I.C. 780=39 C.W.N. 1146=1935 C. 573; 27 A. 184; 2 A. 679 (F. B.); 1 P.L.T. 444=57 I.C. 685; 110 I.C. 191=1928 P. 274; 24 Pat. 334=1945 P.W.N. 327=A.I.R. 1945 Pat. 421; 209 I.C. 530=A.I.R. 1943 Pat. 355; 22 Pat. 275=1943 P.W.N. 194=A.I.R. 1943 Pat. 356; (Separate claims to reliefs preferred by separate claimants are generally distinct subjects). 156 I.C. 135=1935 M. 262=68 M.L.J. 316 (two security bonds by the same judgment-debtor—Suit on—They constitute distinct subjects for purpose of Court-fee); 68 M.L.J. 280 (declaration as regards adoption and wills). They are not to be interpreted with reference to S. 7. 50 I.C. 470=1922 P. 359;

57 I.C. 685=1 P.L.T. 444. As to the meaning of the word 'subject' see 47 M. 150=45 M.L.J. 481=1924 M. 360; 9 P.L.T. 199=7 P. 402=1928 P. 274. The word 'distinct subjects' in S. 17, Court-Fees Act, means distinct causes of action. Where a suit is on more than one mortgage the Court-fee shall be paid on each mortgage. S. 67-A of the T. P. Act does not control S. 17 of the Court-Fees Act. When a subsequent general enactment cannot override or interfere with a special Act, one special Act cannot override or interfere with the provisions of another special Act. 1940 Rang.L.R. 767=1941 Rang. 95. Where two reliefs are claimed in the alternative in respect of the same cause of action, they cannot be considered to be "distinct subjects" within the meaning of S. 17 of the Court-Fees Act. 47 L.W. 64=1938 Mad. 241=(1938) 1 M.L.J. 139; 1925 Pat. 193. S. 17 applies to suits and appeals from suits and not to applications and appeals from orders passed on applications. 27 S.L.R. 312=1933 Sind 343. A suit for *khas* possession of *Zerai* lands against several persons holding the same, is based upon a single right and the Court-fee payable is upon a single cause of action. 9 P.L.T. 199. S. 17 applies to alternative reliefs claimed with reference to more causes of action than one. The section is not necessarily confined to cases where cumulative reliefs are claimed. 47 I.C. 866 (N.); 11 O.C. 173; 16 M.L.J. 462=30 M. 61. But see 44 I.C. 143 (P.); where it has been held that Court-fee must be paid on the relief which appears to be of the higher value. See also 78 I.C. 530=1925 P. 193 (2); 6 B. 302; 16 O.C. 354; 15 B. 82. Where reliefs claimed are alternative S. 17 of the Court-Fees Act does not apply and the Court-fee is payable on the relief which bears the highest valuation. 1939 A.M.L.J. 80. See also 1925 Pat. 193. Where plaintiff has paid Court-fee on smaller of two alternative reliefs, that relief alone should be tried. 1923 L. 456. Where however the alternative reliefs are based exactly on the same cause of action they are not two distinct subjects within the section. 5 L. 114=1924 L. 404; 39 C.L.J. 209; 96 I.C. 826=1926 L. 467. See also 62 M.L.J. 150=55 M. 336; 120 I.C. 411=1930 N. 55 (2). In such a case, Court-fee must be paid on the higher relief. But if a fixed Court-fee is payable in respect of one relief and *ad valorem* Court-fee in respect of another, even though the former is valued higher than the latter, the higher Court-fee should be paid. 55 M. 336=62 M.L.J. 150. Where in respect of a settlement deed executed by the last male-holder, his reversioner sues for a declaration that the said deed is not binding on him as having been brought about by fraud, coercion and undue influence, also praying for an alternative relief that if the deed is found to be valid, he should be given a decree for the amount payable under the deed, the cause of action is only one, namely, the execution of the deed; and though two reliefs are claimed in respect thereof, one on the footing of its validity and the other on the footing of its invalidity, they are not distinct subjects and the plaintiff need not therefore pay separate Court-fees on each of the two reliefs. 47 L.W. 664=1938 M. 241=(1928) 2 M.L.J. 139.

The appellant sued for possession of property purchased by him under a sale deed and in the alternative for the recovery of the consideration money paid by him. He valued the suit at Rs. 955 made up of Rs. 925 representing the value of the property and Rs. 30, the mesne profits claimed by him and paid Court-fee on that amount. The value of the alternative relief also was the same, *viz.*, Rs. 955 made up of Rs. 925 the amount of the consideration for the sale-deed and Rs. 30 for the incidental expenses. *Held*, that a single Court-fee based on the valuation of Rs. 955 was sufficient and the suit did not comprise two "distinct subjects" so as to fall under S. 17. 55 L.W. 621=A.I.R. 1942 Mad. 744=(1942) 2 M.L.J. 417. Where in a suit for specific performance of an agreement to sell, the consideration being the discharge of a mortgage debt due to the plaintiff, a decree on the mortgage is asked for as an alternative relief, the two reliefs are based on the same cause of action, and separate Court-fee on each is not necessary. The matter falls under the proviso to S. 17 (2) of the Court-Fees Act as amended in C. P. 1942 N.L.J. 352.

Suit for money on a promnote from legal representatives of the executant, or in the alternative from an alleged agent of the executant, is for alternative reliefs based on the same cause of action. 1930 N. 55. The plaintiff sued as endorsee of a promissory note. The defence was that the note offended the provisions of the Paper Currency Act. Thereupon the plaintiff obtained an assignment of the original obligation and applied to add it in his plaint. There was no question of limitation: *Held*, the amendment introduced a fresh cause of action, extraneous to the old, and so the plaintiff should be directed to pay Court-fees afresh on the new cause of action. 131 I.C. 1=1931 M. 533. See also 159 I.C. 340=1934 L. 605. (independent reliefs).

**SUIT FOR IMMOVEABLE PROPERTY AND PAST MESNE PROFITS.**—A suit for possession and for mesne profits is not a suit embracing two distinct subjects. 16 A. 401. See also 8 C. 593 (F.B.); 19 C. 615; (1942) O.W.N. 394=201 I.C. 567=A.I.R. 1942 Oudh 412. For decisions to the contrary, see 12 B. 96; 2 A. 676; 4 P.L.J. 195=50 I.C. 470 (each case depends on its own peculiar circumstances). In Madras, the question is now settled by the Full Bench decisions cited below. In a suit for possession of movable property and past mesne profits Court-fee is payable on the aggregate value of both the reliefs and not separately on the value of each relief. 1930 M. 833 (F.B.) [8 C. 593 (F.B.)]; and 16 A. 401, Rel. on; 38 M. 829 (F.B.). Expl. and Dist.; they are not "distinct subjects within the meaning of S. 17 (*ibid.*). A plaintiff suing for redemption of a mortgage and asking for surplus profits is not asking for two distinct reliefs, and the suit does not comprise distinct subjects within the meaning of S. 17 of the Court-Fees Act. The value which the plaintiff places on the relief for redemption covers the relief in regard to surplus profits as well, and the latter need not be valued separately. 1940 M.W.N. 1153=1941 Mad. 115=(1940) 2 M.L.J. 867. O. 2, rr. 2 and 4, C.P. Code,

clearly indicate that a claim for mesne profits would not be barred under O. 2, R. 2, C.P. Code, if such a claim was not included in a previous suit for possession and that the claims for possession and mesne profits are not based on the same cause of action. The cause of action in respect of the claim for arrears of royalty is also separate and distinct from the cause of action for *khas* possession and mesne profits. Consequently, a suit for *khas* possession, mesne profits and arrears of royalty, being based on three separate and distinct causes of action, is a *multifarious* suit and falls within the purview of S. 17. 1942 C. 40. See also 45 C.W.N. 996.

**SUITS FALLING WITHIN THE SECTION.**—S. 17 of the Act applies to suits where the plaintiff in the same suit unites several causes of action against the same defendant or the same defendants jointly and to appeals arising out of those suits. 15 Luck. 395=1940 O.W.N. 165=1940 O. 243. Suits on different hundies affording distinct causes of action. (9 A. 252); suit on several promissory notes executed in plaintiff's favour by defendant (5 L.B.R. 94=4 I.C. 289); suit against the principal debtor and several persons who have guaranteed the amount by separate pronotes or mortgages (8 Bur. L.T. 217=30 I.C. 705). A suit to enforce two different mortgages executed by the same person in respect of the same properties. 2 P. 874=1924 P. 77; 57 I.C. 685=1 P.L.T. 444; 63 C. 720=40 C.W.N. 406. But see 45 P.L.R. 382=A.I.R. 1943 Lah. 275 (F.B.). (Suit on two mortgage bonds where plaintiff treated the debt as one consolidated sum.) Suit to recover moneys due to plaintiff under three deposits made on different dates. 1931 M. 712=61 M.L.J. 680. Suit to enforce specific performance of an agreement to sell land with an alternative claim for pre-emption. (29 A. 155=4 A.L.J. 127; 96 P.R. 1895); claims for rent in suits for redemption (16 M. 415); suit by landlord against several sets of tenants for declaration that their several lands were held under the *Batai* system. (4 P.L.J. 299=51 I.C. 767). Suit by ryots in respect of several holdings for declaration that rent recorded by the settlement authority was much higher than the rents payable. 50 I.C. 328=4 P.L.J. 297. Suit for ejectment of different lessees of different properties. (1945) 2 M.L.J. 571. Suit for declaration arising from distinct cause of action. 1923 A. 306; 18 M. 459; (declaration in respect of various alienations) and claim for costs on appeal independently of the result of the the main contest between the parties. (3 P.L.J. 443=4 P.L.W. 223=44 I.C. 50) have been held to come within the section. See also 53 M. 248=1930 M. 376=58 M.L.J. 510 (F.B.); 53 M. 262=1930 M. 381=58 M.L.J. 521 (F.B.) Where the plaintiff in whose favour the first defendant had surrendered the suit lands for consideration, finding the land belonging to another person, files a suit against both, asking for possession against the latter or for refund from the former of the consideration paid, the suit embraces two distinct reliefs. 78 I.C. 703=1924 N. 169. Where the plaintiffs who are not in possession of any portion of the properties sought to be partitioned pray for joint possession and partition, they are bound to pay Court-fee

on two subject-matters within S. 17. The plaintiffs must pay the fixed fee for partition in addition to *ad valorem* fee in a suit for possession. 3 P. 618=81 I.C. 1052=1924 P. 558. A declaratory suit in respect of properties, partly in the Collector's possession and partly in the plaintiffs possession, each valued separately, is for two distinct subjects and the aggregate value of both the properties constitutes the value of the suit. 36 B. 628=14 Bom.L.R. 757=16 I. C. 1005. [On a ppeal, 50 I.C. 280=43 Bom. 507 (P.C.).] Where the plaintiff claims a sum of money as being due from the defendant on dealings between the parties, and also includes in the suit claims to certain items of money spent by him in connection with a lawyer's notice issued by him to the defendant and registration charges thereof, the latter items cannot be valued as separate and distinct subjects from the other items relating to the dealings, so as to be leviable to separate Court-fee under S. 17 of the Court-Fees Act. 59 M. 739=1936 M. 420=70 M.L.J. 308.

**"DISTINCT SUBJECTS."**—Suit for money—Plea in plaint that deed executed by defendant was not a due fulfilment of agreement between parties—If separate claim for cancellation liable to separate Court-fee. 1936 M. 266.

**SUITS NOT COMING WITHIN THE SECTION.**—Suit for pre-emption of shares in two villages conveyed by a single sale deed does not comprise two distinct subjects as there was only one cause of action. 27 A. 186=1904 A.W.N. 210. So also a suit to recover rent or mesne profits for a number of years. 7 A. 761; a suit to recover land and trees thereon. 40 M. 824=39 I.C. 254. Also a suit for arrears of maintenance and for future maintenance at a fixed rate. 23 Pat. 675=A.I.R. 1944 Pat. 387. Sale of land—suit by plaintiff for possession as owner or in alternative, by pre-emption, sec. 17 not applicable. 40 P.L.R. 33. Where certain creditors who had taken, for their common protection, a mortgage for the entire sum due to them in lieu of their separate claims against the debtor, sued to enforce the mortgage as a whole for their common benefit, *held*, that Court-fee was payable on the entire amount claimed as one subject and that the suit did not embrace distinct subjects within the meaning of S. 17. 1932 M. 737=63 M.L.J. 316. S. 17 is inapplicable to a suit by an assignee of mortgagee rights against mortgagee, the mortgagor, and his surety, as the cause of action against the mortgagee is not distinct from the cause of action against the mortgagor and his surety, and separate Court-fee is therefore not payable. 40 P.L.R. 528=1938 L. 566. A suit to set aside a mortgage of family property and a subsequent charge created over it for a subsequent loan, which was to be redeemed along with the mortgage, does not embrace two subjects. 142 I.C. 641=1933 L. 382. Where in respect of a deed of relinquishment dealing with a number of items of property several declarations are asked for in respect of the various items, only a single Court-fee is payable as the relief arises only out of a single cause of action, namely, the deed of relinquishment. 1939 A.M.L.J. 80. A suit filed by a landholder against the ryots of a village, under S. 193 of the Madras Estates Land Act,

18. When the first or only examination of a person who complains of the

Written examinations of offence of wrongful confinement, or of wrongful res-  
complainants. traint, or of any offence other than an offence for

which police-officers may arrest without a warrant, and who has not already presented a petition on which a fee has been levied under this Act, is reduced to writing under the provisions of the Code of Criminal Procedure,<sup>1</sup> the complainant shall pay a fee of eight annas, unless the Court thinks fit to remit such payment.

Exemption of certain docu-  
ments.

19. Nothing contained in this Act shall render the following documents chargeable with any fee.

(i) Power-of-attorney to institute or defend a suit when executed by an officer, warrant-officer, non-commissioned officer or private of Her Majesty's army not in civil employment.

(ii) [*Rep. by the Repealing and Amending Act, 1891 (XII of 1891).*]

(iii) Written statements called for by the Court after the first hearing of a suit.

(iv) [*Rep. by the Cantonments Act, 1889 (XIII of 1889).*]

(v) Plaints in suits tried by Village Munsiff's<sup>2</sup> in the Presidency of Fort St. George.

(vi) plaints and processes in suits before District Panchayats in the same Presidency.

#### LEG. REF.

<sup>1</sup>This reference should now be read as referring to the Code of Criminal Procedure (Act V of 1898), see S. 3 of that Act.

<sup>2</sup>See the Madras Village Courts Act, 1889, (I of 1889), Madras Code.

does not comprise "distinct subjects" within the meaning of S. 17 of the Court-Fees Act. The Court-Fee payable is on the total of the annual rents of the immovable property to which the suit relates and not on the aggregate of the Court-fees separately payable in respect of the rent of the holding of each particular ryot calculated in accordance with the provisions of S. 7 (xi) (b) of the Act. 1932 M. 667=63 M.L.J. 73. As to appeal against disallowance of claim made under S. 9 of the United Provinces Encumbered Estates Act. 15 Luck. 395=1940 O.W.N. 165=1940 O. 243. For such a case the Bengal Government have framed a Rule Notification No. 6954, L.R., dated 21st July, 1922, according to which Court-fee is to be paid separately for each tenancy. See 59 C. 997=1932 C. 674. See also 3 Pat.L.J. 299=51 I.C. 767, *supra*. Claim for possession and damages for use and occupation after the tenancy terminates are not distinct subjects within S. 17 as they arise out of the tenancy having come to an end. A claim for rent however is a distinct subject as it arises out of the contract of tenancy and can be enforced by a separate suit. 10 Bur. L.T. 60=36 I.C. 883. A suit for recovery of possession of lands with mesne profits from defendants who held different parcels of land separately is based on a single right and S. 17 did not apply. 1928 P. 274. See also 24 Pat. 334=1945 P.W.N. 327=A.I.R. 1945 Pat. 427 (suit for possession of profits, some of which have been sold in private sales and the rest in execution of mortgage decrees). Where the main case of a plaintiff is that he is entitled to all the properties under a primogeniture *sanad* and that is the main cause of action in respect

of all the properties, the fact that some alternative pleas based on different causes of action are raised in respect of some of the items is no ground for charging a separate fee on each of the various items. 201 I.C. 567=1942 O.W.N. 394=A.I.R. 1942 Oudh 412. In a suit for specific performance and possession, Court-fee need be paid only for one prayer. 47 M. 150=45 M.L.J. 431. But see 60 I.C. 654=23 O.C. 388, See also the cases noted under S. 7, cl. (x). In a suit for cancellation of a compromise, the preliminary decree and the final decree, Court-fee is payable on the value of the final decree only, as they are not distinct subjects. 1932 A.L.J. 684=1932 A. 485 (F.B.). In a suit for the balance on a Khata (accounts), which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject-matter of the suit is the balance due on the account and Court-fee is payable on the aggregate amount. 64 I.C. 486 (2)=23 Bom. L.R. 995.

MAXIMUM FEE.—The rule laid down in the section is subject to Sch. I, Art. 1, proviso and the maximum fee in a multifarious suit is Rs. 3,000. 3 A. 101 (F.B.) See also 29 C. 140.

CONSOLIDATION OF APPEALS.—In a case of consolidation of appeals for purposes of hearing, the appeals, are to be separately treated for purposes of stamp on memorandum of appeal. 117 I.C. 692=1929 C. 135. If two sums of Rs. 600 and Rs. 400 respectively are claimed in a suit on two pronotes, Court-fee is payable on the two sums separately, the lower scale prescribed under Art. 2 being payable for the second sum. 1933 M. 178=65 M.L.J. 252.

S. 17 as amended in Bengal. See 45 C.W.N. 996; 1942 Cal. 40.

SEC. 19 (iii).—Written statement pleading a set-off is not exempt. The exemption from stamp duty on written statements in S. 19 (iii), Court-Fees Act, is not limited to written statements in suits, but also applies to written state-

(vii) Plaints in suits before Collectors under Madras Regulation XII of 1816.

(viii) Probate of a will, letters of administration, [and, save as regards debts and securities, a certificate under Bombay Regulation VIII of 1827]<sup>1</sup> where the amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees.

(ix) Application or petition to a Collector or other officer making a settlement of land-revenue, or to a Board of Revenue, or a Commissioner of Revenue, relating to matters connected with the assessment of land or the ascertainment of rights thereto or interests therein, if presented previous to the final confirmation of such settlement.

(x) Application relating to a supply for irrigation of water belonging to Government.

(xi) Application for leave to extend cultivation, or to relinquish land, when presented to an officer of land-revenue by a person holding, under direct engagement with Government, land of which the revenue is settled, but not permanently.

(xii) Application for service of notice of relinquishment of land or of enhancement of rent.

(xiii) Written authority to an agent to distrain.

(xiv) First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person to attend either to give evidence or to produce a document or in respect of the production or filing of an exhibit not being an affidavit made for the immediate purpose of being produced in Court.

(xv) Bail-bonds in criminal cases, recognizances to prosecute or give evidence, and recognizances for personal appearance or otherwise.

(xvi) Petition, application, charge or information respecting any offence when presented, made or laid to or before a Police-officer, or to or before the Heads of <sup>2</sup>Villages or the Village Police<sup>3</sup> in the territories respectively subject to the Provincial Government of Madras and Bombay.

(xvii) Petition by a prisoner, or other person in duress or under restraint of any Court or its officers.

#### LEG. REF.

<sup>1</sup> These words were substituted for the original words and figures "and certificate mentioned in the First Schedule to this Act annexed, No. 12" by the Succession Certificate Act (VII of 1889), S. 13 (2).

<sup>2</sup> See Madras Regulations XI of 1816 and (IV of 1821), S. 6, Mad. Code.

<sup>3</sup> See Bombay Village Police Act (VII of 1867), Ss. 14, 15, and 16 Bom. Code.

ments in miscellaneous cases. Written statements filed in answer to an application by the official liquidator of a company to set aside transfers as fraudulent are therefore exempt from Court-fees under S. 19 (iii). 4 A.W.R. 1196=148 I.C. 642=1934 A.L.J. 881=1934 A. 322.

Sec. 19, Cl. (viii).—No duty is payable in respect of a grant of probate or letters administration where the net value of the estate after the reductions specified in Sch. III, Annexures A and B, is less than Rs. 1,000. 40 A. 279=46 I.C. 865; 7 Bur. L.T. 275=24 I.C. 823. According to the Calcutta High Court, where the gross value is above and the net value below Rs. 1,000 a fee of 2 per cent. is payable, on the net value. 15 I.C. 621=17 C.W.N. 21. See also 18 C.W.N. 121=18 C.L.J. 308; 24 I.C. 823=20 C.W.N. 591. Where, in an application for letters of administration, the widow claimed provident fund amount in her own right, the

amount is not liable to probate duty. 33 C.W.N. 1148=1930 C. 252.

Sec. 19 (xvii).—Sub-S. (xvii) of S. 19 of the Court-Fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. An application by a prisoner praying that an order of acquittal of the opposite party should be set aside and that they should be convicted and sentenced according to law, is wholly unconnected with the applicant's condition or status as a prisoner and asks for no relief affecting him in his capacity as a prisoner. That being so, his application does not fall within sub-S. (xvii) of S. 19 and is, therefore, not exempt from stamp fees. 1936 A.L.J. 453=1936 A. 318. The petition mentioned in Cl. (xvii) of S. 19 must be a petition in respect of, or connected with or arising out of, the matter in connection with which the petitioner is in prison, in duress or under restraint. I.L.R. (1941) 1 All. 793=198 I.C. 275=1941 A.L.J. 733=A.L.R. 1942 All. 45=1941 A.L.W. 1083. No Court-fee is leviable on the memorandum of appeal against an order rejecting an application by a judgment-debtor whilst in custody, to be declared an insolvent. 10 Cl. 61. A petition of appeal or revision presented by a pleader on behalf of the prisoner is exempted from Court-fees. 45 I.C. 158=14 N.L.R. 77; 1 R. 510=1924 R. 160; 202 I.C. 379=A.L.R.



(xviii) Complaint of a public servant (as defined in the Indian Penal Code), a municipal officer, or an officer or servant of a Railway Company,

(xix) Application for permission to cut timber in Government forests, or otherwise relating to such forests.

(xx) Application for the payment of money due by Government to the applicant.

(xxi) Petition of appeal against the <sup>1</sup>chaukidari assessment under Act No. XX of 1856, or against any municipal tax.

(xxii) Applications for compensation under any law for the time being in force relating to the acquisition of property for public purposes.<sup>2</sup>

(xxiii) Petitions presented to the Special Commissioner appointed under Bengal Act No. II of 1869 (*to ascertain, regulate and record certain tenures in Chota Nagpur.*)

<sup>3</sup>(xxiv) [Petitions under the Indian Christian Marriage Act, 1872, Ss. 45 and 48.]

### CHAPTER III-A.<sup>4</sup>

#### PROBATES, LETTERS OF ADMINISTRATION AND CERTIFICATES OF ADMINISTRATION.

19-A. Where any person on applying for the probate of a will or letters of administration has estimated the property of the

Relief where too high a court-fee has been paid. a deceased to be of greater value than the same has afterwards proved to be, and has consequently paid

too high a court-fee, thereon, if, within six months after the true value of the property has been ascertained, such person produces the probate or letters to the Chief Controlling Revenue authority [for the local area]<sup>5</sup> in which the probate or letters has or have been granted.

and delivers to such authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said Authority may—

(a) cancel the stamp on the probate or letters if such stamp has not been already cancelled;

(b) substitute another stamp for denoting the court-fee which should have been paid thereon; and

(c) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at his discretion.

19-B. Whenever it is proved to the satisfaction of such authority that an

#### LEG. REF.

<sup>1</sup> U.P. Code.

<sup>2</sup> See now the Land Acquisition Act, 1894 (I of 1894).

<sup>3</sup> This clause was substituted for the original clause by the Indian Christian Marriage Act (XV of 1872), S. 2. The original clause was as follows:—"Petitions under the 14th and 15th of Victoria, c. 40 (*an Act for Marriages in India*), S. 5, or under Act No. V of 1852, S. 9."

<sup>4</sup> Chapter III-A was inserted by the Probate and Administration Act (XIII of 1875), s. 6.

<sup>5</sup> Substituted for the words "of the Province" by S. 3 (1) of the Court-Fees (Amendment) Act (X of 1901).

SEC. 19 (xviii).—See 5 B.H.C.R. 104; 16 M. 423.

SEC. 19 (xx).—An application for refund of money deposited for the cost of preparing a paper book, etc., is not an application for payment of money due by Government within cl. (xx). On the other hand it is an application or petition presented to the High Court within the provisions of Sch. II, Art. 1. 27 C.W.N. 646=1923 C. 599. An application under S. 13 for refund of Court-fee is covered by the clause. 1932 A.L.J. 601=1932 A. 590.

SEC. 19-A.—On an application for probate, the Court-fee chargeable is to be assessed on the value of the estate at the time of application. Subsequent changes in value do not alter the amount of Court-fee payable. 80 I.C. 4=5 Bur.L.T. 39. The uncertainty of recovering a debt is no ground for reducing the proportionate duty payable thereon. 24 C. 567; nor the fact that an item of property is the subject of litigation. 24 M. 241. But see cases cited under Art. 11, Sch. I.

SEC. 19-B.—On this section, see N.W.P. 214; 1 B. 118; 8 B.L.R. (App.) 43=16 W.R. 253.

1942 Pesh. 50. So also an application for bail by the advocate of a prisoner in jail. 23 Cr. L. J. 121=(1921) 4 U. B. R. 72=1922 U.B. 14. So also an adjournment application by the Counsel. 1930 Cr.C. 373=1930 A. 261. But a petition from an accused, in his defence in summons cases, appears to be liable to the payment of Court-fee. U.B.R. (1892-1896) Vol. 1, p. 9.



Relief where debts due from a deceased person have been paid out of his estate.

or value of the estate, would have occasioned a less court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act.

Such authority may return the difference, provided the same be claimed within three years after the date of such probate or letters,

But when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said Authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

19-C. Whenever<sup>1</sup> a grant of probate or letters of administration has been

Relief in case of several grants.

or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the said Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

19-D. The probate of the will or the letters of administration of the effects

Probates declared valid as to trust-property though not covered by court-fees.

of any person deceased heretofore or hereafter granted shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any moveable or immoveable property whereof or where-to the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration.

#### LEG. REF.

<sup>1</sup> The word "such" was repealed by the Repealing and Amending Act (XII of 1891).

Sec. 19-C.—The section does not apply where property in question has never yet paid any duty in India under the Succession Act. 4 C. 725. But see also 21 B. 673. Where a full fee chargeable on the probate at the time it was granted has been paid, no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate. 43 C. 625=20 C.W.N. 472=30 I.C. 394. The full fee chargeable must be determined with reference to the point of time when the second grant is sought. (*ibid*). When an executor to whom probate is granted, dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration, there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied. (*ibid*). (3 C. 733, Foll.) In the case of an appointment *de bonis non* there is no new succession and no new devolution of the estate, which would justify demand of fresh Court-fees. 3 R. 90=88 I.C. 759=1925 R. 217. An applicant for probate of his wife's

will is bound to pay the full Court-fees due even though the bulk of the property dealt with in the will was included in the wife's father's will of which probate had been granted on full payment of Court-fees. 5 P.L.J. 36=54 I.C. 703.

Sec. 19-D.—Trust properties are exempted from payment of 2 per cent. *ad valorem* fee prescribed by Sch. I, Art. 11. 11 B.L.R. (App.) 39=19 W.R. 230. See also 33 M. 93=19 M.L.J. 591=4 I.C. 1064; 29 B. 161. When a person chooses to apply for Letters of Administration, whether the Letters are absolutely necessary or not and they are granted, he must pay the proper Court-fee according to Art. 11, Sch. I, of the Court-Fees Act. S. 19-D does not in any way exempt from payment of Court-fee letters obtained by a coparcener of a Hindu joint family in respect of property which he takes by survivorship, and not by inheritance as heir. A co-sharer member of a joint Hindu family interested to the extent of an undivided share in the whole of the joint family property cannot be held to be "trustee" for the other co-sharers within the meaning of S. 19-D. Whether an application by the surviving coparceners for Letters of Administration in

19-E. Where any person on applying for probate or letters of administration has estimated the estate of the deceased to be of

Provision for case where too low a court-fee has been paid on probate, etc.

less value than the same has afterwards proved to be, and has in consequence paid too low a court-fee thereon, the Chief Controlling Revenue authority <sup>1</sup>[for the local area] in which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of grant, of five times, or, if it or they is or are produced after one year from such date, of twenty times, such proper court-fee, without any deduction of the court-fee originally paid on such probate or letters :

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequence of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

19-F. In case of letters of administration on which too low a court-fee has

Administrator to give proper security before letters stamped under section 19-E.

been paid at first, the said Authority shall not cause the same to be duly stamped in manner aforesaid until the administrator has given such security to the Court by which the letters of administration have

been granted as ought by law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

#### LEG. REF.

<sup>1</sup> Substituted for the words "of the Province" by S. 3 (1) of the Court-Fees (Amendment) Act (X of 1901.)

respect of the undivided share of a deceased co-parcener is necessary or not, is not a matter to be decided by the Court to which the application is made; when once an application has been made for Letters of Administration, it is necessary to pay the Court-fee and no exemption can be had. 17 Pat. 542. Where property is jointly purchased by four brothers, and one of them dies leaving a will and appointing others as trustees, such property is not liable to probate duty. 23 C. 980=1 C.W.N. 31. A son applying for letters of administration limited to joint family property left by his father, need not pay any Court-fee. 25 Bom.L.R. 1240=48 Bom. 75=1924 B. 228 (F.B.); 47 Bom.L.R. 862; I.L.R. 1942 Lah. 717=202 I.C. 114=44 P.L.R. 330=A.I.R. 1942 Lah. 178 (F.B.) But *see contra* 19 M.L.J. 591=4 I.C. 1064=33 M. 93. As to the conflict of rulings on this point, *see also* cases noted below. In obtaining probate on a will, the legatees must pay full duty leviable on the property comprised in the will. No exemption is allowed to persons capable of inheriting in their natural rights. A Hindu getting residue of his father's property under his will, is not entitled to any exemption on the ground that he is entitled to the property

by survivorship. 5 P.L.J. 510=58 I.C. 1007=1 P.L.T. 710. *See also* 1935 A. 449. A will purporting to dispose of properties held jointly between the testator and his minor son as members of a joint Hindu family, is not exempt from probate duty. 39 B. 245=28 I.C. 475=17 Bom.L.R. 169. A widow who was an executor under a will owning life interest in the property bequeathed jointly to her and certain others was not at trustee, and the other legatees applying for letters of administration after her death, under the will cannot claim exemption under the section read with Sch. III, Annexure B. 30 Bom.L.R. 54. A private company in which a provident fund is deposited cannot be deemed to be trustee for the defendant or the nominee of the depositor and such a deposit is not exempt from Court-fees in letters of administration by the nominee. 6 R. 558=1928 R. 312.

SEC. 19-E : APPLICATION OF THE SECTION.—S. 19-E contemplates an application on the part of a person who has taken out probate and produces the same as duly stamped. Where the estimated value of the estate is less than what the value has afterwards been proved to be, then only a Revenue Court can impose penalty. Where there is no determination of value by the Probate Court, S. 19-E has no application. 43 C. 230=20 C.W.N. 504. A suit lies in the Civil Court by the Secretary of State for recovery of a penalty lawfully imposed under S. 19-E. 43 C. 230.

19-G. Where too low a court-fee has been paid on any probate or letters of administration in consequence of any mistake, or

Executors, etc., not paying full court-fee on probates, etc., within six months after discovery of under-payment.

of its not being known at the time that some particular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters does not within six months [\* \*

\* \* \* \* \*] after the discovery of the mistake or of any effects not known at the time to have belonged to the deceased apply to the said authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

Notice of application for probate or letters of administration to be given to Revenue authorities, and procedure thereon.

<sup>2</sup>19-H. (1) Where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice<sup>3</sup> of the application to be given to the Collector.

(2) Where such an application as aforesaid is made to a High Court, the High Court shall cause notice of the application to be given to the Chief Controlling Revenue Authority [for the local area in which the High Court is situated.]<sup>4</sup>

(3) The Collector within the local limits of whose revenue-jurisdiction the property of the deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of, the record of any case in which application for probate or letters of administration has been made; and if, on such inspection or otherwise, he is of opinion that the petitioner has under-estimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner, (either in person or by agent) and take evidence and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the petitioner to amend the valuation.

#### LEG. REF.

<sup>1</sup> The words and figures "after the first day of April, 1875, or" were repealed by the Repealing and Amending Act (XII) of 1891).

<sup>2</sup> Ss. 19-H, 19-I, 19-J and 19-K were inserted by the Court-Fees Amendment Act, 1899 (XI of 1899), S. 2.

<sup>3</sup> For form of notice under this clause prescribed by the Chief Court of Lower Burma, see Burma Gazette, 1902, Pt. IV, p. 625.

<sup>4</sup> Substituted for the words "of the Provinces" by S. 3 (i) of the Court-fees Amendment Act (X of 1901).

SEC. 19-G.—As to recovery of penalties or forfeitures under S. 19-G, see *infra*, S. 19-J. S. 19-G refers to any mistake, not merely to a mistake of fact. 30 S.L.R. 201=1936 Sind 150.

SEC. 19-H.—The grant of probate cannot be delayed on account of the Collector's omission in making the motion under S. 19 (H) (4). 40 I.C. 576 (C.) As to procedure under the section, see 6 C.W.N. 898. The valuation fixed by the Dt. Judge after objection made by Collector is final and no appeal lies therefrom. 78 I.C. 901=1925 C. 357. A proceeding under S. 19-H merely decides a revenue dispute between the Collector and the holder of probate. The Court has no power to award costs in such proceeding. 50 C. 239=1923 C. 406.

CL. (3) : CONSTRUCTION.—UNDER-ESTIMATION OF VALUE.—MEANINGOF.—The value of an estate under-estimated if part of it is wrongly exempted on the ground that it is held in trust. The

valuation is for the purposes of assessing the duty payable and such valuation is under-estimated if assets which should not have been excluded from that valuation, are excluded. 62 C. 114=1935 C. 509.

CL. (4) Scope.—Application for letters of administration.—Claim to exemption from Court-fee on the ground of the fund being held in trust not beneficially.—Certificate by Registrar of High Court exempting from Court-fee.—If bars application by Collector. 62 C. 114. Per *Curium*.—If a husband enters any shares in the names of himself and his wife, then it is an advancement for the benefit of the wife absolutely if she survives her husband. Hence on the wife's survival, such shares are not property of her deceased husband. The wife then is not liable to pay Court-fees on the value of the shares (English cases considered). 9 Luck. 370=1934 O. 72. An application to the Calcutta High Court by the Collector under S. 19-H (4) should be made in its testamentary and intestate jurisdiction, and not in its ordinary original civil jurisdiction. 49 C.W.N. 695. Under S. 19-H (4) it is not enough for the Collector simply to make an application for enquiry. He should place before the Court materials showing that an enquiry is needed (*i.e.*), he should make a case for enquiry upon definite facts. 49 C.W.N. 695.

STARTING POINT.—The period of six months prescribed in the proviso to sub-S. 4, S. 19-H must be taken to run from the time of the pro-

(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court before which the application for probate or letters of administration was made, to hold an inquiry into the true value of the property :

Provided that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by section 277 of the Indian Succession Act, 1865, or, as the case may be, by section 98 of the Probate and Administration Act, 1881.

(5) The Court, when so moved as aforesaid, shall hold, or cause to be held, an inquiry accordingly, and shall record a finding as to the true value, as near as may be, at which the property of the deceased should have been estimated. The Collector shall be deemed to be a party to the inquiry.

(6) For the purposes of any such inquiry, the Court or person authorized by the Court to hold the inquiry may examine the petitioner for probate or letters of administration on oath (whether in person or by commission), and may take such further evidence as may be produced to prove the true value of the property. The person authorized as aforesaid to hold the inquiry shall return to the Court the evidence taken by him and report the result of the inquiry, and such report and the evidence so taken shall be evidence in the proceeding, and the Court may record a finding in accordance with the report, unless it is satisfied that it is erroneous.

(7) The finding of the Court recorded under sub-section (5) shall be final, but shall not bar the entertainment and disposal by the Chief Controlling Revenue authority of any application under section 19-E.

(8) The Provincial Government may make rules for the guidance of Collectors in the exercise of the powers conferred by sub-section (3).

<sup>1</sup>19-I. (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an appli-

Payment of court-fees in respect of probates and letters of administration.

cation for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

#### LEG. REF.

<sup>1</sup>Inserted by S. 2 of the Court-Fees (Amendment) Act (XI of 1899).

sentation of the revised inventory. [41 Cal. 556 (P.C.), Rel. on.] 9 Luck. 370=1934 O. 72.

Sec. 19-I : CONSTRUCTION.—The word "property" in S. 19-I is used in its inclusive and not in its exclusive sense, and means all the property of the deceased. What the section requires is a full and honest account of all the property of the estate in respect of which a grant is applied for. 30 S.L.R. 201=165 I.C. 202=1936 Sind 150. The expression "valuation of the property" in S. 19 means valuation of the property of the deceased. 9 Luck. 370=1934 O. 72. Court-fee payable on the value as on the date of the application and subsequent alteration of law, enhancing the Court-fee does not affect the petitioner's rights. 39 C.L.J. 209=1924 C. 987. The practice in Calcutta is to pay Court-fees to the Registrar whose certificate should be produced in Court to obtain the grant. 26 C. 404=26 C. 407. See also L.B.R. (1893-1900) 623. In Subordinate Courts the fees must be paid to the Court clerk who will certify the amounts to the Court. L.B.R. (1893-1900) 623. A Court will hear the application for Probate or Letters of Administration where the applicant has not paid but has undertaken to pay whatever fees would be found due.

14 O.C. 14=8 I.C. 695. S. 19-I says that the Court shall not grant probate until the Court-fees are paid. It does not say that the Court shall not try an application for probate or letters of administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application. I.L.R. (1942) 2 Cal. 194=204 I.C. 457=A.I.R. 1943 Cal. 19. On this section, see also 31 I.C. 460. On a petition for letters of administration for part of property Court-fee on the value of the whole property cannot be levied. 90 I.C. 620=1925 L. 493. See also 1935 Sind 150. The section does not apply to provident fund money. 1925 N. 108 (1)=82 I.C. 128. An executor cannot be compelled to pay probate duty until the Collector has finished his work with regard to valuation of the property. 1929 C. 733. The question whether a certain property is or is not trust property comes under S. 19-I and an order in respect of that property by a Financial Commissioner under S. 19-G without proceeding under S. 19-H is *ultra vires*. 1928 L. 947. [33 M. 93 (F.B.), Fol<sup>1</sup>] The date of the payment for the valuation of the estate for the purpose of assessment of probate duty is the date on which the application for grant of probate is made. The Court-fee ought to be levied as a preliminary on the valuation put forward by the applicant for probate but the duty chargeable may subsequently be revised as a result of a reference

(2) The grant of probate or letters of administration shall not be delayed by reason of any motion made by the Collector under section 19-H, sub-section (4).

<sup>1</sup>19-J. (1) Any excess fee found to be payable on an inquiry held under section 19-H, sub-section (6), and any penalty or Recovery of penalties, etc. forfeiture under section 19-G, may, on the certificate of the Chief Controlling Revenue Authority be recovered from the executor or administrator as if it were an arrear of land-revenue by any Collector in any part of British India.

(2) The Chief Controlling Revenue Authority may remit the whole or any part of any such penalty or forfeiture as aforesaid, or any part of any penalty under section 19-E or of any court-fee under section 19-E in excess of the full court-fee which ought to have been paid.

Sections 6 and 28 not to apply to probate or letters of administration.

<sup>1</sup>19-K. Nothing in section 6 or section 28 shall apply to probates or letters of administration.

## CHAPTER IV.

### PROCESS-FEES.

Rules as to cost or processes.

20. The High Court shall, as soon as may be, make rules as to the following matters :

(i) The fees chargeable for serving and executing processes issued by such Court in its appellate jurisdiction, and by the other Civil and Revenue Courts established within the local limits of such jurisdiction ;

### LEG. REF.

<sup>1</sup>Inserted by S. 2 of the Court-Fees (Amendment) Act (XI of 1899).

made by the Collector under S. 19-H of the Act. 12 L.L.T. 37. O. VIII, r. 14 of the Madras High Court (Original Side) Rules, which relates to paupers, refers not only to suits but also to proceedings. An application for probate is clearly a proceeding within the meaning of this rule, and it is open to the Court not only to entertain the application *in forma pauperis* but also to make a further order granting probate to the applicant without payment by him of the requisite Court-fee (succession duty) under Art. 11, Sch. I of the Court-Fees Act. In this respect, S. 19-I of the Court-Fees Act should be reasonably interpreted; the section cannot be read as altering the policy of the pre-existing law. In such cases, on the analogy of O. 33, r. 10, C. P. Code, the Government has a first charge on the subject-matter of the pauper application, *i.e.*, the estate of the deceased. (1937) 2 M.L.J. 899. Application for probate—Duty called for and paid and application refiled—Receipt of dividends in the meantime—Date for valuation of estate. See 14 L. 526=1933 L. 936. Where duty is enhanced after application and before grant, the enhanced duty should be paid. 23 Pat. 672; 218 I.C. 293=A.I.R. 1945 Pat. 86. I.L.R. 1944 All. 229=1944 A.L.J. 133=A.I.R. 1944 All. 119: But see *contra* 46 Bom.L.R. 768=A.I.R. 1945 Bom. 1; 24 Pat. 171=A.I.R. 1945 Pat. 361. S. 19-I is subject to O. 33, C. P. Code—Probate or letters of administration *in forma pauperis*—Court has power to issue. See 47 L.W. 731=1938 M. 486=1938 M.W.N. 640.

NON-COMPLIANCE WITH—EFFECT.—It does not follow that because an application for letters of administration with the will annexed, is not in proper form, because of non-compliance with the provisions of S. 19-I of the Court-Fees

Act the proceedings are a nullity. The Court may not pass an order granting letters until the application is made in proper form and fulfils the requirements of the law. The Court can give the applicant an opportunity to amend the application and make good the debts, and then proceed, to make a grant. It is not necessary that the application should be dismissed and that the applicant asked to start the proceedings *de novo*. 30 S.L.R. 201=1936 Sind 150.

SEC. 19-J.—Where S. 19-J is properly applicable, the petitioner is entirely in the hands of the Chief Controlling Revenue Authority who is at liberty to refuse to stamp probate till the penalty has been paid. 43 C. 230=20 C.W.N. 504=31 I.C. 460.

SEC. 20.—A commission issued to an Ameen to make local investigation, is not a process within S. 20. 17 C. 281. The provisions of S. 93, C. P. Code (now O. 48, r. 1), do not appear to give a Court any power to depart from the rules of the High Court on the subject of the levy of process-fees or to remit these fees. 26 C. 124. The Court of a Special Judge is a Civil Court within the meaning of S. 20. In appeals before the Special Judge, process fees should be paid according to the scale laid down in the High Court Rules framed under the section. R. 65 of the rules framed by the Government under S. 189 of the B. T. Act is not applicable to such a case. 58 C. 995=35 C.W.N. 253=1931 C. 572. Scope—Custody fees in respect of attachment of movables—Decree-holder has a right to refund of unspent fees. See 1937 C. 86=I.L.R. (1937) 1 Cal. 624.=41 C.W.N. 155. An order issued by the Court for the sale of property in its custody during the pendency of a suit either by the process establishment of the Court or by an officer specially appointed under r. 197 of the Madras Civil Rules of Practice and Circular Orders is a "process" within the meaning of S. 20 of the Court-Fees Act and the sale is therefore charge-

(ii) the fees chargeable for serving and executing processes issued by the Criminal Courts established within such limits in the case of offences other than offences for which police officers may arrest without a warrant; and

(iii) the remuneration of the peons and all other persons employed by leave of a Court in the service or execution of processes.

The High Court may, from time to time, alter and add to the rules so made.

All such rules, alterations and additions shall, after being confirmed by the Provincial Government [\* \* \* \* \*]

Confirmation and publica- \* \* \* \* \*<sup>1</sup> be published in the Official  
tion of rules. Gazette, and shall thereupon have the force of law.

Until such rules shall be so made and published, the fees now leviable for serving and executing processes shall continue to be levied, and shall be deemed to be fees leviable under this Act.

21. A table in the English and Vernacular languages, showing the fee chargeable for such service and execution, shall be  
Tables of process fees. exposed to view in a conspicuous part of each Court.

22. Subject to rules to be made by the High Court and approved by the Provincial Government  
Number of peons in District [\* \* \* \* \*]<sup>2</sup>  
and Subordinate Courts.

every District Judge and every Magistrate of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court and each of the Courts subordinate thereto

and for the purposes of this section, every Court of Small Causes established under Act No. XI of 1865 (*to consolidate and amend the*  
Number of peons in Muffasal Small Cause Courts. *law relating to Courts of Small Causes beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature*)<sup>3</sup> shall be deemed to be subordinate to the Court of the District Judge.

\*23. Subject to rules<sup>4</sup> to be framed by the Chief Controlling Revenue Authority and approved by the Provincial Govern-  
Number of peons in Revenue [\* \* \* \* \*]<sup>5</sup> every officer performing the  
Courts. functions of a Collector of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court or the Courts subordinate to him.

24. [Process served under this Chapter to be held to be process within the meaning of the Code of Civil Procedure.] Rep. by the Repealing and Amending Act (XII of 1891).

#### LEG. REF.

<sup>1</sup> The words "and sanctioned by the Governor-General of India in Council" were omitted by Act XXXVIII of 1920, S. 2, Sch. I.

<sup>2</sup> The words "and the Governor-General of India in Council" were omitted by Act XXXVIII of 1920, S. 2, Sch. I.

<sup>3</sup> The reference to Act XI of 1865 should now be read as referring to the Provincial Small Cause Courts Act (IX of 1887), see S. 2 (3) of that Act.

<sup>4</sup> In the Punjab S. 23 is repealed—see the Punjab Land Revenue Act (XVII of 1887), P. and N. W.-F. Code.

<sup>5</sup> For rules framed under the powers conferred by this section—

Madras . . . . . see Mad. R. and O.  
Central Provinces . . . . . see C. P. Gazette, 1905, Pt. III, p. 507.

Assam . . . . . see Assam Rules Manual.

As to Burma, see S. 41 of the Lower Burma Courts Act (VI of 1900).

able with poundage under R. 200. It is a proceeding in execution within the meaning of the Rules. Any remuneration paid to a person appointed to conduct the sale is exclusive of the poundage which, under R. 200, is one of the expenses of the sale and therefore the fixing of the remuneration of the person appointed to hold the sale does not obviate the necessity for the levy of poundage. I.L.R. (1945) Mad. 816 = A.L.R. 1945 Mad. 238 = (1945) 1 M.L.J. 320. Court has no inherent jurisdiction to consolidate Civil Revision Petition in cases disposed of by a single Judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process-fee for the common respondents. 53 M. 262 = 1930 M. 381 = 58 M.L.J. 521 (F.B.). See also 53 M. 248 = 58 M.L.J. 510 = 1930 M. 376 (F.B.).



## CHAPTER V.

## OF THE MODE OF LEVYING FEES.

Collection of fees by stamps.

25. All fees referred to in section 3 or chargeable under this Act shall be collected by stamps.

26. The stamps used to denote any fees chargeable under this Act shall be impressed or adhesive, or partly impressed and partly adhesive, as the [Appropriate Government]<sup>1</sup> may by notification in the Official Gazette from time to time direct.<sup>2</sup>

Rules for supply, number, renewal and keeping accounts of stamps.

27. The <sup>3</sup>[Appropriate Government] may, from time to time make rules for regulating—

- (a) the supply of stamps to be used under this Act :
- (b) the number of stamps to be used for denoting any fee chargeable under this Act.
- (c) the renewal of damaged or soiled stamps ; and
- (d) the keeping accounts of all stamps used under this Act :

Provided that, in the case of stamps used under section 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

All such rules shall be published in the Official Gazette, and shall thereupon have the force of law.

Stamping documents inadvertently received.

28. No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

## LEG. REF.

<sup>1</sup> Substituted by the A. O. for the words "Local Government" which had been substituted by the Devolution Act (XXXVIII of 1920), S. 2 and Sch. I, for "Governor-General of India in Council."

<sup>2</sup> For rules as to levy of Court-fees by adhesive and impressed stamps, see Gazette of India, 1883, Pt. I, p. 189.

<sup>3</sup> Substituted by the A. O., for the words "Local Government."

SEC. 25.—Whether several stamps may be used to make up the full amount chargeable, see 16 W.R. 152 ; 12 W.R.C.R. 449 : 17 W.R.C.R. 220.

SEC. 27.—Stamps impressed with "for use in the High Court only" are not invalidated for use in subordinate Courts. 8 P.L.T. 33=1926 P. 408. Where a plaint not properly stamped is presented to a wrong Court and is returned to be presented to a proper Court, the latter Court can require the plaintiffs to file Court-fees in accordance with the rules though no objection to it was first taken. 11 P.L.T. 711. Where the fees were not devoted in the manner prescribed in the rules the application can be treated as unstamped. 26 N.L.R. 263. Where plaintiffs presented a plaint with two stamps one for Rs. 20 and another for Rs. 10 and the Court returned demanded a single impressed stamp as per rules, the Court should grant a certificate for refund of the stamps originally filed. 11 P.L.T. 708. There is nothing in the rules which prohibits the receipt by the Court of a plaint with Court-fee stamps of a denomination lower than the one required by the rules. The rules provide for this, in fact. Where the Court-fee stamps of the requisite denomination are not available, and the plaintiff

files his plaint with insufficient Court-fee, the Court is bound to receive the plaint, fixing a time within which the deficiency should be made up, and if it is not complied with within the time fixed, then to reject it. It is illegal and unjust to refuse to receive the plaint. The order is liable to be set aside in revision. 44 L.L.W. 830=71 M.L.J. 804.

SEC. 28 : SCOPE.—The specific provisions of the section are not cut down either by Ss. 9 to 11 of this Act or by O. VII, r. 11 (Old S. 54) of C. P. Code. 12 A. 129 (F.B.). The effect of the section is that if the necessary Court-fees on a document are paid within the time allowed by the Court, the document may be treated as valid from the date on which it was filed. 8 R.L.W. 538=129 I.C. 500=1931 R. 38. The mistake or inadvertence referred to in this section is that of the Court and its officers and not of the party. 1901 A.W.N. 21 ; 12 A. 129 ; 20 M. 319. On this point, see also 4 A.L.J. 636 ; 29 A. 749. Where an appeal is not properly stamped, whose appeal will not be dismissed but amount covered by Court-fee will be decreed. 96 I.C. 135=1926 L. 558. See also 131 I.C. 297=1931 L. 237. It is open to plaintiff or an appellant to reduce his claim and effect a saving of Court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final, and the appeal is limited to the amount in contest on which alone Court-fee need be paid. 27 A.L.J. 547=116 I.C. 82=1929 A. 308. See also 27 A. 151. Even Revenue Officer has the powers under S. 28 to direct the payment of Court-fees in revision. 30 I.C. 862 (2)=22 C.L.J. 57. But this power must be exercised before making the final decision in the case. 7 A. 528=5 A.W.N. 140 (But see the judgment of Mahmood, J., *contra*, in the same case). S. 28



But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and, on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

29. Where any such document is amended in order merely to correct a mistake and to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

30. No document requiring a stamp under this Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

Such officer as the Court or the head of the office may from time to time appoint shall, on receiving any such document, forthwith effect such cancellation by punching out the figure-head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.

## CHAPTER V.

### MISCELLANEOUS.

31. [*Repayment of fees paid on applications to Criminal Courts.*] [*Rep. by the Code of Criminal Procedure (Amendment) Act XVIII of 1923.*] S. 163].

of the Court-Fees Act does not empower the Court to call upon the parties to pay the deficit Court-fee after judgment has been pronounced. The Court is then *functus officio*. 11 P. 532=1932 P. 228. *See also* 140 I. C. 191=1932 A.L.J. 165=1932 A. 316; 46 C. 520. Where a plaint is returned by one Court, for presentation to another Court, the latter Court should give credit to the stamp on the plaint. 35 M. 567=21 M.L.J. 533; 29 Bom.L.R. 280. *See also* 8 B. 313; 8 B. 380; 51 B. 236=1927 B. 257. Where a plaint with insufficient Court-fee stamp is presented, opportunity must be given to the party to pay the proper stamp. 106 I.C. 817=1928 L. 221. Written statement claiming set-off not stamped—Effect—Subsequent Order for payment of court-fee—If validates proceedings. *See* 1936 C. 277.

LIMITATION.—Doubts as to whether payment of deficit Court-fee after limitation time would save limitation, have been set at rest by the enactment of S. 149 of C. P. Code. The Court will not exercise the discretion unless it is satisfied that some ground exists. 1 L. 234. Where a deficiency in Court-fee is made good within the time allowed by the Court but beyond the period of limitation prescribed for the suit, the suit is not barred by time. 23 I.C. 408. *See also* 133 I.C. 122 (R.). Plaint and memorandum of appeal insufficiently stamped—Second appeal to High Court properly stamped—High Court has power, on levying the additional stamp duty on the plaint and memorandum of appeal, to hear the second appeal as there was an existing suit at the time the period of limitation expired and the provisions of S. 28 were applicable. 24 M. 331; C.C.M.—248

25 M. 380=11 M.L.J. 119. *See also* 18 M. 29; 1 M.L.J. 598; 2 A. 682 (F.B.); 29 A. 749; 2 C.L.J. 68. Payment of Court-fee after the period of limitation but during the enquiry into pauperism of the plaintiff, saves limitation. 2 A. 241; 24 A. 493. *See also* 22 B. 849; 26 C. 592 (Court-fee paid after rejection of pauper application). Where there was an entry in the proceedings by the Judge that the memorandum of appeal was properly stamped, it would be unfair to dismiss the appeal on the ground that the appeal was incorrectly stamped. S. 28 of the Court-Fees Act gave power to the High Court to make such orders as seem to it suitable in the circumstances of each case and the order of the lower Court dismissing the appeal was to be set aside. 1940 A.M.L.J. 19.

SEC. 29.—A party who filed a suit in a Revenue Court which referred him to the Civil Court regarding a portion of the claim is not exempted under S. 29 from paying the usual Court-fees in his suit in the Civil Court. 132 P.R. 1892.

SEC. 30.—*See* 35 M. 567=21 M.L.J. 533=10 I.C. 201; 29 Bom.L.R. 280 and 51 B. 236 cited under S. 28 (stamp on plaint returned for presentation to proper Court).

[OLD] SEC. 31.—Expenses incurred in the prosecution other than Court and process-fees can be awarded only out of the fine levied from the accused under S. 545 of the Cr. P. Code, (1872-1892) L.B.R. 595; 24 M. 305=2 Weir 722; 1 Weir 723. *See also* 1 L.B. R. 209. The fee ordered to be paid is an integral part of the sentence and must be treated as a fine imposed by the Court. 5 M.H.C.R. App. 28; 2 Weir 724. But *see contra* 1 Weir 724 (No imprisonment in de-

32. [Amendment of Act VIII of 1859 and Act IX of 1869.] [Rep. by the Repealing and Amending Act, (XII of 1891).]

33. Whenever the filing or exhibition in a Criminal Court of a document in respect of which the proper fee has not been paid is, in the opinion of the presiding Judge, necessary to prevent a failure of Justice, nothing contained in section 4 or section 6 shall be deemed to prohibit such filing or exhibition.

<sup>1</sup>24. (1) The <sup>2</sup>[Appropriate Government] may from time to time make rules for regulating the sale of stamps to be used under this Act, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons.

(2) All such rules shall be published in the Official Gazette, and shall thereupon have the force of law.

(3) Any person appointed to sell stamps who disobeys any rule made under this section, and any person not so appointed, who sells or offers for sale any stamp, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

35. The <sup>3</sup>[Appropriate Government] may, from time to time by notification in the Official Gazette reduce or remit,<sup>4</sup> in the whole or in any part of <sup>5</sup>[the territories under its administration] all or any of the fees mentioned in the first and second schedules to this Act annexed and may in like manner cancel or vary such order.

#### LEG. REF.

<sup>1</sup> Substituted for original section by the Amending Act XII of 1891.

<sup>2</sup> Substituted by the A.O. for the words "Local Government".

<sup>3</sup> Substituted by the A.O. for the words "Local Government" which had been substituted by the Devolution Act (XXXVIII of 1920), S. 2 and Sch. I, for the words "Governor-General of India in Council".

<sup>4</sup> For remission of duty payable under the Act, in respect of Indian probates, letters of administration of succession certificates of the share or other interest of a deceased member of a company formed under Act VI of 1882, provided that the said share or interest was registered in a branch register of the United Kingdom under Act IV of 1900, and that such member was at the date of the decease domiciled elsewhere than in India, see Notification No. 881 L.R. Gazette of India, 1900, Pt. I, p. 100. For remission of duty on applications for suspension or remission of land revenue, see Notification No. 4385 L.R., dated 19th August, 1901, Gazette of India, 1901, Pt. I, p. 608. For remission of fees on applications for issue of permits for transport of country spirits, see Notification No. 6260 L.R. dated 12th December, 1901 Gazette of India, 1901, Pt. 1, p. 1030.

<sup>5</sup> Substituted by S. 2 and Sch. I of the Devolution Act (XXXVIII of 1920), for "British India".

fault of payment). See also 26 M. 421=2 Weir 488; 20 C. 687. The making of an

order under S. 31 does not amount to an enhancement of sentence and an appellate Court can order the accused to pay the complainant's Court-fees. 47 M. 914=47 M.L.J. 355. (Old rulings to the contrary are not now good law.) See also 1925 Mad. 136=47 M.L.J. 355.

APPEAL AND REVISION.—The appellate Court cannot set aside an order passed by a Criminal Court under S. 31. 11 Cr.L.J. 194=4 I.C. 1130. But see also 1923 A. 86, *infra*. If under S. 31 the order directing payment to complainant is not proper, it can be corrected in appeal or revision. 3 A. 187 (Cr.)=1923 A. 86.

SEC. 34.—The case of mukhtear who purchases a Court-fee stamp for a client and transfers it to another client is not covered by S. 34. Where a pleader's munshi instead of obtaining refund on an unused stamp altered the name on the stamp and used it for another client for the first time, *held*, that the accused was not liable to be convicted under S. 468, I.P. Code, and S. 34, Court-Fees Act, in the absence of proof that he acted dishonestly or fraudulently. 133 I.C. 645=1931 L. 337. See also 30 C. 921. To establish a charge of an offence under S. 34 (3) it is necessary for the prosecution to identify the stamps alleged to have been wrongfully sold. Where the only evidence on the point was that of three entries in a particular exhibit, it was held that it was not enough to sustain the charge. 174 I.C. 513=42 C.W.N. 246=1938 C. 195.

36. Nothing in Chapters II and V of this Act applies to the commission payable to the Accountant-General of the High Court at Fort William, or to the fees which any officer of a High Court is allowed to receive in addition to a fixed salary.

## SCHEDULE I.

*Ad valorem fees.*

Number.		Proper Fee.
1. <sup>1</sup> Plaint [written statement pleading a set-off or counter-claim] <sup>2</sup> or memorandum of appeal (not otherwise provided for in this Act) <sup>3</sup> [or of cross-objection] presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	5 annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Five rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Fifteen rupees.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees up to thirty thousand rupees.	Twenty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Twenty rupees.

## LEG. REF.

<sup>1</sup> To ascertain the proper fee leviable on the institution of a suit, *see* the table annexed to this schedule.

<sup>2</sup> Inserted by S. 155 and the Fourth Schedule of the Code of Civil Procedure (V of 1908).

<sup>3</sup> Inserted by S. 155 and the Fourth Schedule of the Code of Civil Procedure (Act V of 1908).

SCOPE OF SCHEDULE I.—Schedule is supplementary and not alternative to S. 7. 6 N. L.R. 164=8 I.C. 1125. The proviso to Art. 1 is of general application and is not confined to plaints and memoranda of appeals under Art. 1 only. 3 A. 108 (112); 29 C.

140. Multifarious suits under S. 17 are also subject to it. 3 A. 108.

SCH. AND SS. 4, 6 AND 7: SCOPE.—The schedules to the Court-Fees Act, when read with Ss. 4 and 6 of the Act, do impose a liability. S. 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6 as the case may be. 1939 Rang.L.R. 474=1939 Rang. 375.

ART.: APPLICABILITY.—Art. 1 applies only to those cases which are not otherwise specially provided for under the Act. 61 P. R. 1919=47 I.C. 992. Suit for specific performance of a contract of exchange fails

Number.	Proper Fee.
1. <i>Plaint, etc.—(Contd.)</i>	<p>When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees :</p> <p>Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be three thousand rupees.</p>

under the Article. (1944) 1 M.L.J. 187=57 L.W. 180. Suit for cancellation of instrument under S. 39, Specific Relief Act, falls under the residuary Article, Sch. I, Art. 1. 139 I.C. 32=1932 A.L.J. 684=1932 A. 485 (F.B.). See also cases cited on the point under S. 7, Cl. (iv) (c) (IV-A Mad.). In order to find out the real nature of the relief claimed by the plaintiff one has to look at the allegations in the plaint. Where from such allegations it is clear that the relief claimed is not only for setting aside an award but also for the cancellation of the agreement on the basis of which the award was made as well, the plaintiff is liable to pay *ad valorem* Court-fee. 1942 A.L.W. 223. If prayer for this relief is attached to a prayer for a declaration, the question is whether the cancellation should be regarded as consequential on the declaration or as a substantial relief requiring separate valuation. In the former case, a single Court-fee will have to be paid on the value of the reliefs sought under S. 7 (iv) (c). In the other event, a Court-fee will have to be paid on the value of the subject-matter in dispute under Art. 1 of Sch. I, if the subject-matter is capable of valuation, otherwise a fixed fee of Rs. 10 under Art. 17 (vi) of Sch. II. 43 P.L.R. 252=1941 Lah. 265; I.L.R. 1941 Lah. 451=43 P.L.R. 106=1941 Lah. 97 (F.B.). There is no particular section in the Court-Fees Act for assessment of fair rent and so *ad valorem* fee has to be paid. 100 I.C. 913=8 P.L.T. 366=1927 P. 123. See also 1929 C. 141. An application for restitution under S. 144, C. P. Code, may be stamped as a mere application. *Ad valorem* fee is not necessary. 21 C.W.N. 544. But an appeal against an order passed under S. 144, C. P. Code, is an appeal against a decree and an *ad valorem* stamp duty is payable thereon. 82 I.C. 321=22 A.L.J. 881. See also 41 C.W.N. 157=1937 C. 152; 113 I.C. 270; 42 C.W.N. 152; 1938 Rang. L. R. 635; 1937 Pesh. 3=167 I.C. 879. But see *contra* 1927 L. 635. (See also under Sch. II, Art. 1). So also on an appeal against an order under O. 21, R. 50 (2). 10 Bur. L.T. 42=35 I.C. 429; 1930 L. 825; 37 C.W.N. 227. See I.L.R. (1939) Kar. 589=1939 Sind 161 (F.B.). (Case under Bombay Amending Act and notification). Also on an appeal against an order under O.

21, r. 99. 10 B. 238; 8 C. 720. See also 29 M. 172; 4 M. 221. Regarding Court-Fees in appeals in land acquisition cases, see 1927 C. 45=97 I.C. 140; 29 L.W. 237=1929 M. 223; 35 C.W.N. 1103; 138 I.C. 199=1932 O. 224. (See also under S. 8). An application for settlement of fair rent and for declaration under Ss. 105 and 105-A of the Bengal Tenancy Act *ad valorem* Court-fee is payable on the value of the subject-matter. 117 I.C. 701=1929 C. 141. The principle of valuation in appeal is the same as in original plaint. 1930 R. 164. The value of the subject-matter in dispute in an appeal must be the value of the relief granted by the decree which the appellant wishes to disembarass himself of. The question is "what is the value to the appellant of immunity from the decree." Upon the answer depends the value at which the appeal ought to be assessed. It is not open to the appellant defendant to avoid assessing his appeal at its full valuation merely because it may prove, as a result of the appeal itself, that the plaintiff's valuation was excessive. 1941 A.L.J. 381=1941 All. 295. An *ad valorem* Court-fee has to be paid on a memorandum of appeal against a decree or order having the force of a decree. A memorandum of appeal against an order rejecting a plaint must be stamped *ad valorem*. 1929 P. 615. See also 60 C. 530=37 C.W.N. 227=1933 C. 546; I.L.R. (1939) Kar. 589=1939 Sind 161 (F.B.) [appeal from order under C. P. Code, O. 21, r. 50 (2)]. Where a plaint is rejected under O. 7, r. 11, C.P. Code, as the deficiency in Court-fee was not made good and an appeal is preferred therefrom, the subject-matter of the appeal is not the amount of the claim in the suit but the sum of money rightly claimable as Court-fees. *Ad valorem* Court-fee on the difference between the amount demanded by the Court and that paid by the plaintiff, ought to be paid on the memorandum of appeal. 1939 N. L.J. 32. But see 1935 N. 83 (Court-fee is same as that on plaint); I.L.R. (1938) Mad. 981=(1938) 1 M.L.J. 662. Court holding additional Court-fee necessary and returning plaint for necessary amendments instead of demanding additional Court-fee and rejecting plaint on failure to pay—Proper procedure pointed out—Court has no power to direct amendment. See 1938 M. 645=47 L.W. 523. An appeal from a decision under O. 21, r.

63-H, C. P. Code should be valued at the amount which the decree-holder seeks to recover from the garnishee. This of course is not necessarily the same as the amount for which he has a decree against the judgment-debtor. S. 47, C. P. Code, has no application to decisions under R. 63-H of O. 21. Appeals from such decisions must be valued by the appellant and Court-fee paid *ad valorem* on the value under Sch. I, Art. 1 and not under Sch. II, Art. 11, Court-fees Act. 22 Pat. 278=209 I.C. 394=A.I.R. 1943 Pat. 280=222 I.C. 382.

**COURT-FEES ON SET-OFF.**—The words "set-off" and "counter-claim" are not defined in the Court-Fees Act. They refer to a cross-claim against the plaintiff which entitles the defendant to refuse to pay the amount demanded by the plaintiff and to assert that the result of setting off the cross-claim of the defendant would be that the defendant would on the contrary be entitled to a decree for the balance. 1933 Sind 247. See also 13 L.L.T. 45; 1935 P. 110; 1940 N.L.J. 176. Where the defendant claims set-off, the amount of which exceeds the amount of claim made against him, he must pay *ad valorem* Court-fees on the entire sum claimed by him and not merely on the difference between the two amounts. 45 A. 218=20 A.L.J. 1005=1923 A. 118. See also 8 A. 396; 13 B. 672; 15 M. 29. The expression "set-off" includes an equitable set-off also and is not confined to legal set-off coming under O. 8, r. 6, C. P. Code. 147 I.C. 719; 1933 M. 203; 142 I.C. 719 following 45 All. 218. See also 58 M. 338=68 M.L.J. 23; 1936 A.M.L.J. 60; 1936 N. 290; 165 I.C. 430=1936 N. 222; 1938 A.L.J. 701=1938 All. 522; 43 C.W.N. 838=1939 Cal. 415; 45 Bom.L.R. 516=210 I.C. 88=A.I.R. 1943 Bom.227; I.L.R. 1944 Nag. 260=209 I.C. 241=1943 N.L.J. 455=A. I. R. 1943 Nag. 314. No claim for set-off can be decreed in excess of the amount claimed. Payment of further Court-fee after decision is not permissible. I.L.R. 1944 Nag. 260=1943 N.L.J. 455=209 I.C. 241=A. I. R. 1943 Nag. 314. Suit for possession of share by partition—Defendant claiming to be in possession under wakfnama—Decree by trial Court finding wakf invalid—Appeal seeking to set aside decree—Claim by appellant that declaration of validity of wakf will be enough—Court-fee payable. 159 I.C. 727=1936 A. 216. Where on a suit on a promissory note the defendant claimed a specified amount by way of damages, setting out the particulars of the claim made by him as one arising from the transaction of sale which led to the execution of the promissory note and by reason of the breach of covenant alleged to have been committed by the plaintiff. Held, that the claim by way of set-off came under Art. 1, Sch. I. (*Ibid.*) In a suit for accounts and to recover moneys of a dissolved partnership the defendant's claim for decree on accounts is not a counter-claim. No Court-fee

need be paid thereon until the amount has been ascertained. 27 I.C. 316=8 S.L.R. 122; 27 I.C. 320=8 S.L.R. 124. See also 1933 M. 353. Pending a suit, the disputes were referred to arbitration out of the Court and it was found that the money was payable to defendant. The Court could direct the defendant to plead the award as an adjustment and claim the amount awarded, paying Court-fee thereon. 18 S.L.R. 111=88 I.C. 61 (2)=1925 Sind 266. There is nothing in the Court-fees Act directing payment of Court-fee on oral representations made before a Judge. When admittedly no written statement is filed by the defendant no Court-fee is payable on any set-off or counter-claim made orally by the defendant. 1945 A.M. L.J. 28.

**CROSS-OBJECTIONS.**—A memorandum of cross-objections must bear Court-fees *ad valorem* on the value of the subject-matter in dispute. 46 C. 160=45 I. C. 939=27 C. L.J. 443; 15 A.L.J. 886; 1933 O. 528; 155 I.C. 293=1935 O.W.N. 505; 39 P.L.R. 586; 185 I.C. 623; 43 C.W.N. 838=1939 Cal. 415. Petition stating reasons on which the respondents supported the decree, does not amount to cross-objection for which *ad valorem* fee is payable. 44 A. 577=1922 A. 280. Nor mere criticism of judgment. 1 P. 258; 25 O.C. 275=1923 O. 44 (1). Where the suit of the plaintiff-appellant was entirely dismissed by the Court below and there was nothing in that decree against which the defendant-respondent was required to object, objections filed by him supporting the decree on some of the grounds that have then decided against him in the Court below are strictly speaking not cross-objections but are really only a means of giving notice to the appellant of his intentions and an *ad valorem* Court-fee is therefore not payable on them. 1937 O.L.R. 554=1937 O.W.N. 1057=1937 O. 512. See also I.L.R. (1938) Mad. 981=1938 Mad. 498=(1938) 1 M.L.J. 662. In the case of cross-objections relating to possession of land, *ad valorem* fee is payable on its value and not on the basis calculated under S. 7 (v). 22 A.L.J. 911. Cross-objections in a suit for declaration must bear *ad valorem* fee under this Article as Art. 17 of Sch. II does not refer to cross-objections. 3 P.L.J. 197=45 I. C. 568. See also 40 A. 93=43 I.C. 179. On a cross-objection as to the finding of the lower Court on a portion of sale consideration being not for legal necessity, Court-fees should be paid on the amount held to be not for legal necessity. 45 A. 537=1924 A. 175. See also 40 A. 93=43 I.C. 179=15 A.L.J. 886; 1939 Rang. 375. A respondent who files a memorandum of objections cannot claim to have Court-fees reduced simply because the appellant has paid more than what he should have paid. 46 C. 160=45 I.C. 939. A memo. of cross-objections filed

in the High Court on the question of costs only does not fall under Art. 1, Sch. I, but may be treated as a petition under Art. 1 (d) of Sch. II and a Court-fee of Rs. 2 is leviable thereon. 64 I.C. 606=25 C.W. N. 934. But see *contra* 2 R. 637=1926 R. 145; 98 I.C. 272=1926 L. 645; 8 P. 543=1929 P. 286; 1930 A. 1097. No Court-fee is chargeable on a memorandum of objections filed under O. 41, r. 26, C. P. Code. 54 A. 465=1932 A. 526. Where the defendant is not putting forward any counter-claim, but is making various claims as to items in the particular account to be taken in the suit, he cannot be asked to pay Court-fees on those sums. 1933 M. 353. See also 1940 Rang. L. R. 529=1940 Rang. 300. The plaintiffs and the defendants were tenants in common. The plaintiffs sued for partition of the property. In their written statement the defendants said that the plaintiffs had been managing the property and recovering the rents. They did not value their relief for account of the rent or pay Court-fee thereon. *Held*, that it was incumbent on them to value their relief and to pay necessary Court-fees. 1933 S. 304.

**THE AMOUNT OR VALUE OF THE SUBJECT-MATTER IN DISPUTE.**—The words “value of the subject-matter in dispute” in Art. 1, Sch. I, refer in the case of a suit, to the value of the subject-matter of the suit, and in the case of an appeal, to the value of the subject-matter in dispute in appeal. The subject-matter of the suit and the subject-matter of the appeal may not be the same. Where the appellant appeals against the decree in a suit on merits and also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount of the subject-matter in the suit and the amount of costs challenged. 15 Luck. 392=1940 O. W. N. 167=1940 Oudh 182. S. 7 prescribes the value that shall remain unchanged in all stages of a case. Once the value of the relief is ascertained for the purposes of the plaint, the 1st Schedule rates the relief at the same value for the purposes of the appeal. 6 N. L.R. 164=8 I.C. 1125. See also 25 P.R. 1916=32 I.C. 121. The words “the subject-matter in dispute” in Art. 1, Sch. I, mean, in reference to a cross-objection, the subject-matter in dispute in the cross-objection. If, therefore in an administration suit the respondents, who have been ordered by the preliminary decree to pay to the appellants a certain sum as special costs in any event (the ordinary costs being ordered to abide the passing of the final decree), file a cross-objection relating to the findings in the suit and also to the special costs, the cross-objection, so far as it relates to the special costs, is chargeable with Court-fees *ad valorem* on the amount of the costs. 1939 Rang. L. R. 474=1939 Rang. 375. An appeal filed by some only of the plaintiffs need

only be stamped to the extent required by the interests of those parties. 10 L. L. T. 23. Where the valuation of the original suit is over Rs. 5,000, but the appellant is interested only to the extent of Rs. 200, he can value his appeal at Rs. 200. 37 A. 208=13 A.L.J. 283. In a second appeal from a dismissal of an appeal for non-payment of deficient Court-fee, the dispute in the lower Court having reference only to the Court-fee payable, the subject-matter in dispute in second appeal is the amount of stamp in dispute between the parties, in other words, the difference between the Court-fee paid and the Court-fee demanded is the matter in dispute in second appeal. 1938 Mad. 498=I.L.R. (1938) Mad. 981=(1938) 1 M. L. J. 662. See also 1937 O. 512. The subject-matter of every appeal does not necessarily coincide with the subject-matter of the suit in regard to which the appeal has been filed. I.L.R. (1938) Mad. 981=1938 Mad. 498=(1938) 1 M.L.J. 662; 45 Mad. 246=41 M. L. J. 587. See also 1940 O. 182.

**ILLUSTRATIVE CASES.**—Where a decree for possession is given to the plaintiff conditional on his paying a certain amount to the defendant an appeal by him against the condition must be valued *ad valorem* on the amount he was asked to pay. (*Ibid.*); 59 I.C. 667=21 P.W.R. 1921; 92 I.C. 624=1926 M. 225; 108 I.C. 379 (2)=10 L.L.J. 55; 45 M. 246=1922 M. 211. Where a plaintiff asks for a declaration that a certain decree against him is void and illegal, it involves the setting aside of the decree and relieving plaintiff of the obligations arising thereunder and, therefore, involves a consequential relief and the plaintiff is liable to pay an *ad valorem* Court-fee under Art. 1, Sch. I and not fixed fee as given in Art. 17 (iii) of Sch. II. 1940 O.W.N. 1121=191 I.C. 413=16 Luck. 526. Where the plaintiff's suit for possession was decreed on condition of the plaintiff paying off the encumbrances on the property, an appeal against the condition should bear an *ad valorem* Court-fee on the value of the encumbrance. 1 P.L.T. 738=57 I.C. 481. See also 59 I.C. 667. Where a suit for possession in which the defendant admits plaintiff's title but claims a charge of Rs. 700 over that property, is decreed but without upholding defendant's claim and the defendant files an appeal, he should pay *ad valorem* Court-fee on Rs. 700, the amount claimed by him. 1936 L. 935. Where in a suit for ejectment, the defendant set up title in himself and also claimed Rs. 500 as compensation for improvements, and a decree was passed for the plaintiff the claim in respect of improvements being disallowed, an appeal by defendant again raising both the questions should bear Court-fee only as on a suit for possession. 23 M. 84. See also 48 M. 652=47 M.L.J. 919=1925 M. 323. Thus in a case where the claim for improve-

ments is incidental to a decree for possession Court-fee is as in a suit for possession. See 1926 Mad. 225. See also 1940 O.L.R. 92 (Appeal against order disallowing claim under S. 9, U. P. Encumbered Estates Act). Though the real subject-matter in dispute has reference only to the amount of compensation, still a party can as a mere camouflage raise a question of title in order to escape liability for Court-fees. There is no provision of law authorising him to bring the case under S. 7, Cl. (v). See 1928 M. 929=110 I.C. 752. See also 1931 L. 633. Where the defendant's plea in a suit for possession that the plaintiff cannot get possession without payment of her dower debt, was rejected by the lower Court and the suit decreed, and the defendant appealed, *held*, that she was not bound to pay any Court-fee on the dower amount and the Court could grant a decree to plaintiffs conditional on payment of dower debt to defendant. 36 A. 322=25 I.C. 935=12 A.L.J. 481. Where in the decree of the lower Court a charge is created over the lands purchased by the defendants for payment of certain amounts to the plaintiff and the defendants appeal to remove the charge, they should pay *ad valorem* Court-fee on the value of the properties or on the decretal amount whichever is less. 5 P. 721=8 P. L.T. 284=1927 P. 46; 11 P.R. 1916=33 I.C. 138; 7 L. 215=96 I.C. 473=1926 L. 408 (appeal from the decree rendering a property liable for the decree amounts). The plaintiff sued to recover dower. The trial Court decreed the suit against the person and personal property of 1st defendant but refused to pass a decree against the assets of deceased in the hands of defendants 2 to 5. The plaintiffs besides claiming a further sum by way of interest also prayed for a further declaration that the assets of the deceased might be made liable for the decree debt. *Held*, that Court-fee was payable on the *ad valorem* scale on the value of the debt in respect of which the liability of the properties was sought to be established. 54 A. 608=1932 A. 406=1932 A.L.J. 387. An appeal against one defendant only to establish his liability on a hypothecation bond must bear Court-fee calculated on the amount of the debt sought to be recovered. 13 M. 508; 24 Bom.L.R. 313. See also 86 P.R. 1912=222 P.L.R. 1912. Where a decree gives the plaintiff a partial relief, the plaintiff appellant is bound to pay Court-fee on the difference between the value of the relief he claims and that granted by the decree appealed from. 19 C. 272. See also 6 P. 17=1927 P. 123. In an appeal from instalment decree Court-fee must be paid on the difference to the appellant between getting his money on the date of the decree and getting it by instalments as ordered. 12 P.R. 1915=24 I.C. 931. See also 19 C. 272; 167 I.C. 26=1937 Pesh. 31; 1936 Pesh. 232. A plaintiff appellant who seeks to get

rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money. Plaintiff got a decree for possession subject to his paying his share of the debts binding on the property. Plaintiff appealed against the order requiring him to pay. *Held*, that he should value his appeal on the basis of the value of the order for payment which he was seeking to get rid of in the appeal. 52 L.W. 397=1940 Mad. 955=(1940) 2 M.L.J. 406. The plaintiff sued for the recovery of a certain amount from a company and from certain debenture-holders of that company and for a declaration that the amount was recoverable in priority over the debentures in favour of certain other persons. The debenture-holders appealed to the High Court to modify the decision of the trial Court by refusing the declaration as to priority. *Held*, that Court-fee payable was *ad valorem* on the decretal amount or on the value of the debentures whichever was less. 54 A. 553=1932 A.L.J. 385. If in a suit to contest a notice of ejectment falling under S. 7 (xi) (d), the landlord defendant appeals and the relief which he desires to get rid of is simply the amount of compensation awarded to the plaintiff, he should pay *ad valorem* Court-fee. 11 L.L.J. 116. If in an appeal in a partition suit, the appellant claims sums as due from the other party further than what was allowed by the lower Court, Court-fees should be paid *ad valorem* on the amounts claimed. 33 P.L.R. 12. See also 32 P.L.R. 854. Appeal from order as to restitution under C. P. Code, S. 144, *ad valorem* Court-fees to be paid. See 41 C.W.N. 157=1937 C. 152; 167 I.C. 879=1937 Pesh. 3 (order by trial Court refusing to allow costs directed to be paid by Privy Council). See also 42 C.W.N. 152; 1938 Rang.L.R. 635. Where an appeal is filed against an order of the trial Court awarding interest on the decretal amount to be refunded under S. 144, C. P. Code, claiming additional interest, the Court-fee payable is *ad valorem* Court-fee on the amount claimed. So also where the opposite party making the refund files a cross-objection praying for reduction of the interest awarded by the trial Court, it must pay *ad valorem* Court-fees on the interest sought to be reduced. 167 I.C. 879=1937 Pesh. 3. Where in a suit on a mortgage by one of the two mortgagees the widow of the other impleaded as a defendant prays for a declaration that the mortgagees were not members of a joint Hindu family and that as they both had contributed to the mortgage money she is entitled to one half of anything found due and the Court grants the declaration and passes a decree in favour of both the plaintiff and the widow and the plaintiff appeals against the declaration alone he has to pay *ad valorem* Court-fee on the valuation of the suit under Art. 1, Sch. I of the Court-Fees Act and not the fixed fee as given under



Art. 17 (iii) of Sch. II of the Act. The question in such an appeal is whether the decree is to remain a joint decree or whether it should become a decree solely in favour of the plaintiff. 1943 A.W.R. (C.C.) 57=A.I.R. 1943 Oudh 361.

**FUTURE INTEREST.**—Where the amount due could be ascertained from the judgment and decree appealed from that should be the value of the appeal or cross-objection and future interest need not be taken into account. 36 A. 40=21 I.C. 723=11 A.L.J. 1016. *See also* 3 P.L.J. 443=44 I.C. 50; 171 I.C. 79=1937 N. 95; 3 P.L.T. 813=1923 P. 28; 6 P.L.J. 676=1922 P. 386; 23 S.L.R. 277; 104 I.C. 391=1927 Sind 251. But if any future interest is determined by the trial Court and is entered in the decree, additional Court-fee on such interest has to be paid. 1923 Pat. 28. *See also* 1 Pat. 19; 104 I.C. 391=1927 S. 251; 167 I.C. 577=1937 N. 6; 165 I.C. 279=1936 O.W.N. 916; 1937 N. 95. Where the appellant claims sums of money a definitely ascertainable sum among others by way of *pendente lite* interest which is disallowed by the trial Court must be held to be part of "amount or value of the subject-matter in dispute" and *ad valorem* Court-fee is payable under Sch. I, Art. 1, on the sum claimed as *pendente lite* interest. 52 A. 1029=1931 A. 351; 23 Pat. 905=219 I.C. 234=1945 P.W.N. 7=A.I.R. 1945 Pat. 145. Where the mortgagee appealed on the ground that interest ought to have been allowed till the date of realization, Court-fee is payable under Art. 17 (vi) of Sch. II. 27 A. 559. There is no provision of law authorising assessment of additional Court-fee by reason of accrual of interest *pendente lite* where the plaintiff appeals. 1927 P. 230; 1923 P. 28; 10 M.L.J. 144. *See also* 150 I.C. 653=1934 A.L.J. 957=1934 A. 805; 18 B. 696; 35 A. 94=11 A.L.J. 20. It is otherwise if the defendant appeals. 8 P.L.T. 555=1927 P. 230. In Madras the practice is to include the subsequent amount in the value of an appeal by defendant. The preliminary mortgage decree in a suit for sale of the mortgaged property awarded the plaintiff a certain amount on account of principal and interest on a part of the principal from the date of the suit till the date fixed for redemption. In the appeal the plaintiff claimed interest on the whole amount of the principal from the date of the suit till the date of realization. *Held*, that the period from the date of the institution of the suit till the date of realization was divisible into two parts: (1) the period from the date of the institution of the suit up to the date of redemption, and (2) the period from the date of redemption up to the date of realization. As far as the second period was concerned, the amount claimed by the plaintiff was unascertainable. He must therefore pay a Court-fee of Rs. 10 under Sch. 2, Art. 17 (vi) in respect of this second period. As

far as the first period was concerned the total amount claimed by the plaintiff was ascertainable. The total amount awarded to the plaintiff in respect of this period was also ascertainable. From the total amount claimed in appeal in respect of the first period must be deducted the total amount awarded to the plaintiff in respect of this period by the trial Court. The difference between these two sums would be definite and ascertainable sum. Court-fee on this sum must be paid *ad valorem* under Sch. I, Art. 1. 45 P.L.R. 382=A.I.R. 1943 Lah. 275 (F.B.); *see also* 40 P.L.R. 123. Where a preliminary mortgage decree directs the payment of the principal with interest from the date of the suit till the date of redemption fixed by it the defendant is bound to pay interest till the date of redemption even if he redeems the mortgage on a date earlier than the date fixed for redemption. Consequently in the appeal by the defendant praying for the dismissal of the plaintiff's suit in its entirety the defendant must under Sch. I, Art. 1 pay *ad valorem* Court-fee on the principal and interest from the date of suit till the date fixed for redemption. 45 P.L.R. 382=A.I.R. 1943 Lah. 275 (F.B.) (Such a decree is however not in accordance with the provisions of O. 34, r. 2 and Forms 5-A of App. D of the C. P. Code).

**INTEREST PENDENTE LITE.**—There is no provision in the Court-Fees Act under which a plaintiff can be called upon to pay Court-fee on the interest which accrues after the institution of the suit. The holder of a mortgage decree who has already paid Court-fee on the amount due at the date of suit can execute a decree for a higher amount on account of interest *pendente lite* without being liable to pay additional Court-fee thereon. When a wrong order is made for such payment and complied with, the decree-holder cannot execute the decree for such payment made by him, as the amount cannot properly be regarded as costs in the case recoverable from the judgment-debtor. 152 I.C. 244=15 P.L.T. 548=1934 P. 571 (S.B.). *See also* 154 I.C. 470; 1939 Pat. 83=17 P. 687=1939 P.W.N. 162. As to future interest, *see also* 157 I.C. 633=1935 O.W.N. 919.

**MESNE PROFITS—APPEALS.**—The value of an appeal by defendant from a decree awarding future mesne profits must include the future mesne profits decreed from the date of plaint till the date of appeal. *See* 50 M. 488. An appeal from a final decree under O. 30, r. 12 (2), C. P. Code, in respect of subsequent mesne profits is chargeable with *ad valorem* fee. 45 M. 280=42 M.L.J. 184=1923 M. 19; 11 P. 532=1932 P. 228; 12 P. 188=13 P.L.T. 810=1933 P. 81. No Court fee is payable on future mesne profits in an appeal from the preliminary decree. 20 M.L.J. 98=5 I.C. 880; 21 M. 371; 13 C. W.N. 815. Where the appellants have paid full Court-fee on the claim for mesne profits,

in appeal against the preliminary decree, they need not pay any additional fee on their appeal against the mesne profits ascertained subsequent to their original appeal. 15 I.C. 572=16 C.L.J. 564. *See also* 3 P. 875=1924 P. 694. Where the suit involves a claim for mesne profits *ad valorem* Court-fee is payable on the amount for which the appellant seeks to avoid liability or on the amount by which he seeks to enhance the value of the decree. This rule applies to all appeals whether the profits have accrued before suit or after the institution of the suit. 14 P.L.T. 180=12 P. 694=1933 P. 234. *See also* 1937 P.W.N. 893=18 Pat. L.T. 864. Where the plaintiff's claim to mesne profits was disallowed, an appeal filed by him should bear Court-fee on the amount of mesne profits which had been claimed and disallowed. 1931 A.L.J. 413=1931 A. 538. Where mesne profits are left to be ascertained in execution, an appeal from a decree awarding mesne profits must be valued at the same valuation as the suit. 49 I.C. 962; 1 I.C. 670=13 C.W.N. 815; 1929 P. 731. But *see* 53 M. 540; 22 Mys.L.J. 92=49 Mys.H.C.R. 38. Tentative valuation of a claim is permissible only in suits for account and mesne profits. Defendant who in a suit for damages sets up a cross-claim for damages suffered by him on account of the acts and conduct of the plaintiff and asks for a set-off against the plaintiff's claim must estimate his claim as accurately as he can and pay *ad valorem* Court-fee thereon and cannot be allowed to put a tentative valuation for the claim. 183 I.C. 373=43 C.W.N. 838=1939 Cal. 415.

**RELIEF AS TO COSTS.**—When relief is sought with regard to costs independently of the main contest between the parties, Court-fees must be paid on the costs decreed. 3 P.L.J. 443=44 I.C. 50; 19 M. 350; 35 P.L.R. 656=1933 L. 739. *See also* 157 I.C. 90=1935 L. 379.

**ACCOUNT SUITS.**—*See also* under S. 7, Cl. (iv) (f). Ten rupees stamp is sufficient for an appeal in a preliminary decree for dissolution of partnership dealing with certain items disallowed, as such disallowance is only incidental to the main relief. 1 L. 6=57 I.C. 185. In a suit for an account it is open to the defendant to say that on the accounts being gone into, money would be due to him and that a decree should be passed in his favour for such amount as may be found due to him. In such cases, the Court should not refuse to pass a decree in favour of the defendant if it finds that the plaintiff is indebted to the defendant. In the absence of any express provision in the Court-Fees Act, there is no obligation on a defendant to claim any specific sum as due to him in his written statement or to pay Court-fee thereon on pain of being debarred from obtaining a decree in his favour in the same suit. Nor where a defendant nominally value his relief in his written statement on which he pays

Court-fee and offers to pay additional Court-fee on such sum as may be found due to him on a settlement of accounts can he be deemed to have relinquished his claim for the balance. 1933 S. 247. *See also* 43 Bom. L.R. 475=1941 B. 242=1 L.R. (1941) Bom. 477.

**COMPROMISE.**—Suit to declare compromise and decree void—Court-fee payable. *See* 1934 A.L.J. 955=1934 A. 1071.

**APPEALS IN MORTGAGE SUITS.**—Where the plaintiff in a mortgage suit for sale appeals against the decree for sale, in order to establish the liability to the debt of certain property exonerated by the lower Court, Court-fee is payable on the decree amount but not exceeding the market value of the property. 16 M.L.J. 458=30 M. 96 (F.B.). *See also* 37 C. 914; 33 A. 20; 44 C.W.N. 482. So also where the defendant appeals on the ground that certain property was not liable under the mortgage. 10 M. 197. *See also* 5 O.L.J. 663=43 I.C. 535; 1928 N. 316; 5 P. 721. The method of valuation mentioned in S. 7 (5) cannot be adopted in such a case. 1931 M. 710. *See also* 54 L. W. 526=(1941) 2 M.L.J. 774=A.I.R. 1942 Mad. 152. (Suit for money claiming first charge on certain assets—Decree for money without charge—Appeal claiming charge on assets—Court-fee to be paid on value of assets). Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the liability the value for the purposes of Court-fee would be the price of the property or the decretal amount whichever is less. 176 I.C. 319=1938 Pesh. 38. Where mortgage decree for sale declares the separate liabilities of different properties from different sums of money, the Court-fee on appeal by one of the defendants whose property had been held liable for a specific sum of money must be calculated on the sum for which the property had been held liable. 35 A. 92=18 I.C. 577=11 A.L.J. 33. Members of a joint family have no specified shares in the family property and where some of them appeal against a decree in a suit to enforce a mortgage of the family property, Court-fees must be paid on the amount decreed and not on the appellant's share of the amount. 55 I.C. 233 (P.). Art. 1, of Sch. I applies to appeals in mortgage suits and Court-fee is payable on the subject-matter in dispute in the appeal and not on the principal money secured by the mortgage. 30 A. 547=5 A.L.J. 531. *See also* 47 A. 926=23 A.L.J. 853=1925 A. 734; 162 I.C. 729=38 P.L.R. 12=1936 L. 17; 1 L. 234; 29 A. 471=107 I.C. 671 (1). On this point, *see also* the cases noted under S. 7 Cl. (ix). In an appeal against decree for redemption or foreclosure claiming a higher amount than that fixed by the Court, Court-fee should be paid

on the excess amount claimed. 5 P.R. 1911 =9 I.C. 676; 74 I.C. 88 (1)=1924 O. 170; 22 I.C. 642=16 O.C. 354; 29 I.C. 609. *See also* 1939 M.L.R. 81 (Civil). *Quære*: whether the Court-fee payable in redemption appeal is *ad valorem* or on the diminution claimed in the appeal. 122 I.C. 736=1930 L. 601; 134 I.C. 124=1931 L. 633; 1937 N. 6. Cross-objections in appeals arising out of redemption suits must be stamped *ad valorem* on the amount by which the decretal amount is sought to be reduced. (11 I.C. 198, Rel. on.) 11 O.W.N. 559=1934 O. 246. An appeal filed by certain defendants in a mortgage suit whose claim to priority of their mortgage was negatived by the lower Court, praying for a declaration that they were the prior mortgagees should bear *ad valorem* Court-fee and Art. 17 (iii) has no application. 54 A. 347=1932 A.L.J. 45 =1932 A. 221. But *see contra* 61 C. 320=148 I.C. 1084=58 C.L.J. 542=39 C.W.N. 248=1934 C. 377. In a suit for sale or mortgaged property, the puisne mortgagee and mortgagor were impleaded. The mortgagor denied the puisne mortgage, but the Court found it to be subsisting, and in the decree, ordered that the balance, after paying off the plaintiff mortgagee should be paid to the puisne mortgagee and the surplus, if any, should be given to the mortgagor. In an appeal by the mortgagor challenging the portion of decree in favour of the puisne mortgagee, *held*, that *ad valorem* Court-fee on amount due on the mortgage should be paid and not merely for a declaration. 146 I.C. 1003=1933 L. 954. Appeal against a mortgage decree on the ground that a condition of priority should be removed requires an *ad valorem* fee. 4 P.L.J. 323 =51 I.C. 786. *Ad valorem* Court-fees must be paid on an appeal from an order refusing to make a personal decree under O. 34, r. 6, C. P. Code. 40 A. 553=47 I.C. 562=16 A. L.J. 437; 195 I.C. 239=1941 Pesh. 56. So also on an appeal against an order passing such personal decree. 1924 A. 292. *See also* 30 I.C. 497=19 O.C. 121; 6 N. L.R. 164; 195 I.C. 239=1941 Pesh. 56; (1945) 2 M.L.J. 87=58 L.W. 318=A.I.R. 1945 Mad. 425. Where the mortgagor objected to the passing of final decree pleading an uncertified payment which the Court rejected and final decree is passed, it is not an order in execution but a judgment in the mortgage suit and an appeal therefrom must bear stamp *ad valorem*. 1928 R. 194=6 R. 285. [35 A. 476 (F.B.) and 22 Bom. L. R. 811, Foll.] An appeal against a final decree on the ground that the mortgagor should or should not have been allowed further time in which to pay the mortgage-debt is not an exception to the general rule that an appeal against a final decree requires an *ad valorem* Court-fee. 7 N.L.R. 41; 130 I.C. 98=1931 N. 1 (F.B.). The plaintiff sued for a declaration that the property mortgaged by certain deeds executed by a Mahant is the property of a certain math and that the

mortgagees have no right to have the property sold by auction. *Held*, that the plaintiff sought, in effect to have the mortgage deeds in question adjudged void and the suit must be regarded as falling under S. 39 of the Specific Relief Act and as being not of a purely declaratory nature, and *ad valorem* Court-fee was payable. [1932 A. L.J. 684 (F.B.), App.] 1936 A.L.J. 798 =1936 A. 710. Mortgage decree—Some of mortgaged properties purchased in execution by mortgagee in part satisfaction—Mortgagee assigning properties purchased and also balance of decretal dues to third person—Decree thereafter re-opened and new decree passed under Bengal Money-Lenders Act directing restoration of properties to mortgagor—Appeal by assignee challenging validity of decree, instalments and order for restoration, but not amount of decree—Court-fee payable is on value of the properties. 49 C.W.N. 385=A.I.R. 1945 Cal. 354. As to Court-fee on appeal from personal decree in mortgage suit, *see* 62 C. 568=39 C.W.N. 315.

**APPEALS IN PARTITION SUITS.**—In partition suits whether the plaintiff is in joint possession or out of possession the plaint or memorandum of appeal must bear *ad valorem* Court-fees on the value of share. Art. 17 (6), Sch. II, will not apply. 73 I.C. 788. *See also* the cases noted under S. 7, Cl. (iv) (b). Where in a partition suit, the appellant claims certain sums from the other party and also pleads that he should not have been made liable for certain other sums, Court-fee is payable on the several sums on the *ad valorem* scale. 32 P.L.R. 854. *See also* 33 P.L.R. 12.

**PARTITION SUIT, APPEAL IN—COURT-FEES.**—*See* 157 I.C. 787=1935 L. 14.

**APPEALS IN PRE-EMPTION SUITS.**—Where one of the grounds of appeal in a suit for pre-emption is that the right to pre-empt has or has not been established as the case may be, the subject-matter of the dispute continues to be the right of pre-emption, and its value must be determined with reference to S. 7, Cls. (v) and (vi). 6 A. 488. But when the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court-fee must be calculated on the difference between the amounts allowed as the sale price and that claimed or admitted by the party. (*Ibid.*) *See also* 131 I.C. 751=1931 L. 490; 76 P.R. 1913=19 I.C. 961. In the above classes of cases it may happen that the appeal against the whole decree is chargeable to less Court-fee than an appeal against part of the decree. An appellant is entitled notwithstanding his admitted intention to attack only part of a decree to take advantage of anomaly existing in the law of Court-fee and to appeal against the whole decree in order to avoid payment of a higher Court-fee applicable to an appeal if only an appeal against part of the decree is prefer-

red. See 32 P.L.R. 591=1931 L. 633. Where in a suit for possession of house by pre-emption is decreed on payment of Rs. 700, the Court-fee on memorandum of appeal should be paid *ad valorem* on that amount, 1934 L. 424. See also 1928 M. 929=110 I.C. 752 (parties can avail of camouflage of law).

**PROMISSORY NOTE—SUIT ON.**—Where on a suit brought on the basis of a promissory note the defendant claimed in his written statement a specified amount by way of damages, setting out the particulars of the claim made by him as one arising from the transaction of sale which led to the execution of the promissory note in favour of the plaintiff and by reason of the breach of covenant alleged to have been committed by the plaintiff. *Held*, that the claim by way of set-off came under Art. 1, Sch. I. 142 I.C. 719=1933 M. 203. Suit on promissory note—Decree against defendant personally—Appeal alleging that defendant is not personally liable but only as trustee.—Court-fee payable is *ad valorem*. 52 L.W. 903=1941 M. 313=1940 2 M.L.J. 946.

**RENT, ENHANCEMENT OF.**—A suit for enhancement of rent under S. 7 of the Bengal Tenancy (Amendment) Act is not governed by S. 7 (i) of the Court-Fees Act, because it is not a suit for recovery of money; or by S. 7 (ii) because a claim to enhancement of rent is not similar to a right to maintenance or annuity and the words "other sums payable periodically" must be construed as implying sums payable in the nature of maintenance and annuities upon the rule of *ejusdem generis* (4 P.L.J. 561, Foll.); or by S. 7 (iv) (c), because there was no consequential relief; or by S. 7 (xi) because the words "rights of occupancy" in cl. (b) denote such rights under which a tenant could be in actual physical possession and not to others who hold superior interests, as a tenure holder. The Court-fee in such a suit is therefore payable under Sch. I, Art. 1 of the Court-Fees Act on the difference between the rent actually paid and the rent claimed on appeal on the difference between the rent awarded by the first Court and that claimed. 61 C. 513=38 C.W.N. 527=1934 C. 674. As to Court-fee on suit by tenant under S. 112, Madras Estates Land Act and appeal from the decree by landlord, see I.L.R. (1937) Mad. 980=46 L.W. 263=1937 M. 786=(1937) 2 M.L.J. 347. An appeal from a decree passed by the Special Judge under S. 14 of the U. P. Encumbered Estates Act falls under Art. 1, Sch. I and *ad valorem* Court-fee has to be paid. Neither Art. 11 nor Art. 17 of the Second Schedule applies to the case. I.L.R. (1938) All. 230=1938 O.W.N. 88=1937 A.L.J. 1373=1938 All. 97 (F.B.). See also 1941 O.W.N. 219=1941 O. 269. Appeal under S. 25, U.P. Agriculturists' Relief Act—Court-fee payable. 1937 A.W.R. 932=1938 All. 14.

**APPEALS ARISING FROM A SINGLE SUIT.**—Where several defendants who could have preferred a single appeal prefer separate appeals against a decree, each must pay full Court-fee on his appeal. 48 I.C. 424=91 P.R. 1918. See also 13 P.L.T. 810. Two second appeals by the same party against two decrees passed in the appeals filed by both the parties against a mortgage decree, must be stamped separately and cannot be consolidated. 43 A. 56=58 I.C. 230=18 A.L.J. 894.

**MAXIMUM FEES—PROVISO.**—Although the proviso to Art. 1, Sch. I, refers only to the maximum fee leviable on a plaint or memorandum of appeal and leaves out any reference to written statement pleading a set-off or counter-claim, there is no authority for charging a larger sum on a written statement than that specified as maximum in the schedule. 1930 O. 140. The proviso is of general application and is not confined to plaints or memoranda of appeal under Art. 1 only. 3 A. 108 (112); 29 C. 140. Multifarious suits under S. 17 are also subject to it. 3 A. 108.

**SUITS OF SMALL CAUSE NATURE—ART. 2 (MAD.).**—In Madras a lower scale of fee is prescribed for suits of a small cause value by Art. 2. In a suit for two sums, *viz.*, Rs. 600 and Rs. 400 due respectively on two promissory notes, it has been held that S. 17 applies and Court-fee is payable at the lower scale for the second item. 141 I.C. 533=1933 M. 178. Order rejecting plaint for failure to pay additional Court-fee, appeal from—Court-fee. See 1935 N. 83. See also 1939 N.L.J. 32.

**ARTS. 1 AND 2 (AS AMENDED BY MADRAS ACT V OF 1922)—SUIT IN MOFUSSIL FOR TWO SUMS OF Rs. 600 AND 400—COURT-FEE PAYABLE.**—If two sums of Rs. 600 and 400 respectively are claimed in a suit on the basis of two promissory notes, the Court-fee is payable on the two sums separately. The first item is governed by Art. 1 of Sch. I but the other by Art. 2 and so they are distinct. And S. 6 is controlled by S. 17. 1933 M. 178=65 M.L.J. 252.

**ART. 1 AND UNITED PROVINCES ENCUMBERED ESTATES ACT 1934, S. 14 (5), EXPLANATION.**—Where the amount decreed was subsequently increased by an amendment in virtue of S. 14 (5), Explan. of the U. P. Encumbered Estates Act and an appeal is preferred against the order of amendment, it is in substance an appeal against the amended decree, though the memorandum of appeal merely purported to appeal against the order amending the decree and the case therefore falls under Art. 1, Sch. I, and *ad valorem* Court-fee is payable. 1941 O.W.N. 355=1941 A.W.R. (Rev.) 217=1941 O. 269. See also 1938 All. 97 (F.B.); 1941 O. 60. An appeal against decree of Special Judge under the Encumbered Estates Act is governed by

Number.		Proper Fee.
2. Plaintiff [ . . . ] <sup>1</sup> in a suit for possession under [the Specific Relief Act, 1877, Sec. 9] <sup>2</sup>	.. ..	A fee of one-half of the amount prescribed in the foregoing scale.
3. [Repealed by Act VIII of 1871].		
4. Application for review of judgment, <sup>3</sup> if presented on or after the ninetieth day from the date of the decree.	.. ..	The fee leviable on the plaint or memorandum of appeal.
5. Application for review of judgment, <sup>3</sup> if presented	.. ..	One-half of the fee leviable on the plaint or

## LEG. REF.

<sup>1</sup> The words "or memorandum of appeal" were repealed by Act XX of 1870.

<sup>2</sup> The words "the Specific Relief Act, 1877, section 9" were substituted for the words "Act No. XIV of 1859 (to provide for the limitation of suits)" by Act XII of 1891.

<sup>3</sup> As to application for review of judgment, see the Code of Civil Procedure, 1908.

this Article and not Sch. II, Art. 11 or 17. (1945) O.W.N. 403=1945 A.L.W. 368.

ART. 2.—See 1894 Bom.P.J. 346.

ART. 4.—The decision of a Court dismissing an appeal under O. 41, r. 11, C. P. Code, is a judgment and an application for review of the decision comes within the article. 30 C.W.N. 334=93 I.C. 909 (2)=1926 C. 638. Upon an application for review, no matter, what may be the actual relief sought the Court-fee payable is the fee actually leviable upon the plaint or memorandum of appeal upon which the judgment of which review is sought was passed. 20 I.C. 3=254 P.L.R. 1913; 31 A. 294=6 A.L.J. 215=1 I.C. 209. See also 57 C. 679=142 I.C. 416 (N.); 74 I.C. 255=1924 O. 108; 129 I.C. 191=1930 C. 631; 82 I.C. 297=1924 C. 881; 86 I.C. 143=1925 P. 368. But see *contra* 50 M. 488=52 M.L.J. 128=1927 M. 360; 4 B. 26; 11 R. 120; 142 I.C. 416=1933 N. 207; 11 R. 120=146 I.C. 560=1933 R. 203. The word "leviable" is used to provide for an application for review *in forma pauperis*. 31 A. 294=6 A.L.J. 215. See also (1941) 2 M.L.J. 500. On the point, see also 20 A. 410; 91 P.R. 1895. An application for review of the judgment in a second appeal passed before the Court-Fees Amendment Act of 1922 was presented after the passing of the Act. *Held*, the Court-fee leviable was that which fell to be levied under the amended Act calculated as if the application for review were a plaint or memorandum of appeal for the relief sought for. 50 M. 488=1927 M. 360=52 M.L.J. 128. But see *contra* 28 C.W.N. 403=1924 C. 881; 1932 A.L.J. 908. The words "the plaint" in column 3 mean nothing else than the plaint which was actually filed and which has resulted in the judgment which is sought to be reviewed. They do not mean an ima-

inary plaint which might be filed at the time of the application for review, asking for the same relief as in that application. 57 C. 679=1930 C. 631; 1943 O.W.N. 14=204 I.C. 486=A.I.R. 1943 Oudh 225. As to the fee leviable, see 74 I.C. 255=1924 O. 108 cited under Art. 4. In computing the period of 89 days, the applicant cannot deduct the time which may have been spent in obtaining a copy of the judgment. 2 O.C. 302. See also 39 P.R. 1879. Nor the days during which the Court is closed for vacation. 9 M. 134; 9 C.P.L.R. 479. See also 80 I.C. 794=1924 C. 994. Application presented on 90th day, 89th day being Sunday must be stamped with full fee under Art. 4. 15 C.L.J. 505=15 I. C. 455. Where after the appeal was dismissed and before the application for review was presented, the Court-fee was enhanced, the application is correctly stamped with half the Court-fees paid on the memorandum of appeal. 28 C.W.N. 403=1924 C. 881. See also 1932 A.L.J. 908. But see the cases cited under Art. 4. The proper Court-fee on an application for review of a judgment is that payable on the actual relief sought for in the application and not the entire Court-fee paid on the plaint or memorandum of appeal. Thus where the applicant seeks review only so far as it affects the question of the costs awarded to him Court-fee is payable only on the relief asked for. 11 R. 120=1933 R. 203.

ARTS. 4 AND 5: COURT-FEE PAYABLE.—Under Arts. 4 and 5, the Court-fee to be paid on an application for review of judgment must be either the fee or one-half of the fee leviable on the plaint or memorandum of appeal (*i.e.*) which is prescribed for the original plaint or original memorandum of appeal, and the application cannot be valued in proportion to the value of the relief sought in review. 18 L. 238=1937 L. 439. An application for restoration of an appeal dismissed for non-payment of printing costs should be treated as an application for review and not as an application under O. 41, r. 19 and should be required to be stamped under Arts. 4 and 5 of Sch. I, Court-Fees Act. 17 Pat. 252=19 P.L.T. 17=1938 P. 111. But see cases cited under Sch. II, Art. 1 as regards review of such orders.

ART. 5 AND SEC. 14.—When considering the obligation of an applicant for a review to pay

Number.		Proper Fee.
before the ninetieth day from the date of the decree.		memorandum of appeal.
6. Copy or translation of a judgment or order not being or having the force of, a decree.	When such judgment or order is passed by any Civil Court other than a High Court or by the presiding Officer, of any Revenue Court or Office, or by any other Judicial or Executive Authority— (a) If the amount or value of the subject-matter is fifty or less than fifty rupees. (b) If such amount or value exceeds fifty rupees.	Four annas. Eight annas.
7. Copy of a decree or order having the force of a decree.	When such judgment or order is passed by a High Court. When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court— (a) If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees. (b) If such amount or value exceeds fifty rupees.	One rupee. Eight annas. One rupee.
8. Copy of any document liable to stamp duty under the Indian Stamp Act, 1879, <sup>1</sup> when left by any party to a suit or proceeding in place of the original withdrawn.	When such decree or order is made by a High Court. (a) When the stamp duty chargeable on the original does not exceed eight annas. (b) In any other case.	Four rupees. The amount of the duty chargeable on the original. Eight annas.

## LEG. REF.

<sup>1</sup> See now the Indian Stamp Act (II of 1899).

Court-fee according to Art. 5 of Sch. I of the Act, an obligation that depends to some extent on the time at which the application is made, the calculation of the 90 days' time is not to be according to rules applicable to times laid down in the Limitation Act but the 90 days mentioned in the Court-Fees Act is to be taken as simply 90 days. Holidays and time taken for obtaining copies, could not be excluded. But in cases of hardship where delay is not due to laches on the part of the applicant the Court has a discretion under sec. 14, Court-Fees Act, to give a certificate directing the refund of the excess fee in proper cases. I.L.R. (1941) Nag. 392=1941 N.L.J. 205=1941 N. 236.

ARTS. 6 TO 9.—Where the Deputy Registrar whose duty is to see that all documents presented in the High Court are duly stamped, accepts copies of judgments and decrees filed with an application under sec. 81 (2), Government of Burma Act, which have not been stamped as required by Arts. 6 to 9, Court-Fees Act, it is an implied decision that the copies are in order and when an objection is raised that it is not in order the applicant is entitled to time to furnish the necessary stamps. 196 I.C. 892=1941 R. 294.

ARTS. 6 AND 7.—Notes of judgment furnished to parties under the Rules of Practice

for the guidance of Small Cause Courts are copies of decrees and require a stamp under Art. 7. 6 M.H.C.R. App. xxiii.

This Article is intended to authorise the levy of 8 annas in the case contemplated under O. 13, r. 9 of the Civil Procedure Code, which deals with the return of admitted documents 43 I.C. 383. A copy of a general power-of-attorney produced in Court for verification does not require a Court-fee stamp of annas 8 under this Article. (*Ibid.*)

ARTS. 6 AND 7: BASIS OF VALUATION.—The valuation of the subject-matter of the suit for the purposes of the determination of proper Court-fee payable on copies of judgment and decree must be made according to the provisions of the Court Fees Act itself (*i.e.*) sec. 7. 1945 A.W.R. (Rev.) 74.

ART. 7.—Sec. 47, C. P. Code, applies to execution of decrees of the Privy Council. An order by the trial Court, refusing to allow costs directed to be paid by the Privy Council has the force of a decree and its copy filed with the appeal from the order, must bear a stamp of Re. 1 under Art. 7, Court-Fees Act. Where, however, the copy is under-stamped owing to a *bona fide* mistake, the appellate Court, can under sec. 149, C. P. Code, allow the appellant to make up the deficiency and can condone under sec. 5, Limitation Act, the period from which the appeal was filed with an insufficient stamped copy up to date. 167 I.C. 879=1937 Pesh. 3; 1940



Number.		Proper Fee.
9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account statement, report or the like taken out of any Civil or Criminal or Revenue Court or Office, or from the office of any Chief Officer charged with the executive administration of a Division.	For every three hundred and sixty words or fraction of three hundred and sixty words.	Eight annas.
10. [Repealed by Act VIII of 1890.]		[Two per centum on such amount or value.] <sup>2</sup>
11. Probate of a will or letters of administration with or without will annexed.	[When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees.] <sup>2</sup>	

## LEG. REF.

<sup>1</sup>This article was substituted by Act VII of 1889, sec. 13 (1).

<sup>2</sup>Matters within brackets in columns 2 and 3 of Art. 11 were substituted by Act VII of 1910.

A.M.L.J. 91; 196 I.C. 892=1941 Rang. 294.

ART. 9.—There is no provision of law and there is nothing in the Civil Rules of Practice authorising the levy of search fees for supplying copies to litigants when an application is made; all that is required by a party is to supply stamps for copies and if the required number of stamps are supplied, it is the Court's duty to furnish the copies asked for. 51 M. 599.

ART. 11: SCOPE.—The fee prescribed by this Article is only in respect of probates or letters of administration, and not in respect of the application for probate (for which see Art. 1 of Sch. II). The Court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. 1, Sch. II. Therefore an *ad valorem* duty on the value of the estate need not be levied. 9 I.C. 538=21 M.L.J. 418. See also 4 C.W.N. 600; 1935 A. 449.

AMOUNT OR VALUE OF THE PROPERTY.—'Value' means market value and the market value of mortgaged property is that of the equity of redemption. 6 N.W.P. 214. See also 3 C. 736. A person is bound to pay stamp duty for probate only on the amount of the right, title and interest of the testator in the property bequeathed. 100 I.C. 111. (Mad.). The value of an annuity for determining the amount of probate fee payable thereon is the market value and not ten times the annual payment. 1 Bom. 118. Court-fee is chargeable on the value at the date of the application for probate and subsequent changes do not alter the amount of Court-fee payable. 5 Bur.L.T. 39=14 I.C. 804. The

expression, "the amount or value of the property" signifies the net value obtained by deduction of the debt and expenses from the gross value. 30 I.C. 958=20 C.W.N. 591; see also 18 C.W.N. 121=21 I.C. 502; 7 Bur.L.T. 272=24 I.C. 793; 1 B. 118; 40 A. 279; but see *contra* 13 B.L.R. App. 24; 24 Cal. 567. The uncertainty of recovering a debt is no ground for reducing the proportionate duty payable thereon for probate. 24 C. 567. See also 13 B.L.R. App. 24. But see *contra* 55 B. 844=134 I.C. 729=33 Bom. L.R. 864=1931 B. 419. Nor the fact that an item of property is the subject of litigation. 24 M. 241. Where property is not reduced into possession when probate is taken out but the right to recover it is the subject of suit, the valuation of such property by the applicant at less than Rs. 1,000 may be accepted by the Court. 23 C. 577. Where the appeal is against a decision only under sec. 14 of the U. P. Encumbered Estates Act, it falls within the scope of Art. 11, Sch. II, Court-Fees Act and *ad valorem* Court-fee need not be paid. 1940 O.W.N. 862=1941 O. 60=16 Luck. 153. Hindu joint family—Death of coparcener—Application by survivors for Letters of Administration in respect of undivided interest of deceased—Court-fee to be paid. 17 Pat. 542. Property—Membership of Bombay Native Share and Stock-brokers' Association—Right of—Is not property liable to probate duty. 43 Bom.L.R. 943. In assessing the annual net profit of a Zamindary estate in Assam, a deduction of 15 p.c. of the gross annual rent demand for meeting the management and collection charges should be allowed, as allowed by the Assam Agricultural Income Tax Act, 1939, in the absence of any evidence as to the actual charges on this head. 49 C. W. N. 695. Where assets are situate in several provinces, the duty should be calculated according to the rate prevalent in the Province where the application is made. 50 Cal. 597



Number.		Proper Fee.
	[When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees.]	[Two and one-half per centum on such amount or value.]
	[When such amount or value exceeds fifty thousand rupees.]	[Three per centum on such amount or value.]
	[Provided that, when after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code No. VIII of 1827 in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of fee paid in respect of the former grant.]	
<sup>1</sup> 12. Certificate under the Succession Certificate Act, VII of 1889.	In any case ..	Two per centum on the amount or value of any debt or security

## LEG. REF.

<sup>1</sup> Substituted by Act VII of 1889, sec. 13 (1).

=27 C.W.N. 812=75 I.C. 466. Where the Calcutta High Court has special jurisdiction in the case of the estate of a person who died in Assam, an application made to that High Court must be treated as one made to that Court as the Court having jurisdiction in Assam, and the fee is to be calculated at the Assam rate though part of the assets may be in Bengal. 49 C.W.N. 695.

PROPERTY OUTSIDE BRITISH INDIA.—Probate duty payable, to be calculated only upon the property which at the date of the death of the testator was in British India. 21 B. 139. But see also 4 C. 725. See also 51 P. R. 1902.

PROPERTY OVER WHICH A PERSON HAS A GENERAL POWER OF APPOINTMENT.—Is not his 'property' and is not leviable to Court-fee under Art. 11 of Sch. I. 60 C. 1016=1933 C. 924.

TRUST PROPERTY IS EXEMPT FROM COURT-FEES.—15 W.R. 45=14 Beng.L.R. 184; 11 Beng.L.R. App. 39; 33 M. 93=19 M.L.J. 91. Where married parties held property under the Code Napoleon, and one of them died, it was held that one half of the property was chargeable with duty the other half being exempted under sec. 19-D. 20 C. 575. See also 25 M. 515. So also in the case of Letters of Administration granted to a Buddhist Burmese widow. 50 I.C. 545=11 Bur.L.T. 258. See also under sec. 19-D. No duty is leviable a second time where full duty was paid on the property on the first application. 6 B.L.R. App. 139. See also 43 C. 625.

RAILWAY PROVIDENT FUND.—Money standing to the credit of a deceased person in Railway Provident Fund deposit is personal property, that is, an asset of the deceased and if such sum exceeds rupees two thousand, it is liable to assessment under Sch. I, Art. 11. There is no provision in the Court-Fees Act under which the party can claim an exemp-

tion from liability to pay duty. 122 I.C. 322=1933 O. 145 (F.B.). See also 6 R. 558=1928 R. 312; 1933 S. 101. But see 1930 C. 252 and 92 I.C. 525 and 1926 N. 306 holding that moneys due under a Railway Provident Fund is exempt from succession duty and passes to the nominee of the holder. If a debt has been partly discharged, duty need be paid only on the amount of the balance of debt still due. 19 A. 129. Court-fee should be paid by a Hindu daughter on an application for certificate in succession to mother who succeeded to her husband's properties though duty was paid by the latter on her application. 36 I.C. 125=20 C.W.N. 1125.

ART. 12: "AMOUNT OR VALUE OF ANY DEBT OR SECURITY"—INTERPRETATION.—It is impossible to interpret the words "the amount or value of any debt or security" in Art. 12 of Sch. I of the Court-Fees Act as referring to anything except individual debts and individual securities. Therefore, the amount payable in respect of an application for a succession certificate is to be calculated according to the amount of the individual items comprised in the application and not according to the total amount of those items. 151 I.C. 262=1934 O. 414. The court-fee is not to be paid in the application for the issue of a succession certificate, but on the certificate itself. Therefore, the relevant date for calculating the amount of court-fee is not the date when the application for the issue of the certificate is made, but, the date when the certificate is drawn up or when the Court passes an order that such certificate should be drawn up. 160 I.C. 709=1936 A.L.J. 55=1936 A. 309.

APPLICATION FOR SUCCESSION CERTIFICATE BY MARRIED SISTER OF DECEASED—COURT-FEE.—The married sisters of the deceased are not "dependents" as defined in sec. 2 (c) of the Provident Funds Act. Where they are not nominees, they can only get the money by producing probate, letters of administration or a succession certificate, and court-fee is payable on the deceased's provident fund, as being

Number.	Proper Fee.
12. Certificate etc.—(Contd.)	specified in the certificate under section 8 of the Act, and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.
<sup>1</sup> 12-A. Certificate under the Regulation of the Bombay Code, No. VIII of 1827.	NOTES.—(1) The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.
(1) As regards debts and securities.	(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.
	The same fee as would be payable in respect of a certificate under the Succession Certificate Act, 1889, or in respect of an extension of such a certificate, as the case may be.

## LEG. REF.

<sup>1</sup> This Article substituted by Act VII of 1889, sec. 13 (1).

his property. 26 S.L.R. 429=1933 S. 101. See also 1939 Sind 52.

AS AMENDED IN BENGAL, SCH. I, ART. 12.—Where the original application is in respect of an amount less than Rs. 1,000 but the amount is exceeded by a later application.

Court-fee is payable at 2 per cent. on the original certificate and at the enhanced rate of 3 per cent. under Bengal Act II of 1922 in respect of the extensions. 60 C. 1262=37 C. W.N. 930.

AS AMENDED BY C. P. COURT-FEES (AMENDMENT) ACT, 1935, SCH. I, ART. 12—APPLICABILITY.—Where an application for a succession certificate relates to several items of debt or securities aggregating to more than Rs. 1,000 but no single items of debt or security by itself exceeds Rs. 1,000, no court-fee is payable in respect of it, under Sch. I, Art. 12 of the Court-Fees Act as amended by C.P. Court-Fees (Amendment) Act, 1935. The word 'Any' occurring in that article indicates one out of a number of persons or things more than two. 1940 N.L.J. 495=1940 Nag. 400.

Number.		Proper Fee.
	(2) As regards other property in respect of which the certificate is granted— When the amount or value of such property exceeds one thousand rupees but does not exceed ten thousand rupees ; When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees ; [When such amount or value exceeds fifty thousand rupees.] <sup>1</sup> When the amount or value of the subject-matter in dispute does not exceed twenty-five rupees. When such amount or value exceeds twenty-five rupees.	Two per centum on such amount or value. Two and one-half per centum on such amount or value. [Three per centum on such amount or value.] <sup>1</sup> Two rupees. The fee leviable on a memorandum of appeal.
* 13. Application to the [High Court of Judicature at Lahore]* for the exercise of its jurisdiction under section 44 of the Punjab Courts Act, 1918, [or to the Court of the Financial Commissioner of the Punjab for the exercise of its revisional jurisdiction under Sec. 84 of the Punjab Tenancy Act, 1887]. <sup>4</sup>		
14. [Omitted by Government of India (Adap. of Indian Laws) Order, 1937.]		
15. [Repealed by Act XI of 1923, Sch. II.]		

Table of rate of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds			When the amount or value of the subject-matter exceeds		
Rs.	But does not exceed	Proper Fee.	Rs.	But does not exceed	Proper Fee.
Rs.	Rs.	Rs. A. P.	Rs.	Rs.	Rs. A. P.
..	5	0 6 0	80	85	6 6 0
5	10	0 12 0	85	90	6 12 0
10	15	1 2 0	90	95	7 2 0
15	20	1 8 0	95	100	7 8 0
20	25	1 14 0	100	110	8 4 0
25	30	2 4 0	110	120	9 0 0
30	35	2 10 0	120	130	9 12 0
35	40	3 0 0	130	140	10 8 0
40	45	3 6 0	140	150	11 4 0
45	50	3 12 0	150	160	12 0 0
50	55	4 2 0	160	170	12 12 0
55	60	4 8 0	170	180	13 8 0
60	65	4 14 0	180	190	14 4 0
65	70	5 4 0	190	200	15 0 0
70	75	5 10 0	200	210	15 12 0
75	80	6 0 0	210	220	16 8 0

## LEG. REF.

<sup>1</sup> Columns 2 and 3 of this article were substituted by Act VII of 1910.

<sup>2</sup> Inserted by the Punjab Courts Act (XVIII of 1884), sec. 71, as amended by the Punjab Courts Act (XXV of 1899), sec. 6.

<sup>3</sup> The words "High Court of Judicature at Lahore" were substituted for the words "Chief Court in the Punjab" by Act XVIII of 1919, Sch. I.

<sup>4</sup> The words "or to the Court . . . . . Tenancy Act, 1887," were added by sec. 1

C.C.M.—250

of Act IX of 1901, Sch. I.

ART. 13.—An application for revision against an order refusing to set aside an award is really one against the award decree and is chargeable with *ad valorem* fee under Sch. I, Art. 13. 9 I.C. 388=4 P.L.R. 1911. See also 108 I.C. 382; 1931 Rang.L.R. 54; 1941 Rang. 126 (Revision application from suit under sec. 9, Specific Relief Act—Court-fee payable is same as on the plaint).



When the amount of the subject-matter exceeds				When the amount of the subject-matter exceeds			
Ra.	Ra.	Proper Fee.	A. P.	Ra.	Ra.	Proper Fee.	A. P.
280	280	17	4	680	870	64	4
280	280	18	0	870	880	65	0
280	280	18	12	880	890	66	12
280	280	19	8	890	900	67	8
280	280	20	4	900	910	68	4
280	280	21	0	910	920	69	0
280	280	22	12	920	930	70	12
280	280	23	8	930	940	71	8
280	280	24	4	940	950	72	4
280	280	25	0	950	960	73	0
280	280	26	12	960	970	74	12
280	280	27	8	970	980	75	8
280	280	28	4	980	990	76	4
280	280	29	0	990	1,000	77	0
280	280	30	12	1,000	1,100	80	0
280	280	31	8	1,100	1,200	85	0
280	280	32	4	1,200	1,300	90	0
280	280	33	0	1,300	1,400	100	0
280	280	34	12	1,400	1,500	105	0
280	280	35	8	1,500	1,600	110	0
280	280	36	4	1,600	1,700	115	0
280	280	37	0	1,700	1,800	120	0
280	280	38	12	1,800	1,900	125	0
280	280	39	8	1,900	2,000	130	0
280	280	40	4	2,000	2,100	135	0
280	280	41	0	2,100	2,200	140	0
280	280	42	12	2,200	2,300	145	0
280	280	43	8	2,300	2,400	150	0
280	280	44	4	2,400	2,500	155	0
280	280	45	0	2,500	2,600	160	0
280	280	46	12	2,600	2,700	165	0
280	280	47	8	2,700	2,800	170	0
280	280	48	4	2,800	2,900	175	0
280	280	49	0	2,900	3,000	180	0
280	280	50	12	3,000	3,100	185	0
280	280	51	8	3,100	3,200	190	0
280	280	52	4	3,200	3,300	195	0
280	280	53	0	3,300	3,400	200	0
280	280	54	12	3,400	3,500	205	0
280	280	55	8	3,500	3,600	210	0
280	280	56	4	3,600	3,700	215	0
280	280	57	0	3,700	3,800	220	0
280	280	58	12	3,800	3,900	225	0
280	280	59	8	3,900	4,000	230	0
280	280	60	4	4,000	4,100	235	0
280	280	61	0	4,100	4,200	240	0
280	280	62	12	4,200	4,300	245	0
280	280	63	8	4,300	4,400	250	0
280	280	64	4	4,400	4,500	255	0
280	280	65	0	4,500	4,600	260	0
280	280	66	12	4,600	4,700	265	0
280	280	67	8	4,700	4,800	270	0
280	280	68	4	4,800	4,900	275	0
280	280	69	0	4,900	5,000	280	0
280	280	70	12	5,000	5,100	285	0
280	280	71	8	5,100	5,200	290	0
280	280	72	4	5,200	5,300	295	0
280	280	73	0	5,300	5,400	300	0
280	280	74	12	5,400	5,500	305	0
280	280	75	8	5,500	5,600	310	0
280	280	76	4	5,600	5,700	315	0
280	280	77	0	5,700	5,800	320	0
280	280	78	12	5,800	5,900	325	0
280	280	79	8	5,900	6,000	330	0
280	280	80	4	6,000	6,100	335	0
280	280	81	0	6,100	6,200	340	0
280	280	82	12	6,200	6,300	345	0
280	280	83	8	6,300	6,400	350	0
280	280	84	4	6,400	6,500	355	0
280	280	85	0	6,500	6,600	360	0
280	280	86	12	6,600	6,700	365	0
280	280	87	8	6,700	6,800	370	0
280	280	88	4	6,800	6,900	375	0
280	280	89	0	6,900	7,000	380	0
280	280	90	12	7,000	7,100	385	0
280	280	91	8	7,100	7,200	390	0
280	280	92	4	7,200	7,300	395	0
280	280	93	0	7,300	7,400	400	0
280	280	94	12	7,400	7,500	405	0
280	280	95	8	7,500	7,600	410	0
280	280	96	4	7,600	7,700	415	0
280	280	97	0	7,700	7,800	420	0
280	280	98	12	7,800	7,900	425	0
280	280	99	8	7,900	8,000	430	0
280	280	100	4	8,000	8,100	435	0
280	280	101	0	8,100	8,200	440	0
280	280	102	12	8,200	8,300	445	0
280	280	103	8	8,300	8,400	450	0
280	280	104	4	8,400	8,500	455	0
280	280	105	0	8,500	8,600	460	0
280	280	106	12	8,600	8,700	465	0
280	280	107	8	8,700	8,800	470	0
280	280	108	4	8,800	8,900	475	0
280	280	109	0	8,900	9,000	480	0
280	280	110	12	9,000	9,100	485	0
280	280	111	8	9,100	9,200	490	0
280	280	112	4	9,200	9,300	495	0
280	280	113	0	9,300	9,400	500	0
280	280	114	12	9,400	9,500	505	0
280	280	115	8	9,500	9,600	510	0
280	280	116	4	9,600	9,700	515	0
280	280	117	0	9,700	9,800	520	0
280	280	118	12	9,800	9,900	525	0
280	280	119	8	9,900	10,000	530	0
280	280	120	4	10,000	10,100	535	0
280	280	121	0	10,100	10,200	540	0
280	280	122	12	10,200	10,300	545	0
280	280	123	8	10,300	10,400	550	0
280	280	124	4	10,400	10,500	555	0
280	280	125	0	10,500	10,600	560	0
280	280	126	12	10,600	10,700	565	0
280	280	127	8	10,700	10,800	570	0
280	280	128	4	10,800	10,900	575	0
280	280	129	0	10,900	11,000	580	0
280	280	130	12	11,000	11,100	585	0
280	280	131	8	11,100	11,200	590	0
280	280	132	4	11,200	11,300	595	0
280	280	133	0	11,300	11,400	600	0
280	280	134	12	11,400	11,500	605	0
280	280	135	8	11,500	11,600	610	0
280	280	136	4	11,600	11,700	615	0
280	280	137	0	11,700	11,800	620	0
280	280	138	12	11,800	11,900	625	0
280	280	139	8	11,900	12,000	630	0
280	280	140	4	12,000	12,100	635	0
280	280	141	0	12,100	12,200	640	0
280	280	142	12	12,200	12,300	645	0
280	280	143	8	12,300	12,400	650	0
280	280	144	4	12,400	12,500	655	0
280	280	145	0	12,500	12,600	660	0
280	280	146	12	12,600	12,700	665	0
280	280	147	8	12,700	12,800	670	0
280	280	148	4	12,800	12,900	675	0
280	280	149	0	12,900	13,000	680	0
280	280	150	12	13,000	13,100	685	0
280	280	151	8	13,100	13,200	690	0
280	280	152	4	13,200	13,300	695	0
280	280	153	0	13,300	13,400	700	0
280	280	154	12	13,400	13,500	705	0
280	280	155	8	13,500	13,600	710	0
280	280	156	4	13,600	13,700	715	0
280	280	157	0	13,700	13,800	720	0
280	280	158	12	13,800	13,900	725	0
280	280	159	8	13,900	14,000	730	0
280	280	160	4	14,000	14,100	735	0
280	280	161	0	14,100	14,200	740	0
280	280	162	12	14,200	14,300	745	0
280	280	163	8	14,300	14,400	750	0
280	280	164	4	14,400	14,500	755	0
280	280	165	0	14,500	14,600	760	0
280	280	166	12	14,600	14,700	765	0
280	280	167	8	14,700	14,800	770	0
280	280	168	4	14,800	14,900	775	0
280	280	169	0	14,900	15,000	780	0
280	280	170	12	15,000	15,100	785	0
280	280	171	8	15,100	15,200	790	0
280	280	172	4	15,200	15,300	795	0
280	280	173	0	15,300	15,400	800	0
280	280	174	12	15,400	15,500	805	0
280	280	175	8	15,500	15,600	810	0
280	280	176	4	15,600	15,700	815	0
280	280	177	0	15,700	15,800	820	0
280	280	178	12	15,800	15,900	825	0
280	280	179	8	15,900	16,000	830	0
280	280	180	4	16,000	16,100	835	0
280	280	181	0	16,100	16,200	840	0
280	280	182	12	16,200	16,300	845	0
280	280	183	8	16,300	16,400	850	0
280	280	184	4	16,400	16,500	855	0
280	280	185	0	16,500	16,600	860	0
280	280	186	12	16,600	16,700	865	0
280	280	187	8	16,700	16,800	870	0
280							



Number.		Proper Fee.
Application or petition.— <i>contd.</i>	or when presented to any Civil, Criminal or Revenue Court, or to any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer, or of any other document on record in such Court or Office.	
	(b) When containing a complaint or charge of any offence other than an offence for which police officers may under the Criminal Procedure Code <sup>1</sup> arrest without warrant, and presented to any Criminal Court ;	Eight annas.
	or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by this Act.	
	or to deposit in Court revenue or rent ;	
	or for determination by a Court of the amount of compensation to be paid by landlord to his tenant.	
	(c) When represented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act.	One rupee.
	(d) When presented to a High Court.	Two rupees.
<sup>1</sup> [1-A. Application to any Civil Court that records may be called for from another Court.	When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.	Twelve annas in addition to any fee levied on the application under clause (a), clause (b), or clause (d) of Article I of this Schedule.
2. Application for leave to sue as a pauper.	.. ..	Eight annas.

## LEG. REF.

<sup>1</sup>See now the Code of Criminal Procedure (Act V of 1908).

<sup>2</sup>Added by Act XIV of 1911.

the application. 11 P. 40=1932 P. 103. A memorandum of objections filed under O. 41, r. 26, C.P. Code, is not a petition or application under Art. 1 (d) and no court-fee is chargeable thereon. 54 A. 465=1932 A.L.J. 149=1932 A. 526 following 1928 P. 85. But see 105 I.C. 108. On petitions under secs. 34 and 74, Trusts Act, court-fees under Sch. II, Art. 1 (d) are sufficient. 11 O.W.N. 323=1934 O. 118 (2).

**Art. 1, cl. (d).**—No court-fee is payable in respect of a memorandum of objection filed under O. 41, r. 26, C.P. Code. The object of the memorandum of objection is to give notice to the opposite party of the grounds on which the finding is proposed to be contested. It does not seek any relief from the Court and does not contain any re-

quest for any order being passed on it. It can, therefore, hardly be regarded as an application or petition within the meaning of Art. 1, cl. (d) of Sch. II. 160 I.C. 38 (1)=1936 O.W.N. 113=1936 O. 180. Same judgment governing several suits—Appeals filed in some to High Court and in others in District Court—Application for transfer of all appeals to High Court for analogous trial—Separate application and vakalatnama for each appeal not necessary. I.L.R. (1939) 2 Cal. 264=43 C.W.N. 836=1940 Cal. 84.

**Art. 1 (d), as amended in Madras—Civil Revision Petition.**—The stamp duty on a civil revision petition to the High Court against an order directing a decree-holder to refund a sum received by him in rateable distribution will be Rs. 10 and not Rs. 5, where the value of the suit or the main proceeding wherein the order was made is above the value of Rs. 1,000. 55 L.W. 323=1942 M.W.N. 66=A.I.R. 1942 Mad. 390=(1942) 1 M.L.J. 111.



Number.		Proper Fee.
3. Application for leave to appeal as a pauper.	(a) When presented to a District Court.	One rupee.
	(b) When presented to a Commissioner or a High Court.	Two rupees.
4. Plaint or memorandum of appeal in a suit to obtain possession under Act No. XVI of 1898, or [the 'Mamlatdars' Courts Act, 1876.] <sup>2</sup>	.. ..	Eight annas.
5. Plaint or memorandum of appeal in a suit to establish or disprove a right of occupancy.	.. ..	Do.
6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Procedure, 1908, and not otherwise provided for by this Act.	.. ..	Do.

## LEG. REF.

<sup>1</sup>These words were substituted for the words "Bombay Act V of 1864" (to give Mamlatdars' Courts jurisdiction in certain cases to maintain existing possession, or to restore possession to any party dispossessed otherwise than by course of law), by the Repealing and Amending Act XII of 1891.

<sup>2</sup>See now the Bombay Mamlatdars' Courts Act, 1906 (Bom. Act II of 1906).

<sup>3</sup>This Article was substituted by Act XVII of 1914, Sch. The original Article ran as follows:—"Bail bond or other instrument of obligation not otherwise provided for by this Act, when given by the direction of any Court or executive authority."

Art. 5.—In a suit to establish or disprove a right of occupancy, the plaint or memorandum of appeal shall bear a court-fee of eight annas under article. 40 A. 358=16 A.L.J. 167=44 I.C. 608. As to case where the plaintiff sued to eject defendant as being a tenant at will with the mere intention of contesting the right of occupancy claimed by the latter, see 11 C.L.R. 91; 16 M. 310. For a suit to declare plaintiff statutory tenant on a certain rental article applicable is Sch. II, Art. 17 (iii) not Art. 5. 1941 R.D. 24=1941 O.A. (Supp.) 18=(1941) A.W.R. (Rev.) 29.

Art. 6.—Security bonds filed by a claimant in a claim case, being an instrument of obligation given in pursuance of an order of Court, is governed by Sch. II, Art. 6. 49 C. 997=1923 C. 269 (2). See also 29 C.W.N. 851=53 C. 101=1925 C. 906 (F.B.); 58 M. 687=1935 M. 380=68 M.L.J. 436. They will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or 57 thereof. 2 C.W.N. 851 (F.B.). Security bonds given in pursuance of an order of the Court for stay of execution must be written on paper properly stamped under the Stamp

Act and not on plain paper bearing a court-fee stamp of eight annas. 43 I.C. 376=21 C. W.N. 1150; 7 L.L.J. 343=1925 L. 552. But see 41 L.W. 482=68 M.L.J. 466 (F.B.); 1929 L. 205, holding that the bond must bear court-fees and no stamp under Stamp Act is necessary. Stamp on security bond by receiver pledging immovable property. 43 M. 363=38 M.L.J. 503. Where a security bond is executed by a surety under O. 41, rr. 5, 6, C.P. Code, it is liable to a court-fee under Art. 6 of Sch. II, Court-Fees Act, and to stamp duty under Art. 57, Sch. I, Stamp Act. This applies only in relation to deeds executed in the mofussil. (1933 L. 1004; 1934 L. 138 and 1931 O. 99 (S.B.), Foll.; 1931 A. 189 not foll.; 30 S.L.R. 1); 1936 Sind. 41. Security bond for the production of attached livestock is a bond given in pursuance of an order made by a Court within Art. 6 and the Stamp leviable on such a bond is under Court-Fees Act and not under Arts. 15 and 57 of the Stamp Act. 37 M. 17=20 I.C. 775=24 M.L.J. 637.

A bond executed by a surety in accordance with sec. 55 (4) of the C.P. Code, undertaking that the debtor would file a petition within a month to be declared an insolvent and that he would appear in any proceeding whenever called upon, need only be stamped with a court-fee of annas eight under Art. 6 of Sch. II of the Court-Fees Act. As it imposes only a personal obligation and does not hypothecate any movable or immovable property, Art. 57 of Sch. I of the Stamp Act has no application to it. 14 L. 284=1933 L. 89 (F.B.). See also 143 I.C. 12 (Lah.); (117 I. C. 226; 53 C. 101 and 141 I.C. 301, Foll.; 81 I.C. 772 and 132 I.C. 225, Not Foll.) 143 I. C. 12=34 P.L.R. 480. The article does not lay down that it is illegal for the Court to accept a person as surety in proceedings under sec. 55 (4), C.P. Code, on oral statements made before it or that it is obligatory

Number.		Proper Fee.
7. Undertaking under section 49 of the Indian Divorce Act.		Eight annas.
8. [ <i>Rep. by the Repealing and Amending Act, 1891 (XII of 1891).</i> ]		
9. [ <i>Repealed by Act XII of 1891.</i> ]		
10. Mukhtarnama or Wakalatnama.	When presented for the conduct of any one case—	
	(a) to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except such as are mentioned in clauses (b) and (c) of this number.	Eight annas.
	(b) to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a Division, not being the Chief Revenue or Executive Authority.	One rupee.
	(c) to a High Court, Chief Commissioner, Board of Revenue, or other Chief Controlling Revenue or Executive Authority.	Two rupees.
11. Memorandum of appeal when the appeal is not * * * * * * * * <sup>1</sup> from a decree or an order having the force of a decree, and is presented—	(a) to any Civil Court other than a High Court, or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority.	Eight annas.
	(b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.	Two rupees.

## LEG. REF.

<sup>1</sup>The words "from an order rejecting a plaint or" were omitted by sec. 155 (Sch. 4) of the Code of Civil Procedure (Act V of 1908).

to take a bond in writing. 1937 Lah. 772. Ex parte decree in small cause suit—Application to set aside—Stamp duty on the security bond. See 58 M. 687=1935 M. 380=68 M.L.J. 466 (F.B.).

Art. 10.—A power to a vakil authorising him to present an application for copies to Collector, falls under article and does not require to be stamped under Art. 50 of Sch. I of Stamp Act. 9 M. 146 (F.B.); 33 A. 487=9 I.C. 617. See also 15 I.C. 122=202 P.L. R. 1912 (F.B.); 5 P. 255=1926 P. 246; 40 C.W.N. 1340. The High Court has no inherent jurisdiction to consolidate civil revision petitions in cases disposed of by a single judge of the lower Court, so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents. 53 M. 262=58 M.L.J. 521=1930 M. 381 (F.B.). See also 53 M. 248=58 M.L.J. 510=1930 M. 376 (F.B.). [27 L.W. 366 is not good law.] Where a plaintiff sued to avoid a document executed during his minority, all that was necessary for him was to ask that the document be declared to be void

against him and the suit need not be treated as involving a prayer for consequential relief, namely, the setting aside of the document. 11 R. 66. As to memo. of appearance, see 35 C.W.N. 1100.

Art. 11: Scope of Article.—An order in probate proceedings has the force of a decree and so Art. 11 is not applicable to an appeal therefrom. 21 M.L.J. 481=9 I.C. 538. See also 1938 Rang.L.R. 72=1938 Rang. 141. So also an order under O. 21, r. 50 (2), C.P. Code. 10 Bur.L.T. 42=35 I.C. 429; 37 C. W.N. 227; 1934 L. 958; also an order under O. 21, r. 99, C.P. Code. 10 B. 238; 8 C. 720; 29 M. 172. Though decision under sec. 47 of the C.P. Code is a decree, an appeal therefrom should be stamped under this article by a notification of the Governor-General. The Madras Court-Fees Act removes all doubts by specially including orders under sec. 47 and sec. 144 of the C.P. Code. An application by way of restitution under sec. 144, C.P. Code, is one under sec. 47 and hence an appeal from an order on such application would be chargeable with court-fees under this article under the Government Notification. 11 C.L.J. 541=6 I.C. 125; 41 C.W.N. 157=1937 C. 152. See also 20 M. 448; 8 A. 545; 21 C. 340; 18 N.L.R. 15=1922 N. 62; 39 I.C. 640=21 C.W.N. 544; 1938 Rang.L.R. 635; 42 C.W.N. 152; 17 L.

Number.		Proper Fee.
12. Caveat ..	..	Five rupees.
13. Application under Act No. X of 1859, <sup>1</sup> section 26, or Bengal Act No. VI of 1862, <sup>2</sup> section 9, or Bengal Act No. VIII of 1869, <sup>3</sup> section 37.	..	Do.

## LEG. REF.

<sup>1</sup>Act X of 1859 was repealed by the Bengal Tenancy Act (VIII of 1885) in those portions of the Lower Provinces to which that Act extends and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (Bengal Act I of 1879), in the Province of Agra by Act XVIII of 1873; and in the Central Provinces, by the Central Provinces Tenancy Act (IX of 1883).

<sup>2</sup>Bengal Act VI of 1862 was repealed by the Bengal Tenancy Act (VIII of 1885), so far as it affected those portions of the Lower Provinces to which that Act extends; and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure (Act I of 1879).

<sup>3</sup>Bengal Act VIII of 1869 was repealed by the Bengal Tenancy Act (VIII of 1885).

W. 623=1923 M. 270; 107 I.C. 491=1928 L. 143. But see contra in 8 R. 271=1930 R. 241; 1925 A. 137=47 A. 98 [19 A.L.J. 771, overruled; 1922 A. 223; 1922 A. 238 and 1925 P. 1 (F.B.), Foll.] 40 Bom.L.R. 416=1938 Bom. 320 (Executing Court ascertaining mesne profits and making order for its recovery—Art. 11 applies and court-fee stamp is Rs. 2). So also an appeal against an order directing the mortgagee who obtained a decree for sale, to pay out of the sale proceeds a certain amount as interest due to a prior mortgagee-decree-holder. 4 P. 294=1925 P. 577=92 I.C. 474. The matter of an issue of a personal decree against the judgment-debtor for balance due to decree-holder after the sale of the mortgage property in execution of a mortgage decree falls under sec. 47, C.P. Code and the fee chargeable on an appeal from an order passed on an application for personal decree is limited to amounts chargeable under Art. 11. 164 I.C. 639=1935 R. 352. The directing of the Lower Court to re-admit a case is an order not having the force of a decree and an appeal therefrom is to be stamped under the article. 21 A. 178=1898 A.W.N. 23. So also an appeal from an order under sec. 104 (f), C.P. Code. 9 L. 380=1928 L. 137; 50 A. 128=25 A.L.J. 741. See also 1927 A. 771; 6 Luck. 703=1932 O. 282; 1929 C. 369 (appeal from an order refusing to set aside award); 1929 L. 367 (revision against an appellate order setting aside award). So also an appeal against an order of remand. 1933 O. 191. So also an appeal to the High Court from an order of the District Judge under sec. 214 (now sec. 235) of the Companies Act. 17 A. 238. An

appeal against an order dismissing an application for the ascertainment of mesne profits must be stamped with an ad valorem stamp on the amount claimed. 3 P.L.J. 101=43 I.C. 489. But see also 40 Bom. L.R. 416=1938 Bom. 320. So also an appeal from an order granting application for final decree in a mortgage suit. 27 O.C. 225=84 I.C. 742=1925 O. 102; 130 I.C. 98=1931 N. 1 (F.B.). Also an appeal from order rejecting a plaint for non-payment of court-fee. 67 I.C. 901=3 L.L.J. 237. See also 1929 P. 615. Any appeal from any order connected with the order granting final decree must pay court-fees as in any other appeal from a final decree. 1928 N. 146 (35 A. 476 and 22 Bom.L.R. 811, Foll.). But see 1928 N. 33. See also the cases cited below. An appeal against an order after contest directing that a final decree shall be passed in a mortgage suit should be treated only as an appeal against an order, and not as an appeal against the final decree in the suit for the purpose of court-fee. 53 M. 155=1930 M. 20=57 M.L.J. 718. See also 130 I.C. 98=1931 N. 1 (F.B.). Where a second appeal was decided under sec. 98 (2), C.P. Code, and an application having been made under the amended cl. 15 of the Letters Patent for a certificate the same was refused and against that refusal an appeal was preferred. Held, that the court-fee was chargeable in the memorandum of appeal under Art. 11 (b) of the Second Schedule of the Court-Fees Act. 56 C. 482=117 I.C. 595=1929 C. 575. An appeal from an order under O. 21, r. 50 (2), C.P. Code, is an appeal from an original decree and not a Civil Miscellaneous Appeal and is leviable to ad valorem court-fee. 60 C. 530=146 I.C. 123=37 C.W.N. 227=1933 C. 546. See also 1939 Sind 161 (F.B.). Art. 11 of Sch. II of the Court-Fees Act is inapplicable to an appeal from an order under O. 21, r. 50 (2), C.P. Code, for it expressly excludes from it purview appeal "from a decree" or an order having the force of a decree and it is distinctly laid down in sub-r. (3) of r. 50 of O. 21, that where the liability of any person has been tried and determined under sub-r. (2), the order made thereon shall "have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree". The wording of this rule is very wide and the word "otherwise" here means "in all other respects". An appeal from such an order is governed by Sch. I, Art. 1 under which the court-fee is payable is ad valorem on the subject-matter in dispute. 35 P. L.R. 565=1934 L. 958. See also 1939 Sind 161 (F.B.). As to an appeal from order under O. 21, r. 63-H,

Number.	Proper Fee.
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.	Five rupees.
15. [Repealed by Act V of 1908.]	Do.
16. [Repealed by Act VI of 1889, S. 18 (1).]	
17. Plaint or memorandum of appeal in each of the following suits:— (i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court.	Ten rupees.

C. P. Code (Patna), see 22 Pat. 278=209 I. O. 394=A.I.B. 1943 Pat. 280 and 223 I.C. 802. An appeal from an order under the Companies Act which is enforceable in the same manner as a decree falls under this Article. 221 I.C. 114=A.I.B. 1945 Lah. 146 (F.B.) (Distinction between order having the force of a decree and order enforceable as a decree pointed out). So also an appeal from an order quashing proceedings under sec. 20 of the Oudh Encumbered Estates Act, 1946 O.A. (C.C.) 82. Appeal is against an order of remand it should be filed as a miscellaneous appeal under O. 43, r. 1 (u), C.P. Code, and a Court-fee of Rs. 2 is payable as on a Civil Miscellaneous Appeal. 144 I.C. 967=10 O.W.N. 148=1933 O. 191. This article applies to appeal under Rules of Madras Agriculturists' Relief Act. I.L.R. (1941) Mad. 935=53 L.W. 637=1941 M. 639=(1941) 1 M.L.J. 721. See also 1941 A.W.R. (H.C.) 59=1941 A.L.J. 109 (Order of special judge under U.P. Encumbered Estates Act (secs. 9 and 13) rejecting written statement by creditors. See 1937 A.L.J. 1373=(1938) A.W.R. (H.C.) 22 (F.B.); 1937 A.W.R. 932=1938 All. 14; 1938 O.W.N. 1221=1939 O. 437. An order under sec. 5 (1) of the U.P. Agriculturists' Relief Act, has not by itself the force of a decree and is not capable of execution. It is an order passed in the suit and should be considered to be interlocutory. On an appeal from such an order *ad valorem* Court-fee need not be paid. 1937 A.W.R. 1223=1937 A.L.J. 1212. See also 1936 R.D. 236. An arbitrator making an award under sec. 19 (1) (b) of the Defence of India Act for compulsory acquisition of land under r. 75-A of the Defence of India Rules, is not a Court and his award is not an 'order within the meaning of sec. 8 of the Court-Fees Act. The court-fee payable on the memorandum of appeal against such an award is not *ad valorem* under sec. 8, but the fixed fee under Sch. II, Cl. 11 of the Court-Fees Act, 47 Bom.L.R. 327=A.I.B. 1945 Bom. 348. As to appeal against award under sec. 30 of the Workmen's Compensation Act, see 1943 O.A. (C.C.) 269.

AS AMENDED IN MADRAS, SCH. II, ART. 11.  
—An order rejecting an application under O. 20, r. 12, C.P. Code, asking for an in-

quiry into future profits, which has been left open in the decree in the suit, and for an order directing the defendants to pay the amount found due, is not a decree as defined by S. 2 (d), C.P. Code. An appeal from the order rejecting the application, has to be valued for purposes of Court-fee under Sch. II, Art. 11 of the Court-Fees Act, as amended in Madras, and a Court-fee of one rupee is sufficient. The appellant cannot be ordered to estimate the amount at which he values his relief and to pay an *ad valorem* Court-fee. 49 L.W. 652=1939 Mad. 667=(1939) 2 M.L.J. 356.

ART. 11 (AS AMENDED IN BIHAR AND ORISSA), SCH. II.—Applicability.—Appeal from decree under O. 20, r. 12 (2), C.P. Code—Proper Court-fee. 18 P.L.T. 864.

ART. 12.—A petition by which a party upon whom citation has been issued, opposes the grant of probate is not a caveat and need not be stamped as such. 36 I.C. 38=20 O.W.N. 787.

ART. 17: APPLICABILITY — MEMO. OF CROSS-OBJECTIONS.—Court-fee on memo. of cross-objections should be paid *ad valorem* under Art. 1, Sch. I and not as under Sch. II, Art. 17, as the word "cross-objection" is to be found only in Art. 1, Sch. I and not in Sch. II, Art. 17. 1933 O. 528. But see 1934 A.L.J. 743=1934 A. 728 *contra*. An appellant appealing merely against the portion of a decree declaring his personal liability, can do so on a Court-fee of Rs. 10. 36P.L.R. 104=1934 L. 865.

ART. 17 (i): SUIT TO SET ASIDE SUMMARY ORDER.—A plaint in a suit under O. 21, r. 63, C.P. Code, is governed by this article. 26 O.W.N. 126=1922 C. 166; 64 I.C. 49; 8 P.L.T. 832=1923 P. 152; 22 I.C. 676=1913 U.B.R. 181. See also 6 A. 341; 6 A. 466; 1938 O.W.N. 1018; 51 P.R. 1897; 35 C. 202=35 I.A. 22; 10 B. 610. A suit to cancel the order on the claim petition, to declare the plaintiff's title to the property, to raise the attachment and to obtain a permanent injunction against the execution being continued to sale is in substance one to avoid the attachment and Court-fee is payable under Art. 17 of Sch. II of the Court-Fees Act. 64 M.L.J. 568=1932 M. 439; 56 M. 716=144 I.C. 243. See also the Privy Council decision in 35 I.A. 22=35 C. 202. The value for purposes of

Number.	Proper Fee.
(ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates :	Ten rupees.

jurisdiction in such a case is the value of the land under Cl. (v). 64 M.L.J. 568=1933 M. 439. When a claim or objection to attachment has been made under O. 21, r. 58, C.P. Code, a suit for a bare declaration under O. 21, r. 63, will lie. In such a suit the proper Court-fee payable is Rs. 10 and the valuation of the suit for Court-fee and the valuation thereof for jurisdiction will always be different, the valuation for the latter purpose being the value of the attached properties. 12 R. 679=1934 R. 332; 45 O.W.N. 50=72 C.L.J. 526=1941 Cal. 28; 18 Pat. 323=20 Pat. L. T. 710=1939 P. 571. A suit under O. 21, r. 108, C.P. Code, though the plaintiff claims possession of property of which he had been dispossessed, nevertheless falls under Art. 17 of Sch. II. The restoration of possession is implicit in the setting aside of the executing Court's Order. The consequential relief in substance is not one to seek possession but reversal of the executing Court's order. 1938 N.L.J. 107=1938 Nag. 300. A suit for cancellation of a certificate which was signed by the certificate officer under sec. 6 of the Public Demands Recovery Act, comes within Art. 17, Cl. 1 of Sch. II, and only a fixed Court-fee is payable. 44 C.W.N. 255=1940 Cal. 215. A suit under Madras Act (XXVII of 1860) to contest the award of a Settlement Officer falls within this clause. 4 M. 204. The proper Court-fee payable on an application under sec. 84 of the Madras Hindu Religious Endowments Act (II of 1927) is that fixed by Art. 17-A (1) of the Madras Court-Fees (Amendment) Act, 1922, and not that fixed by Art. 17 (1). The Board of Commissioners for Hindu Religious Endowments is not a 'Civil Court' under Art. 17 (1) of the Madras Court-Fees (Amendment) Act of 1922. 113 I.C. 88=1929 M. 52. But see 1929 M. 334. The Court-fee payable on such petitions under sec. 84 (2) is Rs. 15, the fee prescribed in Art. 17. 52 M. 388=1929 M. 334. Arts. 17-A and 17-B cannot be regarded as parts of Art. 17 but only as new articles. 1929 M. 334=52 M. 388 (1929 M. 52, Diss. from). See also 68 M.L.J. 327; 68 M.L.J. 329; 68 M.L.J. 280.

**MADRAS AMENDMENT—SCH. II, ART. 17-A.**  
—Art. 17-A (1) governs only cases where no consequential relief is prayed for. If as incidental to his remedy by way of partition, a plaintiff contends that a mortgage of the joint family property is not for family purposes, it cannot be said that the suit is one in which no consequential relief is prayed. 1938 M. W.N. 181=1938 M. 474. Where a suit for a declaration without consequential relief instituted in a District Munsiff's Court, is transferred to a Subordinate Judge's Court for trial along with another suit in that Court, an

appeal against the decree in such suit must be stamped with a Court-fee stamp of Rs. 100 and not Rs. 15. The decree appealed against is a decree of a sub-Court; the fact that the suit was originally filed in the Court of the District Munsiff cannot make it a decree of that Court for purposes of court-fee under Art. 17-A of Sch. II of the Court-Fees Act I.L.R. (1940) Mad. 646=51 L.W. 228=1940 Mad. 383=(1940) 2 M.L.J. 425. Decree against temple in suit on promissory note by hereditary trustee—Suit by worshippers to declare decree not binding on temple as being collusive—Temple and trustee made defendants to suit—Court-fee payable. 53 L.W. 311=(1941) 1 M.L.J. 414. Suit for partition by Hindu coparcener—Prayer for account of family property—Court-fee payable. (1940) 1 M.L.J. 32 (F.B.). See also 46 L.W. 484=1937 Mad. 876=(1937) 2 M.L.J. 616. Suit by creditors under sec. 53, Transfer of Property Act—Court-fee. 1939 M.W. N. 778. Co-operative Societies Act, sec. 42 (2) (b)—Order of liquidator under—Suit to declare null and void—Court-fee payable. (1937) 1 M.L.J. 640. On this Article, see also 12 Cut.L.T. 10.

**MADRAS AMENDMENT—SCH. II, ART. 17-B.**  
—The word "estimate" in Art. 17-B of Sch. II of the Court-fees Act as amended in Madras involves the idea of approximation and cannot be interpreted as meaning accurate valuation. Where in a suit to recover a sum of Rs. 18,897 from the defendant as a first charge from certain properties as trust money; the plaintiff gets only a decree but no charge, and the plaintiff appeals against the decree and seeks to get a charge on the properties which are valued in the memorandum of appeal at Rs. 9,500 it cannot be said that the relief is incapable of valuation so as to attract Art. 17-B of Sch. II of the Court-Fees Act. The Court-fee payable on the memorandum of appeal is the amount which would be payable under Art. 1, Sch. I, on the sum of Rs. 9,500 which is the value placed by the plaintiff on the property over which the charge is claimed. 54 L.W. 526=(1941) 2 M.L.J. 774. The appellants were executors of three promissory notes on which suits were instituted. Two of the notes were executed by them simply in their personal capacity while in the third there was a reference to a trust in the body of the instrument, though the appellants had not signed as trustees. In all the three suits the claim was against the appellants in their personal capacity and decrees were passed rendering them personally liable. The appellants preferred second appeals and contended that as the debts had been contracted for trust purposes they should not be made personally liable, and that the decrees should have been set aside.

Number.	Proper Fee.
(iii) to obtain a declaratory decree where no consequential relief is prayed :	Ten rupees.

trustees and against the trust property in their hands. The appellants claimed that the appeals were incapable of valuation and that they were only liable to Court-fee under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras and that no *ad valorem* Court-fee was payable. *Held* that the appellants were seeking to get rid of their liability to the extent of both their persons and property in respect of the amounts decreed against them, and it could not therefore be said that the subject-matter of the appeals was incapable of valuation so as to permit Court-fee being paid under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras and that therefore Court-fee must be paid *ad valorem* on the value of the decree in each suit. 52 L.W. 903=(1940) 2 M.L.J. 946=1941 Mad. 313. A suit under sec. 112 of the Madras Estates Land Act is not a suit in which it is not possible to estimate at a money value the subject-matter in dispute; and therefore Art. 17-B of the Court-Fees Act as amended in Madras cannot apply to such a suit. An appeal by the landlord against a decree in a suit filed by the tenant is not also governed by Art. 17-B. The value of the subject-matter in such a suit or appeal is not more than the annual rent the recovery of which is resisted, and *ad valorem* Court-fee must be paid on such amount under Sch. I, Art. 1. I.L.R. (1937) Mad. 980=1937 Mad. 786=(1937) 2 M.L.J. 347. Decree-holder purchaser obtaining symbolical delivery of part of house—Suit for partition and possession against another purchaser in physical possession—Valuation—Court-fee. 1939 M. W.N. 303=(1939) 1 M.L.J. 531. Suit for possession of office of member and manager of school committee—Valuation—Court-fee. 1939 M.W.N. 720=(1939) 2 M.L.J. 226.

BOMBAY AMENDMENT, SCH. II, ART. 17 (iv).—Applicability—Suit to set aside prior decree in suit for partition and for fresh partition of all properties—Court-fee payable. I. L.R. (1941) Kar. 102.

BIHAR AND ORISSA AMENDMENT, SCH. O, ART. 17 (iv).—Applicability and scope—Hindu widow—Alienations by—Suit by reversioner to declare invalid—Application for and granting of interim injunction to restrain further alienations by widow—Court-fee payable. 20 P.L.T. 855. A suit by a defeated claimant under O. 21, r. 63, C.P. Code, for a declaration of his title to the property in suit, and for a permanent injunction on the defendant so that no delivery of possession of the property in suit may take place, and to prevent the defendant from taking any illegal action whatsoever to the detriment of the plaintiff, is governed for purposes of Court-fee by Sch. II, Art. 17 (1) of the Court-Fees Act as amended in Bihar and Orissa and the Court-fee payable is that prescribed by

that article and not *ad valorem* Court-fee. 193 I.C. 782.

U.P. AMENDMENT, SCH. II, ART. 17 (i).—See 1941 Pat. 174=21 P.L.T. 1019; 193 I. C. 782.

ART. 17, CL. (iii).—See CL (i) of Art. 17-A of Madras Act.

CROSS-OBJECTION IN DECLARATORY SUIT—AD VALOREM COURT-FEES, IF PAYABLE.—A cross-objection in a declaratory suit where no other relief is asked for, does not require *ad valorem* Court-fees. The Court-fees Act lays down the principles for Court-fees and the Schedules merely apply those principles in detail. The principle of the Act to be deduced from sec. 7 is that *ad valorem* Court-fee are not to be charged in a declaratory suit where consequential relief is not prayed for. On that view, the omission of the words "cross objection" from Schedule II, Art. 17 (iii) is a mere clerical error and it is no doubt intended that by a memorandum of appeal a cross-objection should also be included. A cross-objection and an appeal are very intimately connected and there is no essential difference from the point of view in Court-fee between the one and the other, and there is no reason why a person who files a cross-objection should have to pay *ad valorem* Court-fee, whereas if he filed an appeal instead of a cross-objection he will not have to pay Court-fee. 152 I.C. 196=1934 A.L.J. 743=1934 A. 728. But see 1933 O. 528, *contra*.

SUITS FOR DECLARATION WHERE NO CONSEQUENTIAL RELIEF IS PRAYED.—Where a plaint or a memorandum of appeal asks only for a pure declaration, the Court in calculating Court-fees cannot go into the question whether he should also have asked for consequential relief. The effect of failing to ask consequential relief is for the final decision of the Court. A fixed fee under article is sufficient. 27 C.W.N. 972=1924 C. 183. See also 162 I.C. 750=1936 O. 317; 1931 A.L.J. 235=1931 A. 369; 32 P.L.R. 745; 1932 A. L.J. 466; 1932 A. 560; 1932 A.L.J. 165=1932 A. 316; 1933 A. 488 (F.B.); 43 P.L.R. 106 (F.B.); 202 I.C. 450=A.I.R. 1942 Pesh. 62; 205 I.C. 145=45 P.L.R. 22=A.I.R. 1943 Lah. 39. A suit solely to declare that a sale-deed executed by the plaintiff is void and inoperative against him, on the ground that he was made to execute it because of coercion, undue influence and fraud falls under this Article. 9 O.W.N. 440=138 I.C. 147. The plaintiff who was not a party to the deed sued to have it declared null and void. There was no prayer for the document being delivered up after cancellation. *Held*, that the suit was one for a mere declaration and was leviable to Court-fee on that basis. 141 I.C. 798=10 O.W.N. 19=1933 O. 116. See also 163 I.C. 462=1936 Pesh. 140; 1941 Rang.L.R. 387=1941 Rang. 269; 10 O.W.N. 133=142 I.C.



699=1933 O. 127; 140 I.C. 191=1932 A. 316=1932 A.L.J. 165. But see 63 M.L.J. 764=139 I.C. 317=1932 M. 605, holding that a party cannot alter the nature of the suit or its eventual effect by wording the plaint as one for a declaration and that a suit for possession or cancellation of decree cannot be framed as one for declaration that the decree was not binding on the plaintiff in order to pay a smaller Court-fee. Even where relief is prayed for it may be a mere surplussage in which case the suit may be stamped as a mere declaratory suit under this article. 3 P. 795=80 I.C. 655=1925 P. 44. Where the plaintiff merely asks for a declaration that the previous decree is not in any way binding upon him and is altogether void and ineffectual, his suit is one for obtaining a declaratory decree only and falls under Art. 17 (3), Sch. II. (1931 A. 369; 1932 A. 560; 1932 A. 316 and 1933 A. 350, Rel. on; 1932 A. 485 (F.B.), Expl. 1933 A.L.J. 673=1933 A. 483 (F.B.). See also 1937 O.W.N. 1186=1938 Oudh 1 (F.B.); 1941 O.W.N. 1107=1941 O.A. 803; 1941 L. 139 (Plaintiff not being a party to previous decree); 1940 O.W.N. 1121; 35 I.C. 797=12 O.W.N. 375; 30 C. 788; 20 B. 736. See also 34 C.W.N. 1129. A suit by a reversioner for mere declaration that conveyance by a Hindu widow is void in respect of anything beyond her life interest comes under this article. 70 P.R. 1877. See also 24 C. 833=12 M. 234; 159 I.C. 454=41 L.W. 702=68 M.L.J. 327=1935 M. 318. No separate fee is necessary in such a suit for declaration that the plaintiff is the reversioner. 23 Pat. 749=(1945) P.W.N. 199=A.I.B. 1945 Pat. 81. For a similar suit where a prayer for the appointment of Receiver is added, see 96 I.C. 29=1926 M. 678=51 M.L.J. 67 and other cases cited under sec. 7, Cl. (iv) (c). A suit for declaration that a certain document was null and void where the plaintiff was not a party to it. 10 O.W.N. 19=1933 O. 116; suit by a member of a joint Hindu family for declaration that an alienation made by a managing member is not binding on him. 7 M. 134; 78 I.C. 782; 1925 L. 90. Suit for declaration that plaintiff is the real owner of a decree obtained by the defendant against another and for transfer of the decree to him. 1 P.R. 1911=17 P.L.R. 1911; suit for declaration that the plaintiff is entitled to certain sum of money held in Court deposit by the receiver appointed under sec. 146, Cr.P. Code. 1933 P. 224=12 P. 261=14 P.L.T. 113; that plaintiffs were occupancy tenants and not tenure-holders and that the survey entry describing them as tenure-holders was wrong. 4 P.L.J. 302=50 I.C. 298; that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage decree to which he is not a party. 85 I.C. 349=1925 O. 500; that the entire family property in the hands of the plaintiff as the head of the joint family belonged equally to the plaintiff and the defendant and that certain documents executed by certain deceased members of the family did not affect the jointness of the family. 1932 A.L.J. 466=1932 A. 560; that a deed of gift executed by the judgment-debtor is fictitious and void

and that the property caused by it is capable of being attached and sold. 130 I.C. 344=1931 O. 72; 1933 A.L.J. 1537; 10 O.W.N. 133=1933 O. 127. See also 1937 Sind 248; 1941 Rang.L.R. 387=1941 Rang. 269; that plaintiff's share in certain property is not liable to attachment and sale in execution of a decree against his father. 11 O.W.N. 617=1934 O. 212 (2) (F.B.); 1937 Sind 248. A suit to set aside a compromise decree for maintenance falls under the article (Art. 17-A of the Madras Act). 1928 M. 416. See also 145 I.C. 777=1933 Sind 53. (Suits to set aside consent decree in partition suit). See also 1934 A.L.J. 955. A suit under sec. 106, B.T. Act, which is transferred to the Civil Court is a suit for declaratory decree within this article. 48 I.C. 552=28 A.L.J. 801. See also 18 I.C. 275=17 O.L.J. 416. In a suit for recovery of possession with mesne profits and in the alternative for assessment of fair rent, the prayer for assessment is not in the nature of a declaratory relief. 6 P. 17=100 I.C. 913=1927 P. 123. A prayer in a suit for partition by a Hindu son that he may be granted a partition free of a mortgage which he alleges is not binding on him need not be stamped as for a declaratory relief in addition to the fee for partition. I.L.R. (1940) Mad. 259=186 I.C. 491=51 L.W. 11=1940 Mad. 113=(1940) 1 M.L.J. 32 (F.B.), overruling the previous decisions to the contrary. The law allows a plaintiff if he is in possession of property or if the defendant is not in possession to get a declaratory decree. If he is out of possession he will not be entitled to take possession under the decree. Where the relief of possession is not implied in the declaratory decree Court-fee for possession need not be paid. 1941 O.W.N. 1107=17 Luck. 145=A.I.B. 1942 Oudh 58. The plaintiff sued for possession as the transferee of one G. The first Court gave him a decree on condition that his possession should continue only during the lifetime of his transferor. An appeal by the plaintiff against the condition is for a mere declaration and need bear a Court-fee of Rs. 10 only. 33 A. 705=11 I.C. 977=8 A.L.J. 821. Where in a Land Acquisition proceeding, the compensation money awarded is kept in Court deposit on behalf of a widow owning life interest in the property, an appeal by the rival claimant claiming that the compensation money must be payable to him alone should bear only a fixed fee as for declaration. 55 M. 641=62 M.L.J. 541=139 I.C. 131=1932 M. 438. An order in a proceeding under sec. 38 of the Bengal Moneylenders' Act which has the force of a decree for the purpose of an appeal, is a declaratory decree pure and simple where no consequential relief is prayed for and court-fee on memo. of appeal from such order is Rs. 20, under Art. 17, Sch. II. 48 O.W.N. 680. Where a plaintiff sues for a declaration of title in respect of properties some of which are in his own possession and some are in the possession of a receiver of Court, the suit is purely one for a declaration and not one implicitly for possession inasmuch as the receiver was in custody of some of the properties not in his own right



Number.	Proper Fee.
(iv) to set aside an award	Ten rupees.

but for the rightful owner. 210 I.C. 48=1943 A.L.W. 428=1943 O.W.N. 245=A.I.R. 1943 Oudh 462. An award having been made in favour of an alienee from Hindu widow in respect of lands sold by her and acquired by the Government compulsorily, the reversioners of the widow's husband claimed the proceeds on the ground that the alienation was not binding on them and prayed that the amount should not be paid to the alienee but might be invested under sec. 32 of the Land Acquisition Act. The claim was disallowed and they appealed. *Held*, that the appeal was not one under sec. 8 of the Court-Fees Act but fell under Art. 17 (iii) of Sch. II of the Act and that the Court-fee was Rs. 20. 39 C.W.N. 110=60 C.L.J. 216. Where in a partition suit a mortgagee of certain property is unnecessarily impleaded as a party to the suit and a finding is given which would bar a part of his claim in a subsequent suit on his mortgage and he appeals against it, as he is entitled to, he cannot be said to be seeking any consequential relief in the appeal and hence Court-fee as on a claim for a declaration is quite enough. 20 Luck. 101=1944 A.W.R. (C.C.) 220=A.I.R. 1945 Oudh 30. The Bombay practice of valuing suits for declaration at Rs. 130 and paying a Court-fee of Rs. 10 thereon is misleading and unwarranted by law. A fixed fee of Rs. 10 is to be paid thereon. 43 B. 507=46 I.A. 24=36 M.L.J. 437 (P.C.). No *ad valorem* fee need be paid when a suit is brought for a declaration that money is jointly due, plaintiff not objecting to its being received by the defendants. 1923 L. 359. A declaratory suit that a registered release deed be considered cancelled, must be valued for Court-fees at the amount at which the relief is valued. 35 P.R. 1914=25 I.C. 435. Suit by a Hindu reversioner for declaration that a release executed by the widow in favour of defendants 1 to 4 would not be binding on them and for the appointment of a Receiver—Decree that the release deed would not be binding on the reversioners but that the defendants 1 to 4 should be paid a certain amount spent for the benefit of the estate—Appeal by defendants 1 to 4 impugning the declaratory decree and also claiming larger amount—Appellants bound to pay Court-fee only in respect of the declaration and not also on the amount claimed by them in the alternative. 63 M.L.J. 822. Suit for cancellation of an instrument under sec. 39, Specific Relief Act, falls under Sch. I, Art. 1 and not under this article. 1932 A.L.J. 684=1932 A. 485. (F. B.). See also under sec. 7, cl. (iv) (c), (iv-a) Mad. A suit for the reversal of a *patni* sale is not solely for a declaration that the sale is a nullity. 51 C. 216=28 C.W.N. 683=1924 C. 731. See also 1937 A.L.J. 1373; 1938 O.W.N. 1018=1938 A. W. R. (C.C.) 122 (Appeal against dismissal of claim under sec. 11, U.P. Encumbered

Estates Act). A claim to be declared a holder of an *ay*o is covered by article. 98 I.C. 196=1926 R. 184 (F.B.). An appeal in a mortgage suit claiming priority for the mortgage held by the appellants, must bear *ad valorem* court-fee. 54 A. 347=1932 A. 221. See also under Sch. 1, Art. 1. A suit for declaration that a certain wakfnama is valid as against a defendant who is in possession and claims the property (covered by the deed) as his own private property is not maintainable without a consequential relief by way of joint possession, injunction or the like. Such a suit cannot, therefore, be brought upon a fixed court-fee payable under Sch. II, Art. 17. 34 C.W.N. 1129. A suit by a beneficiary under a trust to set aside certain alienations of trust property by the trustees does not fall under this article. 61 M.L.J. 39=130 I.C. 449=1931 M. 24. A suit for declaration that a previous decree declaring certain wakfnamas invalid is not binding on the plaintiff falls under Art. 17, Sch. II, and not under sec. 7, cl. (4) (c). 34 C.W.N. 1129 (21 C.W.N. 375; 20 B. 742, Ref. to). See also 156 I.C. 13=1935 L. 611. Where the declaration sought by a plaintiff amounts to no more than that she has a right to recover her dower debt from a certain property, the subject of the waqf, the plaintiff is only suing for her right as to the property, namely, the right to attach and put to sale that property for recovery of her dower debt. The declaration sought falls within the purview of sec. 42 of the Specific Relief Act and hence the relief is for a mere declaratory decree without any consequential relief coming under Art. 17 (iii) of the Second Schedule to the Court-Fees Act and does not fall under sec. 7 (iv) (c). 1939 O.W.N. 152=1939 O.A. 293. Where an ex-minor sued alleging that he was a minor at the time of the execution of a mortgage deed by him and that it was void against him. *Held*, that all that was necessary for the minor was to ask that the document be declared to be void against him and the suit need not be treated as involving a prayer for a consequential relief, namely, the setting aside of the document. 11 R. 66=1933 R. 109.

ART. 17, CL. (iv).—See cl. (ii) of Art. 17-A of Madras Act inapplicable to compensation awards under the Land Acquisition Act covered by sec. 8. 21 M. 269. See also 35 C.W.N. 1103; 138 I.C. 199=1932 O. 224; 1938 A.L.J. 1124 (Appeal against order of tribunal constituted under U.P. Town Improvements Act). But sec. 8 applies only to appeals by persons who claim compensation. For an appeal by the Secretary of State against the compensation award of the Court, a court-fee of Rs. 10 only is required under article. 37 P. R. 1913=17 I.C. 764. Proceedings before the Court on a reference by the Collector under sec. 19, Land Acquisition Act, cannot be described as a suit to set aside an award

Number.	Proper Fee.
(v) to set aside an adoption ;	Ten rupees.
(vi) every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.	Ten rupees.

under this Art. 17 (4). Where a suit is for a declaration that an award made by the Registrar of Co-operative Societies which directed the plaintiff to pay the opposite party a sum of Rs. 10,244-1-9, is *ultra vires*, the suit is governed by Art. 17 (iv) of Sch. II, and it is only a fixed court-fee and not *ad valorem* court-fee that is payable. There is no reason to limit the term 'Award' in the article to an award by arbitrators. Any judicial decision which is not a decree might be considered to be an award for the purposes of Art. 17 (iv) of Sch. II. L.L.R. (1942) Nag. 636=1941 N.L.J. 254=1941 Nag. 243. The provision applicable is Sch. I, Art. 1 if not sec. 8 and court-fees are payable in the appeals *ad valorem* on the difference between the sum awarded by the Court and the sum which the appellant claims should have been awarded. 6 R. 281=1928 R. 197. Where an appeal is preferred to the High Court against an order of the Civil Court on a reference by the Collector under sec. 5 of the Bengal Alluvial Land Act, a fixed court-fee of Rs. 20 is payable. 58 C. 710=35 C.W.N. 181.

ART. 17 (v).—The plaintiff may value the relief claimed in his suit to set aside an adoption and that valuation determines the Court which is to decide the suit. 37 C. 860=14 C.W.N. 929=6 I.C. 680. See also 15 A. 378. In a suit to declare adoption invalid, market value of property claimed is the basis of court-fee. 52 M. 340=56 M.L.J. 107=1928 M. 1294. See also 1937 Rang. 400 (Suit for cancellation of a deed of adoption). A suit for mere declaration that an adoption is valid does not admit of being satisfactorily valued and falls under Art. 17, cl. (vi). 24 I.C. 286=17 O.C. 90. A suit for declaration that certain adoption deed executed by a widow shall be of no effect on the plaintiff's reversionary rights is not a suit to annul an adoption. 84 I.C. 486=1925 L. 229.

ART. 17, CL. (v).—Where a suit for declaration that plaintiff is the adopted son of the last male owner and therefore entitled to property in his possession was dismissed, the court-fee payable on the appeal is an *ad valorem* fee on the value of the property in possession of the appellant as the adopted son of the last owner. 43 I.C. 64=15 N.L.R. 24. In a suit for declaration that an adoption never took place, court-fee is payable on the value of the property, title to which is affected. 58 I.C. 965 (1). [These decisions were under a C.P. Gazette, Notification No. 1641, dated 28th September, 1911.]

BOMBAY FINANCE ACT, 1932, SEC. 7 (iv) (c) AND SCH. II, ART. 17 (v).—A suit for a

declaration that a decree passed against plaintiff for Rs. 5,366 was obtained by misrepresentation, fraud and undue advantage and was therefore unenforceable and void, and for an injunction restraining the defendant from executing it, is in effect a suit for setting aside the decree passed against the plaintiff. Such a suit falls, for purposes of court-fee, under Art. 17 (v) of Sch. II to the Court-Fees Act as amended by the Bombay Finance Act (1932). Sec. 7 (iv) (c) does not apply to such a case. Hence a court-fee of Rs. 15 for the relief of setting aside, under Art. 17 (c), Sch. II, and another court-fee for the injunction on the valuation given by the plaintiff must be paid. The plaintiff cannot be allowed to value the whole suit as he chose under sec. 7 (iv) (c) of the Court-Fees Act. 47 Bom.L.R. 386=1945 Bom. 474.

ART. 17, CL. (vi).—See Art. 17-B of the Madras Act. (1937) 2 M.L.J. 347; (1937) 2 M.L.J. 572.

CONSTRUCTION AND SCOPE.—Art. 17 (vi) of Sch. II of the Court-Fees Act should be very strictly interpreted, the article cannot be invoked when a suit is otherwise provided for. 60 C.L.J. 201=39 C.W.N. 131. To bring a case within the scope of this clause, it must be established that it is not possible, even to state approximately a money value for the subject-matter in dispute. 1 I.C. 670=13 C.W.N. 815. See also 59 C.L.J. 447=1934 C. 786; A.I.R. 1943 Pat. 433. Thus a suit for restitution of conjugal rights would fall under the clause. 34 C. 352=11 C.W.N. 458=5 C.L.J. 400. See also 60 C.L.J. 201; 8 C.W.N. 705=31 C. 849; 28 A. 545; 9 I.C. 186=8 A.L.J. 889; 33 A. 767=11 I.C. 186. So also a suit under sec. 92, C.P. Code. 14 C.W.N. 932=12 C.L.J. 211=7 I.C. 92; 1927 M. 940=53 M.L.J. 457; 8 L. 730=1928 L. 113. See now cl. (iii) of Art. 17 of Madras Act. Also a suit for removal of a trustee of a religious endowment. 23 M. 537; 19 A. 104; 24 C. 418; 31 B. 48; 1934 P. 647. See also 1938 N.L.J. 357=1938 N. 537. Also a suit for appointment of receiver. 27 All. 406; 51 M.L.J. 67; 1946 A.L.J. 129=1946 A.L.W. 139=1946 O.W.N. (H.C.) 181. A prayer for temporary mandatory injunction to compel defendant to deposit in Court an amount due by him to the trust, in a scheme suit under sec. 92, C.P. Code, does not alter the character of the suit and the fee fixed in Sch. II, Art. 17 (ii) is sufficient. 47 M.L.J. 656=1924 M. 882. See also 110 I.C. 264=1928 L. 113; 48 M.L.J. 514=1925 M. 722; I.L.R. (1940) Mad. 256=(1940) 1 M.L.J. 32=1940 Mad. 113 (F.B.) (Prayer for ap-

Number.	Proper Fee.
18. Application under section 326 of the Code of Civil Procedure, 1908.	Ten rupees.

pointment of interim receiver in partition suit), A suit under Registration Act, sec. 77 to compel registration falls under the article. 21 P.R. 1895; 3 C. 515. Also a suit for reduction of maintenance. I.L.R. (1945) Nag. 661. =1945 N.L.J. 365=A.I.R. 1945 Nag. 264. A temple as such has no market value and a suit for recovery of possession of temple falls under Sch. II, Art. 17, cl. (iv). 46 M. 782 =45 M.L.J. 274=1934 M. 19 (F.B.). An appeal against an order refusing grant of letters of administration is governed by Art. 17 (vi) as the subject-matter in dispute cannot be estimated at a money value. 22 I.C. 98=35 A. 448. The court-fee payable on a memorandum of appeal presented to a High Court from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Art. 11, Sch. II. Neither Art. 1 of Sch. I, nor Art. 1 or Art. 17 (vi) of Sch. II, is applicable to such a case. 1938 Rang. L.R. 72=1938 Rang. 141. The memorandum of appeal against a redemption decree absolute on the ground that the money was deposited at a later date than that allowed and that it should not have been so received falls within the clause. 10 I.C. 736=7 N.L.R. 41. As to appeal against an order rejecting an appeal memorandum for non-payment of court-fee, see 98 I.C. 663 (2)=1927 N. 100. But see 1935 N. 83 (F.B.); *contra*. As *kyauing* cannot be transferred by sale, mortgage or gift, it has no market value and the plaint in a suit by *Hypangyi* to recover possession of *kyauing* should bear a fixed stamp. 57 I.C. 953=13 Bur. L.T. 40. Where the plaintiff alleging that he was the duly elected Mahant sued for possession of the Math properties, *held*, the case was governed by sec. 7 (v) and not this article but that the temple should be left out of account as having no market value. 1932 A.L.J. 777=1932 A. 593. See also 7 R. 245=1929 R. 134 and 372 (F.B.); 40 P.L.R. 113; 1938 N.L.J. 214 (Suit for possession of temple). A mere intention to dedicate property for religious purposes is not sufficient to convert the property into religious property. Court-fee to be paid for recovery of possession of such property will be *ad valorem*. 178 I.C. 232=1938 R. 303. A suit under sec. 92, C.P. Code, that a mahant may be removed and new mahant may be appointed along with a committee and that the trust property may be made over to them falls under Sch. II, Art. 17 (6) and not under sec. 7 (iv) (c). 110 I.C. 264=1928 L. 113. But see 48 C.W.N. 598 where certain reliefs not covered by sec. 92, were also asked for. Where the subject-matter of the suit is the right to mutawalliship and the office does not carry any salary or any other material enjoyment, it is not capable of monetary valuation and therefore the proper court-fee is the fixed fee of Rs. 15 provided

by Sch. II, Art. 17, para. 6. 1934 P. 647. See also 1938 N.L.J. 357=1938 N. 587 (Suit for removal of mutawalli and rendition of accounts). Plaintiffs prayed that they be appointed mutawallis and the defendant be ordered not to interfere with their management and worship. The suit having been dismissed, the plaintiffs preferred an appeal. *Held*, that the relief claimed should not be presumed to be one for possession of the trust property, the latter part of the relief may be considered a superfluity, the case comes under Art. 17 (vi) of the second schedule, as it is not possible to estimate at a money value the subject-matter in dispute namely, the appointment of the plaintiffs as mutawallis in the place of the defendant. The criterion is to see whether by obtaining the particular relief claimed, the plaintiffs can obtain possession of the property by execution of the decree. 171 I.C. 468=1937 O.W.N. 1149=1937 O.L.R. 555. An appeal preferred against the decree in an interpleader suit which declares the title of one of the claimants and directs the delivery of the property to him upon payment of costs to the plaintiff should be stamped under the article. 2 P.L.T. 280=61 I.C. 820. Court-fee is necessary on the claim for interest from date of suit to date of realization made in appeal, either *ad valorem* the sum up to the date of the appeal or at least a court-fee of Rs. 10 as provided by Art. 17 (6). 1935 L. 241. An objection on appeal as to the manner in which a decree in a suit for dissolution of partnership is to be enforced is covered by this article. 90 I.C. 629=1925 L. 496. Where in an appeal from the final decree in a mortgage suit, the only question is whether the property should be sold or whether the mortgagee should foreclose, it is difficult to place an exact money value on the appeal for the calculation of *ad valorem* court-fees and under Art. 17 (66) of Sch. II of the Court-Fees Act, the memorandum of appeal should bear a court-fee stamp of Rs. 15. 15 P.L.T. 696=1934 P. 473 (L). But see also 61 C. 320=38 C.W.N. 276=1934 C. 377. Suit for money against joint family consisting of two brothers B and G—Personal decree against G only but decree against both with respect to share in family property—Appeal by plaintiff praying for personal decree against B also—Court-fees must be under Art. 17 (vi). See 171 I.C. 13=1937 Pesh. 89. Where in an appeal from a final decree for sale in a mortgage suit, the amount of the decree is not challenged, but the only reliefs prayed were extension of time for payment and permission to pay by instalments, the reliefs claimed are incapable of valuation and as such Art. 17 (vi) of Sch. II applies. In respect of each of the two reliefs separate court-fee has to be paid. I.L.R. (1938) Nag.

Number.	Proper Fee.
<sup>1</sup> [19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.]	Ten rupees.

## LEG. REF.

<sup>1</sup> Substituted by sec. 155 (4th Sch.) of the Code of Civil Procedure, Act V of 1908 for the original entry which was as follows:—“Agreement under sec. 328 of the same Code.”

423=1938 N.L.J. 269=1938 Nag. 409 (F. B.). Memorandum of objections by ryot only attacking the finding of the lower appellate Court as to the amount of rent legally due is capable of being estimated in money value within the meaning of cl. 17 (6) of Sch. II. 57 M.L.J. 260=1930 M. 22. Relief originally prayed for was a declaration that the plaintiff was the owner of certain property. A court-fee of Rs. 10 was paid. Subsequently the prayer was sought to be amended thus: “On account of that (a particular) decree is null and void and ineffectual it may be declared, etc.” *Held*, that the effect of the amendment was to add to the original relief a prayer for a further declaration for which a further court-fee of Rs. 10 should be paid and that the second relief asked for was not consequential relief within the meaning of sec. 7 (iv) (c) so as to necessitate the payment of *ad valorem* fees. 55 A. 274=1933 A. L.J. 811=1933 A. 850. Where in an appeal under sec. 45, U. P. Encumbered Estates Act, the appellant does not object to the amount of the decree but only to certain conditions imposed by the special Judge, the appeal comes under Sch. II, Art. 17 (vi) of the Court-Fees Act in that it is not possible to estimate the subject-matter of the appeal at a money value. An appeal which does not relate to the amount of the decree passed but only to the manner in which the decree can be enforced or executed falls only under Art. 17 (vi) of the second schedule to the Court-Fees Act. 15 Luck. 321=1940 O.W.N. 26=1940 Oudh 183. *See also* 1940 O.W.N. 207=15 Luck. 413. In a suit on mortgage the mortgagee was granted a decree for certain sum payable in annual instalments and was held entitled to possession under O. 34, r. 2, C.P. Code, on mortgagors’ failure to pay the instalments regularly. The mortgagee appealed from it claiming a decree under O. 34, r. 4, C.P. Code. *Held*, that the court-fee payable in appeal was under Art. 17 (6), Sch. II. 167 I.C. 26=1937 Pesh. 31. *See also* 1936 B. D. 236. The amount of future interest cannot be determined as it depends upon the date of payment of the amount decreed, by the judgment-debtor. Therefore, a court-fee stamp Rs. 10 only is payable on cross-objections filed with regard to future interest. 163 I.C. 928=38 P.L.R. 276=1936 L. 668.

CASES NOT COMING UNDER THE CLAUSE.—Art. 17 could not apply to a case where a person with a definite decree for a particular sum of money against him seeks to set it

aside. The question whether or not the decree is at the moment capable of execution without payment of certain amount by plaintiff as additional court-fees need not be considered. 33 O.W.N. 743=1929 C. 815. Where in a suit for the enforcement of a mortgage or charge against certain property the trial Court held the charge to be enforceable only against a portion of the property, an appeal to have the charge declared against the whole property must bear *ad valorem* fee on the value of the property in dispute. 65 I.C. 114=24 O.C. 295. So also an appeal in a mortgage suit claiming priority for the mortgage held by the appellants. 54 A. 347=1932 A. 221. But *see* 46 L.W. 524=1937 M. 840. Art. 17 (vi) cannot apply to the case of property which clearly has a money value although it may be difficult to estimate such value correctly. Where the plaintiff-appellants sought to render certain property in the hands of the defendants liable for a certain money claim, *held*, that *ad valorem* court-fee was payable. 54 A. 608=1932 A.L.J. 387=1932 A. 406. When a plaintiff who obtained a decree for the full amount sued for against one of the defendants appealed with a view to make the other defendants also liable, *held* he was bound to pay *ad valorem* court-fee on the amount for which the other defendants were sought to be made liable and not fixed fee under this article. 24 Bom.L.R. 313=46 B. 840. *See also* 86 P.R. 1912=16 I.C. 777; 59 C.L.J. 447=1934 O. 786 (Valuation of appeal by defendants in a suit for accounts). Tank bed, suit for recovery of—Court-fees. *See* 67 M.L.J. 688. In a suit for sale of mortgaged property, the puiame mortgagee and mortgagor were impleaded. The mortgagor denied the puiame mortgagee, but the Court found it to be subsisting, and in the decree, ordered that the balance, after paying off the plaintiff mortgagee should be paid to the puiame mortgagee and the surplus, if any, should be given to the mortgagor. In an appeal by the mortgagor challenging the portion of decree in favour of the puiame mortgagee, *held* that *ad valorem* court-fee on amount due on the mortgage should be paid and not merely for a declaration. 146 I.C. 1003=1933 L. 954.

SUITS FOR PARTITION.—[*See also* under sec. 7, cl. (iv) (b)]. A suit for partition, pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share falls within the clause. 2 P. 482=4 P.L.T. 257; 49 I.C. 115 (P.); A.I.R. 1943 Pat. 433. *See also* 13 C. L.R. 253; 141 I.C. 175=1933 L. 208; 123 I.C. 525=1930 L. 839; 8 C. 757; 34 A. 184=8 A.L.J. 1329; 1943 A.L.W. 848; 90 I.C. 843=1936 M. 122 (partition claimed after divi-

sion in status); 58 C. 188; I.L.R. (1940) Mad. 259=186 I.C. 494=51 L.W. 11=1940 Mad. 113=(1940) 1 M.L.J. 32 (F.B.). The distinction observed in the previous case-law between partition of joint family property and other joint property abolished. See 64 M.L.J. 24=1933 M. 430; 40 P.L.R. 2; 14 Luck. 846=1938 O.W.N. 1265=1939 O. 90; 43 P.L.R. 147=1941 Lah. 123 (F.B.). See also 1939 Lah. 566; I.L.R. (1941) Lah. 308=43 P.L.R. 238=1941 Lah. 152 (F.B.). It is enough if the person claims to be in joint possession of the property. 16 I.C. 771=6 S.L.R. 74 (notes); 1930 L. 839=123 I.C. 525 (2); 43 P.L.R. 147=1941 Lah. 123 (F.B.); 20 P. 780=23 P.L.T. 218=A.I.R. 1942 Pat. 60; 34 P.L.R. 772=1933 L. 780; 34 P.L.R. 84=1933 L. 208; I.L.R. 1945 Kar. 84; 1938 Rang. 76; 40 P.L.R. 27; 32 S.L.R. 124. Where in suit for partition of joint family property, the plaintiff alleges that he is a coparcener, that is enough to show plaintiff's joint possession, because the possession of one coparcener must be deemed to be in possession on behalf of all. Where a plaintiff alleges that the family has continued joint court-fee has to be calculated on the basis of that allegation and the suit does not fall under sec. 7 (v) of the Court-Fees Act merely because the plaintiff does not specifically allege joint possession or enjoyment. 45 L.W. 541=1937 M. 606. This rule applies where the suit is by the widow of a deceased coparcener under the Hindu Women's Right to Property Act. (1943) 2 M.L.J. 172=56 L.W. 417=1943 M.W.N. 519=A.I.R. 1943 Mad. 654. Where some of the family properties has been alienated by the father or manager of the family, the suit in respect of that property should be valued as a suit for possession under sec. 7 (v). I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32=1940 Mad. 113 (F.B.). Suit to set aside decree effecting partition by metes and bounds and for fresh partition of all properties held by plaintiff and defendants exclusively since date of prior partition. It cannot be said that in such a case the plaintiff is in joint possession with the defendants, so as to take the suit out of sec. 7 (iv) (c), and to bring it under Sch. II, Art. 17(vi), as being liable to a fixed court-fee instead of *ad valorem* court-fee. The fact that the plaintiff is already in possession of a portion of the property of which he seeks a re-partition cannot entitle him to credit for court-fees payable in respect of that part of the property. I.L.R. (1941) Kar. 102=1941 S. 154. The suit for partition is not converted into a case of claim to possession because the defendants set up that the house is not joint property and that the plaintiff has no title to it. 35 C.W.N. 942. See also 12 C.W.N. 37=6 G. L.J. 651; 38 C. 681; 1937 Rang.L.R. 447=1938 R. 76; 32 S.L.R. 124=40 P.L.R. 27. The wording of Art. 17, Sch. II, Court-Fees Act shows that when a suit falls under any one of the clauses of that article, the plaint as well as the memorandum of appeal arising from such a suit, is chargeable with a fixed court-fee of Rs. 10 only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value. I.L.R. (1941) Lah. 234=43 P.L.R. 147=

1941 Lah. 123 (F.B.). Where in defence to a suit for partition by a Mahomedan heir, the widow pleads that her right to remain in possession in lieu of dower is paramount to that of the plaintiff's and her defence is rejected, the test to be applied to find out the proper court-fee payable in respect of an appeal against the rejection of such a plea is, to consider what would be position, if the appellant was endeavouring to establish in a suit in which she was plaintiff the same right as she is trying to maintain in the appeal. Applying the test, the court-fee payable was not an *ad valorem* court-fee but court-fee under Art. 17 (vi) of the second schedule of the Court-Fees Act. 1940 A.L.J. 789=1940 All. 521. A decision as to the amount of court-fee should be founded solely on a consideration of the cause of action on which the plaintiff is suing and not on pleas of defendant. 16 I.C. 773=6 S.L.R. 72. On the application of one of the co-sharers in a partition suit the Court directed the properties to be sold as they were not capable of partition. Another sharer appealed against this order. Held, that the Court-fee payable was Rs. 10 under this article. 100 I.C. 17 (2)=1927 L. 189; 1930 R. 164. A suit, however, in which plaintiff plays for declaration of his title and partition as a consequential relief, falls within sec. 7. Cl. (iv) (c) and the plaintiff's share becomes also the valuation of the suit for jurisdiction. 2 P. 432=4 P.L.T. 257. See also 81 I.C. 648=1924 N. 105; 84 I.C. 538=1925 P. 703. So also in a suit intended to recover possession, plaintiff must pay *ad valorem* fee upon the value of the share. 8 C. 757; 8 P. 818=1930 P. 1; 1935 Pest. 30. See also cases noted under sec. 7 (iv) (b). A memorandum of appeal against an order of the Court in a partition suit, directing the defendants to put in properly stamped applications if they wished to have their respective shares separated off by the Court, must be stamped with a Court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi). 274 P. L.R. 1913=20 I.C. 177=183 P.W.R. 1913. Where in a suit for declaration and partition the defendant appeals from the decree for partition he is not entitled to stamp the appeal memorandum with Rs. 10, Court-fee stamp, simply on the ground that he is in possession of the property. 1930 R. 164. A plaintiff sued for partition alleging that he was in joint possession and paid Court-fees under Sch. II, Art. 17 (vi). The Court found that he was not in joint possession and called upon him to pay *ad valorem* Court-fee. The suit was dismissed on plaintiff's failure to pay the deficient Court-fee. The Court-fee for appeal by plaintiff was under this sub-clause until the question of joint possession was finally decided in appeal. 1930 A. 443. So also for the appeal by the defendant if the lower Court finds the plaintiff to be in joint possession. 1930 L. 839. A suit for partition of a joint property is with reference to the matter of Court-fees governed by Sch. II, Art. 17, Cl. (vi). In appeals against decrees in partition suits the Court-fee payable is Rs. 15. It does not matter whether the ground of attack is with reference



to the allotment of specific portion of immovable or movable property or the ground of attack is the question of costs. 56 C. 188=116 I.C. 383=1928 C. 878. Where the plaintiff sued for partition, his father and step-brother alleging a previous partition, it was substantially for a declaration that the prior partition was not binding on him and for other reliefs and falls under sec. 7, Cl. (4) (c) and not under this article. 129 I.C. 824=1931 M. 94. Where in an appeal in a suit for partition the only proper relief is the claim for partition and the relief regarding the declaration and injunction are unnecessarily put in the Court may permit the appellant to give up the unnecessary reliefs and limit his claim to partition. 35 C.W.N. 942: Art. 17 (vi) of Sch. II of the Court-Fees Act is inapplicable to an appeal from an order under O. 21. r. 50 (2), C. P. Code. Sub-rr. (2) and (3) of r. 50 of O. 21 show that the subject-matter in dispute in proceedings under them is the liability of the person against whom execution is sought for payment of the decretal amount, on the ground that he was a partner in the judgment-debtor firm. The subject-matter in appeal against an order passed under sub-r. (2), therefore, is the liability of the judgment-debtor for the same amount. This amount is clearly ascertainable and it cannot, therefore, be said that the subject-matter of the appeal is one where it is not possible to estimate it at a money value. On such an appeal Court-fee payable is *ad valorem*. 35 P.L.R. 565=1934 L. 958. As to suits for maintenance, see 149 I.C. 982=1934 L. 150. Appeal in suit for partition—Property subject to charge to meet marriage expenses—Court-fee payable. 159 I.C. 802=1936 A. 221.

**SPECIFIC PERFORMANCE, SUIT FOR.**—The plaintiff sued for specific performance of a contract to execute a deed of trust in favour of certain institutions in respect of certain joint properties belonging to and in possession of both the plaintiff and the defendant. Under the trust deed, both the plaintiff and the defendant were made trustees. *Held*, that the suit did not come under any of the specified classes of suits for specific performance which are contemplated by sec. 7 (x) of the Court-Fees Act, that the relief claimed was not the property itself but merely specific performance of the agreement, the money value of which it was not possible to estimate and that consequently the suit was governed by Sch. II, Art. 17 (vi) of the Court-Fees Act. I.L.R. (1938) 2 Cal. 411=42 C.W.N. 667. Article not applicable to suit for specific performance of a contract of exchange. See (1944) 1 M.L.J. 187=57 L.W. 130.

**SUIT ON PROMISSORY NOTE.**—Where a decree in a suit on a promissory note awards interests at the contract rate up to the date of suit, but is silent as to the claim for interest from the date of suit till realisation, for an appeal from such decree on the ground that interest should have been allowed up to the date of realisation, the proper Court-fee payable is Rs. 10 as provided for by Art. 17 (vi) of Sch. II to the Court-Fees Act. 154 I.C. 479. A suit to obtain an injunction restraining

the defendants from interfering with the service by the plaintiffs of an idol and to frame a scheme so that they and the defendant might be entitled to carry on the service of the idol and to enjoy the emoluments of the office separately and without interference from each other cannot be described as a suit for partition; yet it is, in a sense, a suit which may be regarded as a suit of a similar nature for the purpose of estimation of Court-fees. Such a suit is one to which Art. 17 (vi) of the Second Schedule applies. 1935 A.L.J. 295=1935 A.W.R. 251.

**ORDER REJECTING PLAINT FOR FAILURE TO PAY ADDITIONAL COURT-FEE—APPEAL FROM—COURT-FEE.**—Per Full Bench.—Where an appeal is filed from an order rejecting a plaintiff for failure to pay additional Court-fee demanded, the subject-matter in appeal is capable of valuation. An order rejecting a plaintiff for failure to pay additional Court-fee demanded is such a complete and final determination of the rights of the parties that there is no room in any appeal from such an order for the proposition that the subject-matter in appeal is not the same as the subject-matter in the original suit, and the same Court-fee is payable on the appeal as on the plaint. 1935 N. 83 (F.B.)=157 I.C. 186=18 N.L.J. 207.

**DISTINCT RELIEFS—TRST.**—Where the relief sought consists of two parts which are such that the first is the foundation for the second and the second part is a necessary consequence of the granting of the first part then the two can be taken together as really constituting one relief which is quite enough for the purpose of decreeing the plaintiff's claim. On the other hand, if the two parts are such that the second does not necessarily follow from the first or that the first goes farther than what is necessary for the granting of the second part of the relief, then one sum of Rs. 10 as Court-fees would not be sufficient. Where the relief claimed is that it may be declared that the property in suits is *wakf alaulad* and is not attachable and saleable, the declaration that the property is *wakf alaulad* is the foundation for and would necessarily involve the granting of the relief that the property is not attachable and saleable and only one sum of Rs. 10 is payable as Court-fees. But where the relief claimed is that it may be declared that the property in suit is owned and possessed by the plaintiff and cannot be subject to attachment and sale in satisfaction of a certain decree, the plaintiff in asking for a declaration as to possession is asking for more than is actually necessary for the granting of the second part of the relief, as the plaintiff would succeed if he establishes that he is the owner of the property. In such a case, therefore, two distinct reliefs are claimed by the plaintiff and two sums of Rs. 10 are payable as Court-fees. 1936 A.L.J. 1155=1936 A. 874.

**WRITTEN STATEMENT CLAIMING PARTITION.**—A defendant in a partition suit asking for a decree for his share need not pay Court-fee in order to make his claim effective. 55 M. 975=1932 M. 722=63 M.L.J. 845.

**PRAYER FOR EXPUNGING—REMARKS FROM JUDGMENT.**—The prayer in an appeal was that

Number.	Proper Fee.
20 Every petition under the Indian Divorce Act, except petitions under S. 44 of the same Act, and every memorandum of appeal under S. 55 of the same Act.	Twenty rupees.
21. Plaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.	Twenty rupees.

SCHEDULE III.<sup>1</sup>

See section 191.

FORM OF VALUATION (TO BE USED WITH SUCH MODIFICATIONS, IF ANY, AS MAY BE NECESSARY).

IN THE COURT OF  
 Re *Probate of the Will of* *(or administration of the property*  
*and credits of* *) deceased.*  
 I *solemnly affirm*  
*make oath.*

and say that I am executor (or one of the executors or one of the next of kin) of deceased and that I have truly set forth in Annexure A to this affidavit all the property and credits of which the abovenamed deceased died possessed or was entitled to at the time of his death, and which have come, or are likely to come, to my hands.

2. I further say that I have also truly set forth in Annexure B all the items that I am by law allowed to deduct.

3. I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased are under the value of

## ANNEXURE A.

## VALUATION OF THE MOVEABLE AND IMMOVEABLE PROPERTY OF DECEASED.

Rs. A. P.

Cash in the house and at the Banks, household goods, wearing-apparel, books, plate; Jewels, etc.:

(State estimated value according to best of Executor's or administrator's belief.)

Property in Government securities transferable at the Public Debt Office

(State description and value at the price of the day; also the interest separately, calculating it to the time of making the application.)

Immoveable property consisting of

(State description, giving, in the case of houses, the assessed value, if any and the number of year's assessment, the market-value is estimated at, and in the case of land, the area, the market-value and all rents that have accrued.)

## LEG. REF.

1 This schedule was inserted by the Court-Fees (Amendment) Act (XI of 1899), sec.

3. The original Schedule III was repealed by Act XIV of 1870.

certain findings in the lower Court judgment should be expunged from the judgment or that they may be declared to be *obiter dicta* and consequently not binding on the parties. The appellants did not pay Court-fee stamps on this part of the appeal and on a preliminary objection being raised, *held*, that the appellants were entitled to invoke the aid of the High Court without paying Court-fee stamps and that as the relief claimed by them was not capable of being estimated in money value, a Court-fee stamp of Rs. 10 under Art. 17 (vi) should be paid. 144 I.C. 620 =1933 L. 678 (2).

ART. 18 (MADRAS).—An application to set aside award falls under Sch. II, Art. 1 and not under this Article. (1945) 2 M.L.J. 536 = (1945) M.W.N. 764=58 L.W. 631.

ART. 20.—A Court-fee of Rs. 20 is sufficient in a suit for divorce, whatever damages

are claimed. 12 L. 266=1931 L. 1 (S.B.). The Court-fee applicable to the Divorce Act cannot be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act, 1926. Hence Art. 20 does not apply. 158 I. C. 631=1935 A.L.J. 988=1935 A. 791.

ART. 20 of Sch. II of the Act is applicable to a petition under sec. 16, Divorce Act for making a decree *nisi* absolute and is chargeable with a fee of Rs. 37-8-0 and not with the Court-fee payable on an ordinary application to the Court concerned. 1945 A. W.R. (C.C.) 91 (1)=1945 O.A. (C.C.) 91 (1).

ART. 22: (PUNJAB).—The term "ancestral land" in Art. 22, Sch. II, means land held by the common ancestor himself and the last male owner. 1928 L. 221. Where in a suit by a reversioner for a declaration that an alienation of a certain land by a widow following customary law would not affect his reversionary rights, the plaintiff alleged a special custom which restrained the widow from alienating ancestral property and stated that the land was ancestral. *Held*, that having regard to the allegations in the plaint, the Court-fee leviable on an appeal by



## Leasehold property

Rs. A. P.

(If the deceased held any leases for years determinable, state the number of year's purchase, the profits rents are estimated to be worth and the value of such, inserting separately arrears due on the date of death and all rents received or due since the date to the time of making the application.)

## Property in public companies

(State the particulars and the value calculated at the price of the day; also the interest separately calculating it to the time of making the application.)

## Policy of insurance upon life, money out on mortgage and other securities, such as bonds, mortgages, bills, notes and other securities for money

(State the amount of the whole; also the interest separately, calculating it to the time of making the application.)

## Book debts

(Other than bad.)

## Stock in trade

(State the estimated value, if any.)

## Other property not comprised under the foregoing heads

(State the estimated value, if any.)

TOTAL ..

Deduct the amount shown in Annexure B not subject to Duty

NET TOTAL ..

ANNEXURE B.  
SCHEDULE OF DEBTS, ETC.

Rs. A. P.

Amount of debts due and owing from the deceased, payable by law out of the estate..

Amount of funeral expenses ..

Amount of mortgage incumbrances ..

Property held in trust not beneficially or with general power to confer a beneficial interest ..

Other property not subject to duty ..

TOTAL ..

THE COURT-FEES (AMENDMENT) ACT (VII OF 1910).

(Repealed by Act I of 1938).

PROVINCIAL AMENDMENTS OF COURT-FEES ACT (VII OF 1870).

(Local Amendments of the Court-Fees Act.)

THE ASSAM COURT-FEES (AMENDMENT) ACT (III OF 1932).

An Act to amend the Court-Fees Act, 1870.

WHEREAS it is necessary to amend the Court-Fees Act, 1870, in its application to Assam in the manner hereinafter appearing;

Short title, extent and commencement.

1. (1) This Act may be called THE ASSAM COURT-FEES (AMENDMENT) ACT, 1932.

(2) It extends to the whole of Assam.

(3) It shall come into force on the 1st May, 1932.

Amendment of section 7.

2. In section 7 of the Court-Fees Act, 1870, (hereinafter referred to as the principal Act),

in sub-clause (a) of clause v for the word 'ten' the word 'twenty' shall be substituted.

Amendment of section 10.

3. For clause (ii) of section 10 of the principal Act, the following clause shall be substituted, namely:—

ii. In such case—

(a) The suit shall be stayed until the additional fee is paid and if the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed; and whether the additional fee is or is not paid.

(b) The Court may, if it is of opinion that the estimation has been grossly insufficient, further order that the expenses of the commission, or such portion thereof as the Court may think reasonable, be paid by party in fault to the Government, and the order so made shall have the force and effect of a decree passed by the Court.

THE BENGAL COURT-FEES (AMENDMENT) ACT (IV OF 1922).

An Act to amend the Court-Fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, with reference to the scale of Court-fees in Bengal.

WHEREAS it is necessary to revise the scale of court-fees for Bengal, by amendment of the Court-Fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, in their application to Bengal, in the manner hereinafter appearing; It is hereby enacted as follows:—

the reversioner was Rs. 20 under Art. 22 of Sch. II to the Court-Fees Act, as amended

by the Punjab Court-Fees Act, VII of 1922. I.L.R. (1938) Lah. 450.

Short title, extent and commencement.

1. (1) This Act may be called THE BENGAL COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Bengal.

(3) It shall come into force on the first day of April, 1922.

2. The Court-Fees Act, 1870, as amended by subsequent legislation, and the Presidency Small Cause Courts Act, 1882, as amended by subsequent legislation, shall be amended, in their application to Bengal, in the manner hereinafter provided.

Amendment of S. 18 of Act VII of 1870.

3. In section 18 of the Court-Fees Act, 1870, for the words "a fee of eight annas" the words "a fee of one rupee" shall be substituted.

Amendment of S. 19.

4. In item VIII in section 19 of the same Act for the words "One thousand rupees" the words "Two thousand rupees" shall be substituted.

Amendment of Sch. I, Art. 1.

5. For Art. 1 in the first schedule to the same Act the following shall be substituted, namely:—

Number.

Proper fee.

1. *Plaint written statement pleading a set off or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.*

When the amount [or value] of the subject-matter in dispute does not exceed seventy-five rupees, for every five rupees or part thereof of such amount or value,

Six annas.

and  
when such amount or value exceeds seventy-five rupees, for every five rupees, or part thereof, in excess of seventy-five rupees up to one hundred rupees,

Eight annas.

[\*]  
when such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one hundred and fifty rupees,

One rupee two annas.

and  
when such amount or value exceeds one hundred and fifty rupees, for every ten rupees, or part thereof, up to one thousand rupees,

One rupee two annas.

and  
when such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of the thousand rupees, up to seven thousand five hundred rupees,

Seven rupees eight annas.

and  
when such amount or value exceeds seven thousand and five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees,

Fifteen rupees.

and  
when such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees,

Twenty-two rupees eight annas.

and  
when such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees,

Thirty rupees.

and  
when such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.

Thirty-seven rupees eight annas.

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.

Amendment of Sch. I, Art. 6.

6. In the third column in Art. 6 in the same schedule to the same Act,—

(a) for the words "Four annas," opposite clause (a) in the second column; the words "Six annas," shall be substituted; and

(b) for the words "Eight annas," opposite the first item in clause (b) in the second column, the words "Twelve annas" shall be substituted, and for the words "One rupee" opposite the second item in that clause, the words "One rupee eight annas" shall be substituted.

7. For the entries above the proviso in the second column, and for the entries in the third column, in Art. 11 in the same schedule to the same Act, the following shall be substituted, namely:—

1. When the amount or value of the property in Two per centum.  
respect of which the grant of probate or letters

- is made exceeds two thousand rupees, [or such amount or value up to ten thousand rupees.]  
and  
when such amount or value exceeds ten thousand rupees, [ \* \* \* \* \* ] [on the portion] of such amount or value which is in excess of ten thousand rupees, [up to fifty thousand rupees,]  
and  
when such amount or value exceeds fifty thousand rupees, [ \* \* \* \* \* ] [on the portion] of such amount or value which is in excess of fifty thousand rupees [up to a lakh of rupees,]  
and  
when such amount or value exceeds a lakh of rupees, [on the portion] of such amount or value which is in excess of a lakh of rupees.
3. For the entry in the second column in Article 12 in the same schedule to the same Act, and for the first paragraph in the third column in the said Article the following shall be substituted, namely :—
- “When the amount or value of any debt or security specified in the certificate under S. 8 of the Act exceeds one thousand rupees, [on such amount or value up to ten thousand rupees]  
and  
when such amount or value exceeds ten thousand rupees [ \* \* \* \* \* ] [on the portion] of such amount or value which is in excess of ten thousand rupees, [up to fifty thousand rupees]  
and  
when such amount or value exceeds fifty thousand rupees, [ \* \* \* \* \* ] [on the portion] of such amount or value which is in excess of fifty thousand rupees, [up to a lakh of rupees]  
and  
when such amount or value exceeds a lakh of rupees, [on the portion] of such amount or value which is in excess of a lakh of rupees.
- Amendment of Table of rates of *ad valorem* fees.
- Amendment of Sch. II, Art. 1 in cls. (a), (b) and (c).  
(a) in clause (a) after the words “Municipal Commissioner” in the third entry in the second column the words “or member of a District Board” shall be inserted;  
(b) (i) for the words “One anna,” opposite clause (a) in the second column, the words “Two annas” shall be substituted;  
(ii) for the words “Eight annas,” opposite clause (b) in the second column, the following shall be substituted, namely :—  
“In the case of a complaint or charge of an offence presented to a criminal Court one rupee, and in other cases twelve annas”; and  
(iii) for the words “One rupee” opposite clause (c) in the second column, the words “One rupee eight annas” shall be substituted;
- Amendment of Sch. II, Art. 1, cl. (d). same schedule to the same Act, and for the entries opposite that clause in the third column thereof, the following clause and entries shall be substituted, namely :—  
“(d) (i) When presented to the High Court under S. 115 of the Code of Civil Procedure, 1908, for the revision of an order—  
(a) When the value of the suit to which the order relates does not exceed Rs. 1,000 Five rupees.  
(b) When the value of the suit exceeds Rs. 1,000. Ten rupees.  
(ii) When presented to the High Court otherwise than under that section. Two rupees.

Art 11.—The words “on such amount or value” where they occur in 3rd column were omitted by Act VI of 1922, S. 3 (2).

Arts. 11 and 12.—The words “on such amount or value up to ten thousand rupees” were

- Amendment of Sch. II, Art. 10. 12. In the third column in Art. 10 in the same schedule to the same Act,  
 (1) for the words "Eight annas," opposite clause (a) in the second column, the words "One rupee" shall be substituted; and  
 (2) for the words "One rupee," opposite clause (b) in the second column, the words "One rupee eight annas" shall be substituted.

Amendment of Sch. II, Art. 11. 13. For Art. 11 in the same schedule to the same Act the following shall be substituted, namely:—

Number.	Proper Fee.
"11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented—	
(a) (i) to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority,	Eight annas.
(ii) to any Civil Court other than a High Court,	One rupee.
(b) to a Chief Controlling Executive or Revenue Authority,	Two rupees.
(c) to a High Court	Five rupees."

14. Above the words "Five rupees," where they occur in the third column opposite Arts. 12 and 13 in the same schedule to the same Act, the words "Ten rupees," shall be inserted opposite Art. 12 and the bracket between Arts. 12 and 13 in the second column shall be omitted.

Amendment of Sch. II, Art. 12. 15. (1) The words "Ten rupees" in the third column, opposite Art. 17 in the same schedule to the same Act, and the bracket opposite that article in the second column in the same schedule shall be omitted.

Amendment of Sch. II, Art. 17. (2) In the third column in the said article,—  
 (a) opposite entries i, ii, iv, and vi, the words "Fifteen rupees" shall be inserted; and  
 (b) opposite entries iii and v the words "Twenty rupees" shall be inserted.

Amendment of S. 71 of Act XV of 1882. 16. In section 71 of the Presidency Small Cause Courts Act, 1882,—

(1) in clause (a) for the words "Five hundred rupees" the words "Fifty rupees" shall be substituted;

(2) after clause (a) the following shall be inserted, namely:—  
 "(b) when the amount or value of the subject-matter exceeds fifty rupees, but does not exceed five hundred rupees—the sum of six rupees four annas and three annas in the rupee on the excess of such amount or value over fifty rupees;"

(3) cl. (b) shall be renumbered as clause (c) and in that clause as renumbered for the words "Sixty-two rupees eight annas" the words "Ninety rupees ten annas" shall be substituted, and after the words "One anna" the words "Six pies" shall be inserted.

17. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued.

### THE SCHEDULE.

TABLE OF RATES OF *ad valorem* FEES LEVIABLE ON THE INSTITUTION OF SUITS.

(See section 9 of the Bengal Court-Fees (Amendment) Act, 1922.)

When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper fee.	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	60	65	4 14
5	10	0 12	65	70	5 4
10	15	1 2	70	75	5 10
15	20	1 8	75	80	6 2
20	25	1 14	80	85	6 10
25	30	2 4	85	90	7 2
30	35	2 10	90	95	7 10
35	40	3 0	95	100	8 2
40	45	3 6	100	110	9 12
45	50	3 12	110	120	11 6
50	55	4 2	120	130	13 0
55	60	4 8	130	140	14 10

substituted for the words "but does not exceed ten thousand rupees"; and the words "on the portion" whenever they occur were substituted for the words "for the portion"; and the words "but does not exceed fifty thousand rupees" and "but does not exceed a lakh of rupees" were omitted; and after the words "in excess of ten thousand rupees" and "in excess of fifty thousand rupees" the words "up to fifty thousand rupees" and "up to a lakh of rupees" respectively were added by Bengal Act VI of 1922, S. 3 (1);

When the amount or value of the subject- matter exceeds.				When the amount or value of the subject- matter exceeds.			
		But does not exceed.	Proper fee.			But does not exceed.	Proper fee.
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
140	150	16	4	820	830	93	6
150	160	18	0	830	840	94	8
160	170	19	2	840	850	95	10
170	180	20	4	850	860	96	12
180	190	21	6	860	870	97	14
190	200	22	8	870	880	99	0
200	210	23	10	880	890	100	2
210	220	24	12	890	900	101	4
220	230	25	14	900	910	102	6
230	240	27	0	910	920	103	8
240	250	28	2	920	930	104	10
250	260	29	4	930	940	105	12
260	270	30	6	940	950	106	14
270	280	31	8	950	960	108	0
280	290	32	10	960	970	109	2
290	300	33	12	970	980	110	4
300	310	34	14	980	990	111	6
310	320	36	0	990	1,000	112	8
320	330	37	2	1,000	1,100	120	0
330	340	38	4	1,100	1,200	127	8
340	350	39	6	1,200	1,300	135	0
350	360	40	8	1,300	1,400	142	8
360	370	41	10	1,400	1,500	150	0
370	380	42	12	1,500	1,600	157	8
380	390	43	14	1,600	1,700	165	0
390	400	45	0	1,700	1,800	172	8
400	410	46	2	1,800	1,900	180	0
410	420	47	4	1,900	2,000	187	8
420	430	48	6	2,000	2,100	195	0
430	440	49	8	2,100	2,200	202	8
440	450	50	10	2,200	2,300	210	0
450	460	51	12	2,300	2,400	217	8
460	470	52	14	2,400	2,500	225	0
470	480	54	0	2,500	2,600	232	8
480	490	55	2	2,600	2,700	240	0
490	500	56	4	2,700	2,800	247	8
500	510	57	6	2,800	2,900	255	0
510	520	58	8	2,900	3,000	262	8
520	530	59	10	3,000	3,100	270	0
530	540	60	12	3,100	3,200	277	8
540	550	61	14	3,200	3,300	285	0
550	560	63	0	3,300	3,400	292	8
560	570	64	2	3,400	3,500	300	0
570	580	65	4	3,500	3,600	307	8
580	590	66	6	3,600	3,700	315	0
590	600	67	8	3,700	3,800	322	8
600	610	68	10	3,800	3,900	330	0
610	620	69	12	3,900	4,000	337	8
620	630	70	14	4,000	4,100	345	0
630	640	72	0	4,100	4,200	352	8
640	650	73	2	4,200	4,300	360	0
650	660	74	4	4,300	4,400	367	8
660	670	75	6	4,400	4,500	375	0
670	680	76	8	4,500	4,600	382	8
680	690	77	10	4,600	4,700	390	0
690	700	78	12	4,700	4,800	397	8
700	710	79	14	4,800	4,900	405	0
710	720	81	0	4,900	5,000	412	8
720	730	82	2	5,000	5,100	420	0
730	740	83	4	5,100	5,200	427	8
740	750	84	6	5,200	5,300	435	0
750	760	85	8	5,300	5,400	442	8
760	770	86	10	5,400	5,500	450	0
770	780	87	12	5,500	5,600	457	8
780	790	88	14	5,600	5,700	465	0
790	800	90	0	5,700	5,800	472	8
800	810	91	2	5,800	5,900	480	0
810	820	92	4				

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
But does not exceed—		Proper fee.		But does not exceed—		Proper fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
5,900	6,000	487	8				
6,000	6,100	495	0	28,000	29,000	1,470	0
6,100	6,200	502	8	29,000	30,000	1,500	0
6,200	6,300	510	0	30,000	31,000	1,530	0
6,300	6,400	517	8	31,000	32,000	1,560	0
6,400	6,500	525	0	32,000	33,000	1,590	0
6,500	6,600	532	8	33,000	34,000	1,620	0
6,600	6,700	540	0	34,000	35,000	1,650	0
6,700	6,800	547	8	35,000	36,000	1,680	0
6,800	6,900	555	0	36,000	37,000	1,710	0
6,900	7,000	562	8	37,000	38,000	1,740	0
7,000	7,100	570	0	38,000	39,000	1,770	0
7,100	7,200	577	8	39,000	40,000	1,800	0
7,200	7,300	585	8	40,000	41,000	1,830	0
7,300	7,400	592	0	41,000	42,000	1,860	0
7,400	7,500	600	0	42,000	43,000	1,890	0
7,500	7,750	615	0	43,000	44,000	1,920	0
7,750	8,000	630	0	44,000	45,000	1,950	0
8,000	8,250	645	0	45,000	46,000	1,980	0
8,250	8,500	660	0	46,000	47,000	2,010	0
8,500	8,750	675	8	47,000	48,000	2,040	8
8,750	9,000	690	0	48,000	49,000	2,070	0
9,000	9,250	705	8	49,000	50,000	2,100	0
9,250	9,500	720	0	50,000	55,000	2,137	8
9,500	9,750	735	0	55,000	60,000	2,175	0
9,750	10,000	750	8	60,000	65,000	2,212	8
10,000	10,500	772	0	65,000	70,000	2,250	0
10,500	11,000	795	0	70,000	75,000	2,287	8
11,000	11,500	817	8	75,000	80,000	2,325	0
11,500	12,000	840	0	80,000	85,000	2,362	8
12,000	12,500	862	8	85,000	90,000	2,400	0
12,500	13,000	885	0	90,000	95,000	2,437	8
13,000	13,500	907	8	95,000	1,00,000	2,475	0
13,500	14,000	930	0	1,00,000	1,05,000	2,512	8
14,000	14,500	952	8	1,05,000	1,10,000	2,550	0
14,500	15,000	975	0	1,10,000	1,15,000	2,587	8
15,000	15,500	997	8	1,15,000	1,20,000	2,625	0
15,500	16,000	1,020	0	1,20,000	1,25,000	2,662	8
16,000	16,500	1,042	8	1,25,000	1,30,000	2,700	0
16,500	17,000	1,065	0	1,30,000	1,35,000	2,737	0
17,000	17,500	1,087	8	1,35,000	1,40,000	2,775	0
17,500	18,000	1,110	0	1,40,000	1,45,000	2,812	8
18,000	18,500	1,132	8	1,45,000	1,50,000	2,850	0
18,500	19,000	1,155	0	1,50,000	1,55,000	2,887	8
19,000	19,500	1,177	8	1,55,000	1,60,000	2,925	0
19,500	20,000	1,200	0	1,60,000	1,65,000	2,962	8
20,000	21,000	1,230	0	1,65,000	1,70,000	3,000	0
21,000	22,000	1,260	0	1,70,000	1,75,000	3,037	8
22,000	23,000	1,290	0	1,75,000	1,80,000	3,075	0
23,000	24,000	1,320	0	1,80,000	1,85,000	3,112	8
24,000	25,000	1,350	0	1,85,000	1,90,000	3,150	0
25,000	26,000	1,380	0	1,90,000	1,95,000	3,187	8
26,000	27,000	1,410	0	1,95,000	2,00,000	3,225	0
27,000	28,000	1,440	0	2,00,000	2,05,000	3,262	8

and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees, or part thereof, up to a maximum fee of ten thousand rupees, for example,—

3,00,000	3,00,000	4,012	8	8,00,000	8,00,000	7,762	8
4,00,000	4,00,000	4,762	8	9,00,000	9,00,000	8,512	8
5,00,000	5,00,000	5,512	8	10,00,000	10,00,000	9,262	8
6,00,000	6,00,000	6,262	8	11,00,000	11,00,000	10,000	0
7,00,000	7,00,000	7,012	0				

#### THE BENGAL COURT-FEES (AMENDMENT NO. II) ACT (VI OF 1922).

*An Act further to amend the Court-Fees Act, 1870, with reference to the scale of court-fees in the Bengal.*

WHEREAS it is necessary further to amend the Court-Fees Act, 1870, in its application to Bengal in the manner hereinafter appearing ;

It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE BENGAL COURT-FEES (AMENDMENT No. II) ACT, 1922.

(2) It extends to the whole of Bengal.

2. In Article 1 in the first schedule to the Court-Fees Act, 1870, as amended by the Bengal Court-Fees (Amendment) Act, 1922, hereinafter referred to as the said Act,—

(a) the commas, before and after the word “pleading” the first column shall be omitted, (b) for the words “in value” in the first entry in the second column the words “or value” shall be substituted, and

(c) the word “and” between the third and fourth entries in the second column shall be omitted.

3. (1) In the second column of Articles 11 and 12 in the first schedule to the said Act,—

(a) for the words “but does not exceed ten thousand rupees” the words “on such amount or value up to ten thousand rupees” shall be substituted,

(b) for the words “for the portion,” wherever they occur, the words “on the portion,” shall be substituted,

(c) the words “but does not exceed fifty thousand rupees” and the words “but does not exceed a lakh of rupees” shall be omitted, and

(d) after the words “in excess of ten thousand rupees” the words “up to fifty thousand rupees” and after the words “in excess of fifty thousand rupees” the words “up to a lakh of rupees” shall be added.

(2) In the third column of Article 11 in the first schedule to the said Act, the words “on such amount or value,” wherever they occur, shall be omitted.

*Note.*—Article 12 has been re-enacted by Act XI of 1935—see next page.

4. The amendments set forth in sections 2 and 3 shall be deemed to have been made with effect from the commencement of the Bengal Court-Fees (Amendment) Act, 1922.

#### THE COURT-FEES (BENGAL SECOND AMENDMENT) ACT (XI OF 1935).

*An Act further to amend the Court-Fees Act, 1870.*

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to Bengal, in the manner hereinafter appearing :

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80-A of the Government of India Act to the passing of this Act :

It is hereby enacted as follows :

Short title, extent, commencement and duration.

1. (1) This Act may be called THE COURT-FEES (BENGAL SECOND AMENDMENT No. II) ACT, 1935.

(2) It extends to the whole of Bengal.

(3) It shall come into force on such date as the Local Government may, by notification in the *Calcutta Gazette*, appoint.

(4) Clauses (a) and (b) of section 4 and sub-section (2) of section 5 shall remain in force for three years only and thereafter the Court-Fees Act, 1870, shall have force as if it had not been amended by the said clauses and sub-section.

Application of Act.

2. The Court-Fees Act, 1870, hereinafter referred to as the said Act, shall, in its application to Bengal, be amended in the manner hereinafter provided.

Amendment of Sch. I, Art. 8 of Act VII of 1870.

3. In Article 8 of the first schedule to the said Act, for the figures “1879” in the first column the figures “1899” shall be substituted.

Amendment of Sch. I, Art. 11.

4. In Article 11 of the first schedule to the said Act,

(a) after the words “in excess of a lakh of rupees” in the second column, the words “up to two lakhs and fifty thousand rupees,” shall be inserted ;

(b) in the second and third columns, before the proviso in the second column, the following shall be inserted, namely :—

“and

when such amount or value exceeds two lakhs and fifty thousand rupees, on the portion of such amount or value which is in excess of two lakhs and fifty thousand rupees up to three lakhs of rupees,

Five and a half per centum.

and

when such amount or value exceeds three lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs of rupees,

Six per centum.

and

when such amount or value exceeds four lakhs of rupees on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees,

Six and a half per centum.

and

when such amount or value exceeds five lakhs of rupees on the portion of such amount or value which is in excess of five lakhs of rupees :—

Seven per centum.



and  
(c) in the proviso, for the words and figures "the Succession Certificate Act, 1899" the words and figures "the Indian Succession Act, 1925" shall be substituted.

5. (1) For Article 12 of the first schedule to the said Act the following article shall be substituted, namely :—  
Substitution in Sch. I of new Article 12.

"12 Certificate under the Indian Succession Act, 1925-	When the amount or value of any debt or security specified in the certificate under section 374 of the Act exceeds one thousand rupees, and when the aggregate amount or value of any debts or securities specified in the certificate and of any debts or securities to which the certificate has been extended under section 376 of the Act exceeds one thousand rupees.	Two per centum on the first ten thousand rupees, three per centum on the next forty thousand rupees, four per centum on the next fifty thousand rupees and five per centum on the remainder of such amount or value, In respect of such portion of the aggregate amount or value as consists of the amount or value of debts or securities so specified the fee hereinbefore provided in that behalf in this article and three per centum on such portion of the first ten thousand rupees, four and a half per centum on such portion of the next forty thousand rupees, six per centum on such portion of the next fifty thousand rupees, and seven and a half per centum on such portion of the remainder of such aggregate amount or value as consists of the amount or value of debts or securities to which the certificate has been extended. <i>Notes.</i> —(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained. (2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security or for both purposes, the value of the security is its market value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained."
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(2) In the third column of the said article as amended by sub-section (1),—

(a) after the words "five per centum" the following shall be inserted, namely :—

"on the next one lakh and fifty thousand rupees,  
five and a half per centum on the next fifty thousand rupees,  
six per centum on the next one lakh of rupees,  
six and a half per centum on the next one lakh of rupees,  
and

seven per centum"

(b) after the words "seven and a half per centum" the following shall be inserted, namely :—

"on such portion of the next one lakh and fifty thousand rupees,  
eight and a quarter per centum on such portion of the next fifty thousand rupees,  
nine per centum on such portion of the next one lakh of rupees,  
nine and three-quarters per centum on such portion of the next one lakh of rupees,  
and

ten and a half per centum."

Amendment of Sch. II, Article 18.  
6. In Article 18 of the second schedule to the said Act, for the words and figures "section 326 of the Code of Civil Procedure" the words and figures "paragraph 17 of the second schedule to the Code of Civil Procedure, 1908," shall be substituted.

7. Nothing in this Act shall apply to any probate, letters of administration or certificate under the Indian Succession Act, 1925, in respect of which the fee payable under the law for the time being in force has been paid before the commencement of this Act, but which has not issued.
- Exemption of certain probates, etc.

### THE COURT-FEES (BENGAL AMENDMENT) ACT (VII OF 1935).

*An Act further to amend the Court-Fees Act, 1870.*

WHEREAS it is expedient to revise the law relating to Court-fees in Bengal by amendment of the Court-Fees Act, 1870, in its application to Bengal, in the manner hereinafter appearing ;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80-A of the Government of India Act to the passing of this Act ;

It is hereby enacted as follows :—

Short title, extent and commencement. 1. (1) This Act may be called THE COURT-FEES (BENGAL AMENDMENT) ACT, 1935.

(2) It extends to the whole of Bengal.

(3) It shall come into force in whole or in part on such date as the Local Government may, by notification in the *Calcutta Gazette*, appoint and for this purpose different dates may be appointed for different provisions of this Act.

Application of Act.

2. The Court-Fees Act, 1870, hereinafter referred to as the said Act, shall, in its application to Bengal, be amended in the manner hereinafter provided.

Substitution of new section for section 2 of Act VII of 1870. 3. For section 2 of the said Act the following section shall be substituted, namely :—

“2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(1) “appeal” includes a cross-objection ;

(2) ‘Chief Controlling Revenue authority’ means the Board of Revenue ;

(3) ‘Collector’ includes any officer not below the rank of sub-deputy collector appointed by the Collector to perform the functions of a Collector under this Act ;

(3) ‘suit’ includes an appeal from a decree except in section 8-A.”

Amendment of heading of Chapter II.

4. In Chapter II of the said Act, for the heading “Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns” the heading “Fees payable in Courts and in Public Offices” shall be substituted.

Amendment of heading of Chapter III.

5. In Chapter III of the said Act, for the heading “Fees in other Courts and in Public Offices” the heading “Computation of fees” shall be substituted.

6. (1) Section 6 of the

said Act shall be transferred from Chapter III and inserted after section 5 in Chapter II and section 6 as thus transferred shall be re-numbered as sub-section (1) of section 6 and in that section as so re-numbered for the words “be paid” the words “has been

Amendment of section 6.

paid” shall be substituted.

(2) To the said section as so re-numbered and amended the following sub-section shall be added, namely :—

“(2) Notwithstanding anything contained in sub-section (1) or in any other Act, a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid, subject to the following conditions, namely :—

(a) no such plaint or memorandum of appeal shall be registered unless the plaintiff or appellant has, before such date as the Court may have fixed in this behalf paid to the Court such reasonable sum on account of court-fee as the Court may direct ;

(b) the Court shall reject the plaint or memorandum of appeal if the sum referred to in clause (a) is not paid before the date fixed by the Court.”

Amendment of Section 7.

7. In section 7 of the said Act,—

(1) clause (b) of paragraph iv shall be omitted.

(2) in paragraph iv, after the words “memorandum of appeal” the following words, figure and letter shall be inserted, namely :—

“subject to the provisions of section 8-C” ;

(3) for paragraph v the following paragraph shall be substituted, namely :—

“v. In suits for the possession of land, buildings or gardens—

(a) according to the value of the subject-matter, and such value shall be deemed to be fifteen times the nett profits which have arisen from the land, building or garden during the year next before the date of presenting the plaint, or if the Court sees reason to think that such profits have been wrongly estimated, fifteen times such amount as the Court may assess as such profits or according to the market-value of the land, building or garden, whichever is lower ;

(b) if, in the opinion of the Court, such profits are not readily ascertainable or assessable, or where there are no such profits, according to the market-value of the land, building or garden ;

Explanation.—In this paragraph “building” includes a house, outhouse, stable, privy, urinal, shed, hut, wall and any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever ;”

(4) for paragraph vi the following paragraph shall be substituted, namely :—

vi. In suits to enforce a right of pre-emption—according to the market-value of the land, building or garden in respect of which the right is claimed :

*Explanation.*—In this paragraph 'building' has the same meaning as in paragraph v ;

(5) after paragraph vi the following paragraph shall be inserted, namely :—

vi-A. In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff has been excluded from possession of the property of which he claims to be a co-parcener or co-owner, according to the market-value of the share in respect of which the suit is instituted ;” ;

Insertion of new sections 8-A to 8-F.

8. After section 8 of the said Act, the following sections shall be inserted, namely :—

“8-A. In every suit in which an *ad valorem* court-fee is payable under this Act on the plaint, the plaintiff shall file with the plaint a statement of particulars of the subject-matter of the suit and his own valuation thereof unless such particulars and the valuation are contained in the plaint. The statement shall be in such form and shall contain such particulars as may be prescribed by the Local Government by notification in the *Calcutta Gazette*. In every such suit the plaintiff shall also, if the Court so directs, file a duplicate copy of the plaint and of the said statement.

8-B. (1) In every suit in which a court-fee is 'payable under this Act on the plaint or memorandum of appeal the Court shall, as soon as may be after the registration of the plaint or memorandum of appeal, and in every case before proceeding to deliver judgment, record a finding whether a sufficient court-fee has been paid.

(2) If the Court records a finding that an insufficient court-fee has been paid on the plaint or memorandum of appeal the Court shall—

(a) stay all further proceedings in the suit until it has determined the proper amount of such Court-fee payable and the plaintiff or the appellant, as the case may be, has paid such amount or until the date referred to in clause (b), as the case may be ;

Provided that if the plaintiff or appellant gives, within such time as the Court may allow, security, to the satisfaction of the Court, for the payment of any additional amount for which he may be found liable the Court may proceed with the suit,

(b) fix a date before which the plaintiff or appellant shall pay the amount of court-fee due from him, as determined by the Court under clause (a).

(3) If the plaintiff or appellant fails to give the security referred to in clause (a) of sub-section (2) or to pay the amount referred to in clause (b) of that sub-section within the time allowed, or before the date fixed by the Court, as the case may be, the suit shall be dismissed.

8-C. If the Court is of opinion that the subject-matter of any suit has been wrongly valued it may revise the valuation and determine the correct valuation and may hold such inquiry as it thinks fit for such purpose.

8-D. (1) For the purpose of an inquiry under section 8-C the Court may depute, or issue a commission to, any suitable person to make such local or other investigation as may be necessary and to report thereon to the Court. Such report and any evidence recorded by such person shall be evidence in the inquiry.

(2) The Court may, from time to time, direct such party to the suit as it thinks fit to deposit such sum as the Court thinks reasonable as the costs of the inquiry, and if the costs are not deposited within such time as the Court shall fix, may, notwithstanding anything contained in any other Act, dismiss the suit if such party is the plaintiff or the appellant and in any other case, may recover the costs as a public demand.

8-E. (1) The Court, when making an inquiry under section 8-C and any person making an investigation under section 8-D shall have, respectively, for the purposes of such inquiry or investigation, the powers vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely :—

- (a) enforcing the attendance of any person and examining him on oath or affirmation ;
- (b) compelling the production of documents or material objects ; and
- (c) issuing commissions for the examination of witnesses.

(2) An inquiry or investigation referred to in sub-section (1) shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

8-F. If in the result of an inquiry under section 8-C the Court finds that the subject-matter of the suit has been undervalued the Court may order the party responsible for the undervaluation to pay all or any part of the costs of the inquiry.

If in the result of such inquiry the Court finds that the subject-matter of the suit has not been undervalued the Court may, in its discretion, order that all or any part of such costs shall be

paid by Government or by any party to the suit at whose instance the inquiry has been undertaken, and if any amount exceeding the proper amount of fee has been paid shall refund the excess amount so paid."

Repeal of sections 9 and 10.  
Substitution of new section  
for section 11.

9. Sections 9 and 10 of the said Act are hereby repealed.  
10. For section 11 of the said Act the following section shall be substituted, namely :—

" 11. Where in any suit for mesne profits or for land and mesne profits or for an account, the fee which would have been payable if the suit had comprised the whole of the relief to which the Court finds the plaintiff to be entitled exceeds the fee actually paid, the Court shall require the plaintiff to pay an additional fee equal to the amount of the excess, and if such additional fee is not paid within such time as the Court may fix, the suit, or if a decree has previously been passed therein, so much of the claim as has not been so decreed, shall be dismissed :

Procedure in suits for mesne profits or accounts when amount found due exceeds amount claimed.

Provided that, where the additional fee is payable in respect of a portion of the claim which can be relinquished, that portion only shall be dismissed."

Amendment of section 12.

11. In paragraph ii of section 12 of the said Act, for the words and figures "and the provisions of section 10, paragraph ii shall apply" the following shall be substituted, namely :—

"and thereafter :—

(a) if the party required to pay is the appellant or petitioner, the provisions of sub-section<sup>s</sup> (2) and (3) of section 8-B shall, so far as may be, apply ;

(b) if the party required to pay is the respondent or the opposite party, the provisions of sub-section (2) of section 8-B shall, so far as may be, apply, and, if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as a public demand :

*Explanation.*—For the purposes of this section a question relating to the classification of any suit for the purpose of section 7 shall not be deemed to be a question relating to valuation."

Substitution of new section  
for section 17.

12. For section 17 of the said Act, the following section shall be substituted, namely :—

" 17. (1) In any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memoranda of appeal would be chargeable under this Act in separate suits instituted in respect of each such cause of action :

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, 1908, to order separate trials.

(2) Where more reliefs than one based on the same cause of action are sought either jointly or in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

Amendment of section 19.

13. In section 19 of the said Act,—

(a) in paragraph i, after the words "Power-of-attorney" the words "or other written authority" shall be inserted ; and

(b) after paragraph xxiv the following paragraph shall be added, namely :—

"xxv. Petitions of appeal by Government servants or servants of a Court of Wards against orders of dismissal, reduction or suspension ; copies of such orders filed with such appeals, and applications for obtaining such copies."

Insertion of new sections 34-34-A.

14. After section 34 of the said Act, the following section shall be inserted, namely :—

" 34-A. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

Substitution of new section  
for section 35.

15. For section 35 of the said Act, the following section shall be substituted, namely :—

" 35. (1) The Local Government may, from time to time subject to such conditions or restrictions as it may think fit to impose, by notification in the *Calcutta Gazette*, suspend the payment of or reduce or remit, in the whole of Bengal or in any part thereof, all or any of the fees mentioned in the first and second schedules to this Act annexed and may in like manner cancel or vary such order.

(2) The Local Government may, from time to time by rules, prescribe the manner in which any fee the payment of which is suspended under sub-section (1) may be realised and for this purpose direct that such fee may be recovered as a public demand."

Amendment of schedule II.

16. In Schedule II to the said Act,—

(1) in Article 17, after entry v the following entry shall be inserted, namely :—  
“ v-A, for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property if the plaintiff is in possession of the property of which he claims to be a co-parcener or co-owner :  
Fifteen rupees.”

(2) after Article 18 the following article shall be inserted, namely :—  
“ 18-A. Application under paragraph 20 of the second Schedule to the Civil Procedure Code, 1908, to file an arbitration award, and memorandum of appeal from a decree passed under paragraph 21 of the said Schedule.  
Fifteen rupees.”

(3) after Article 21 the following article shall be inserted, namely :—  
“ 22. Petition. (a) questioning the election of any person as a Municipal Commissioner, when presented to a District Judge under section 36 of the Bengal Municipal Act, 1932 ;  
(b) questioning the election of any person as a member of a District Board or Local Board when presented to any authority appointed under clause (a) of section 138 of the Bengal Local Self-Government Act of 1885 to decide disputes relating to such elections.  
Fifteen rupees.”

## THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT (II OF 1922).

*An Act to amend the Court-Fees Act, 1870.*

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the Province of Bihar and Orissa in the manner hereinafter appearing ; It is hereby enacted as follows :—

1. (1) This Act may be called THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Bihar and Orissa including the Sontal Parganas.

(3) It shall come into force on the twenty-fourth day of August, 1922.

2. In paragraph 3 of S. 4 of the Court-Fees Act, 1870, as amended by subsequent legislation, and hereinafter called the principal Act, for the word “ two ” shall be substituted the word “ one.”

3. In clause (a) of S. 7 (v) of the principal Act, for the word “ ten ” shall be substituted the word “ twenty ” and in clause (b) of the said section for the word “ five ” shall be substituted the word “ ten.”

4. In S. 17 of the principal Act, after the words “ of appeal ” in both places where they occur the words “ or of cross-objection ” shall be inserted.

5. In S. 18 of the principal Act, for the words “ a fee of eight annas ” the words “ a fee of twelve annas ” shall be substituted.

6. In item viii of S. 19 of the principal Act, for the words “ One thousand rupees ” the words “ Two thousand rupees ” shall be substituted.

7. (1) In Art. 1 of Schedule I of the principal Act, for the entry in the first column the following entry shall be substituted, namely :—

“(1) Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal or of cross-objection, not otherwise provided for in this Act, presented to any Civil or Revenue Court except those mentioned in S. 3.”

(2) For the “ proper fees ” set out in the third column of the said Schedule I and shown opposite Art. 1 in the Schedule A of this Act, the “ proper fees ” shown against them in the second column of said Schedule A shall be substituted.

(3) The proviso in Art. 1 of the said Schedule I shall be omitted.

8. For the “ proper fees ” set out in Schedule I of the principal Act for Articles 6, 7, 8 and 9 shown in Schedule A of this Act, the “ proper fees ” shown against them in the second column of the said Schedule A shall be substituted.

9. For the entries above the proviso in the second column and for the entries in the third column, in Art. 11 of Sch. I of the principal Act, the following shall be substituted, namely :—

“ When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, on such amount or value up to ten thousand rupees,  
Two per centum.

and  
when such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees,  
Three per centum.

and  
when such amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,

Four per centum.

and  
when such amount or value exceeds a lakh of rupees, on the portion of such amount or value which is excess of one lakh of rupees.

Five per centum.

10. For the entry in the second column of Art. 12 of Sch. I of the principal Act, and for the first paragraph in the third column of the said Article, the following shall be substituted, namely :—  
“When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds one thousand rupees, on such amount or value up to ten thousand rupees,

Two per centum and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, three per centum.

and  
when such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees, up to fifty thousand rupees,

Three per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, four and a half per centum.

and  
when such amount or value exceeds fifty thousand rupees on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,

Four per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, six and a half per centum.

and  
when such amount or value exceeds a lakh of rupees, on the portion of such amount or value which is in excess of one lakh of rupees.

Five per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, seven per centum.

11. For the table of rates of *ad valorem* fees annexed to Sch. I of the principal Act, the table set forth in Sch. B of this Act shall be substituted.

12. (1) In the first column of the said Sch. II after the words “memorandum of appeal” in Arts. 5, 11, 17, 20 and 21 the words “or of cross-objection” shall be inserted.

(2) For the “proper fees” set out in the said Sch. II and shown in Sch. C of this Act, the “proper fees” shown against them in the second column of the said Sch. C shall be substituted.

13. Nothing in this Act shall apply to any probate, letters of administration or certificate under the Succession Certificate Act, 1889, in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued.

#### SCHEDULE A.

[See Ss. 7 (3) and 8 of the Bihar and Orissa Court-Fees (Amendment) Act, 1922.]

Proper fees set out in Schedule I of the Principal Act.

Proper fees to be substituted.

Article 1	..	Twelve annas	..	One rupee.
		Five rupees	..	Seven rupees and eight annas.
		Ten rupees	..	Fifteen rupees.
		Fifteen rupees	..	Twenty-two rupees and eight annas.
		Twenty rupees	..	Thirty rupees.
Article 6	..	Twenty-five rupees	..	Thirty-seven rupees and eight annas.
		Four annas	..	Six annas.
		Eight annas	..	Twelve annas.
Article 7	..	One rupee	..	One rupee and eight annas.
		Eight annas	..	Twelve annas.
		One rupee	..	One rupee and eight annas.
Article 8	..	Four rupees	..	Six rupees.
		The amount of the duty chargeable on the original.	..	One and half times the amount of the duty chargeable on the original.
Article 9	..	Eight annas	..	Twelve annas.

#### SCHEDULE B.

##### BIHAR AND ORISSA.

Table of rates of *ad valorem* fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds—			But does not exceed—			When the amount or value of the subject-matter exceeds—			But does not exceed—		
Rs.		Proper fee.	Rs.			Rs.		Proper fee.	Rs.		
..			5	0	6	10			15	1	2
5			10	0	12	15			20	2	8

When the amount  
or value of the  
subject-matter  
exceeds

But does not  
exceed

Proper fee.

When the amount  
or value of the  
subject-matter  
exceeds

But does not  
exceed

Proper fee.

Rs.	Rs.	Rs.	A.	P.	Rs.	Rs.	Rs.	A.	P.
20	25	1	14		590	600	57	8	
25	30	2	4		600	610	58	8	
30	35	2	10		610	620	59	8	
35	40	3	0		620	630	60	8	
40	45	3	6		630	640	61	8	
45	50	3	12		640	650	62	8	
50	55	4	2		650	660	63	8	
55	60	4	8		660	670	64	8	
60	65	4	14		670	680	65	8	
65	70	5	4		680	690	66	8	
70	75	5	10		690	700	67	8	
75	80	6	0		700	710	68	8	
80	85	6	6		710	720	69	8	
85	90	6	12		720	730	70	8	
90	95	7	2		730	740	71	8	
95	100	7	8		740	750	72	8	
100	110	8	8		750	760	73	8	
110	120	9	8		760	770	74	8	
120	130	10	8		770	780	75	8	
130	140	11	8		780	790	76	8	
140	150	12	8		790	800	77	8	
150	160	13	8		800	810	78	8	
160	170	14	8		810	820	79	8	
170	180	15	8		820	830	80	8	
180	190	16	8		830	840	81	8	
190	200	17	8		840	850	82	8	
200	210	18	8		850	860	83	8	
210	220	19	8		860	870	84	8	
220	230	20	8		870	880	85	8	
230	240	21	8		880	890	86	8	
240	250	22	8		890	900	87	8	
250	260	23	8		900	910	88	8	
260	270	24	8		910	920	89	8	
270	280	25	8		920	930	90	8	
280	290	26	8		930	940	91	8	
290	300	27	8		940	950	92	8	
300	310	28	8		950	960	93	8	
310	320	29	8		960	970	94	8	
320	330	30	8		970	980	95	8	
330	340	31	8		980	990	96	8	
340	350	32	8		990	1,000	97	8	
350	360	33	8		1,000	1,100	105	0	
360	370	34	8		1,100	1,200	112	8	
370	380	35	8		1,200	1,300	120	0	
380	390	36	8		1,300	1,400	127	8	
390	400	37	8		1,400	1,500	135	0	
400	410	38	8		1,500	1,600	142	8	
410	420	39	8		1,600	1,700	150	0	
420	430	40	8		1,700	1,800	157	8	
430	440	41	8		1,800	1,900	165	0	
440	450	42	8		1,900	2,000	172	8	
450	460	43	8		2,000	2,100	180	0	
460	470	44	8		2,100	2,200	187	8	
470	480	45	8		2,200	2,300	195	0	
480	490	46	8		2,300	2,400	202	8	
490	500	47	8		2,400	2,500	210	0	
500	510	48	8		2,500	2,600	217	8	
510	520	49	8		2,600	2,700	225	0	
520	530	50	8		2,700	2,800	232	8	
530	540	51	8		2,800	2,900	240	0	
540	550	52	8		2,900	3,000	247	8	
550	560	53	8		3,000	3,100	255	0	
560	570	54	8		3,100	3,200	262	8	
570	580	55	8		3,200	3,300	270	0	
580	590	56	8		3,300	3,400	277	8	



When the amount or value of the subject-matter exceeds				When the amount or value of the subject-matter exceeds			
But does not exceed		Proper fee.		But does not exceed		Proper fee.	
Rs.	Rs.	Rs.	A. P.	Rs.	Rs.	Rs.	A. P.
3,400	3,500	285	0	19,000	19,500	1,125	8
3,500	3,600	292	8	19,500	20,000	1,147	0
3,600	3,700	300	0	20,000	21,000	1,177	8
3,700	3,800	307	8	21,000	22,000	1,207	8
3,800	3,900	315	0	22,000	23,000	1,237	8
3,900	4,000	322	8	23,000	24,000	1,267	8
4,000	4,100	330	0	24,000	25,000	1,297	8
4,100	4,200	337	8	25,000	26,000	1,327	8
4,200	4,300	345	0	26,000	27,000	1,357	8
4,300	4,400	352	8	27,000	28,000	1,387	8
4,400	4,500	360	0	28,000	29,000	1,417	8
4,500	4,600	367	8	29,000	30,000	1,447	8
4,600	4,700	375	0	30,000	32,000	1,477	8
4,700	4,800	382	8	32,000	34,000	1,507	8
4,800	4,900	390	0	34,000	36,000	1,537	8
4,900	5,000	397	8	36,000	38,000	1,567	8
5,000	5,250	412	8	38,000	40,000	1,597	8
5,250	5,500	427	8	40,000	42,000	1,627	8
5,500	5,750	442	8	42,000	44,000	1,657	8
5,750	6,000	457	8	44,000	46,000	1,687	8
6,000	6,250	472	8	46,000	48,000	1,717	8
6,250	6,500	487	8	48,000	50,000	1,747	8
6,500	6,750	502	8	50,000	55,000	1,785	0
6,750	7,000	517	8	55,000	60,000	1,822	8
7,000	7,250	532	8	60,000	65,000	1,860	0
7,250	7,500	547	8	65,000	70,000	1,897	8
7,500	7,750	562	8	70,000	75,000	1,935	0
7,750	8,000	577	8	75,000	80,000	1,972	8
8,000	8,250	592	8	80,000	85,000	2,010	0
8,250	8,500	607	8	85,000	90,000	2,047	8
8,500	8,750	622	2	90,000	95,000	2,085	0
8,750	9,000	637	8	95,000	1,00,000	2,122	8
9,000	9,250	652	8	1,00,000	1,05,000	2,160	8
9,250	9,500	667	8	1,05,000	1,10,000	2,197	0
9,500	9,750	682	8	1,10,000	1,15,000	2,235	8
9,750	10,000	697	8	1,15,000	1,20,000	2,272	8
10,000	10,500	712	8	1,20,000	1,25,000	2,310	0
10,500	11,000	727	8	1,25,000	1,30,000	2,347	8
11,000	11,500	742	8	1,30,000	1,35,000	2,385	0
11,500	12,000	757	8	1,35,000	1,40,000	2,422	8
12,000	12,500	772	8	1,40,000	1,45,000	2,460	0
12,500	13,000	787	8	1,45,000	1,50,000	2,497	8
13,000	13,500	802	8	1,50,000	1,55,000	2,535	0
13,500	14,000	817	8	1,55,000	1,60,000	2,572	8
14,000	14,500	832	8	1,60,000	1,65,000	2,610	0
14,500	15,000	847	8	1,65,000	1,70,000	2,647	8
15,000	15,500	862	8	1,70,000	1,75,000	2,685	0
15,500	16,000	877	8	1,75,000	1,80,000	2,722	8
16,000	16,500	892	8	1,80,000	1,85,000	2,760	0
16,500	17,000	907	8	1,85,000	1,90,000	2,797	8
17,000	17,500	922	8	1,90,000	1,95,000	2,835	0
17,500	18,000	937	8	1,95,000	2,00,000	2,872	8
18,000	18,500	952	8	2,00,000	2,05,000	2,910	0
18,500	19,000	967	8				

and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees or part thereof, for example, when the amount or value of the subject-matter exceeds.

Rs.	Rs.	Rs.	Rs.
3,00,000	3,660	8,00,000	7,410
4,00,000	4,410	9,00,000	8,160
5,00,000	5,160	10,00,000	8,910
6,00,000	5,910	11,00,000	9,660
7,00,000	6,660		

## SCHEDULE C.

[See S. 12 (4) of the Bihar and Orissa Court-Fees (Amendment) Act, 1922.]

Proper fees set out in Schedule II of the Principal Act.

Proper fees to be substituted.

Article 1.	One anna ..	Two annas.
	Eight annas ..	Twelve annas.
	One rupee ..	One rupee and eight annas.
	Two rupees ..	Three rupees.
Article 1-A.	Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Article 1 of this Schedule.	One rupee in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Article 1 of this Schedule.
Article 10;.	Eight annas ..	One rupee.
	One rupee ..	Two rupees.
	Two rupees ..	Three rupees.
Article 11;.	Eight annas ..	One rupee.
	Two rupees ..	Four rupees.
Article 12;.	Five rupees ..	Ten rupees.
Article 14;.	Five rupees ..	Ten rupees.
Articles 17, 18 and 19 ..	Ten rupees	Fifteen rupees.
Articles 20 and 21 ..	Twenty rupees	Thirty rupees.

## BOMBAY ACT NO. II OF 1932.

It extends to the whole of the Presidency of Bombay.

12. In section 7 of the Court-Fees Act, 1870, in its application to the Presidency of Bombay, in this Part referred to as the said Act,—

Amendment of S. 7 of Act VII of 1870. (a) to clause (d) of paragraph (iv) the words “or other consequential relief” shall be added;

(b) after the word “appeal” in paragraph (iv) the words “with a minimum fee of rupees five in the case of suits falling under clause (c),” shall be inserted; and

(c) in clauses (1), (2) and (3) to the proviso to paragraph (v) for the words “five,” “ten” and “ten” the words “seven and a half,” “fifteen” and “fifteen,” shall, respectively, be substituted.

13. For Articles 1, 8, 11, 12 and 12-A of, and the Table of rates of *ad valorem* fees in Schedule I to the said Act, the following shall be substituted, namely:—

## SCHEDULE I.

*Ad Valorem Fees.*

Number.		Proper fee.
1. Complaint, written statement pleading a set-off or counter-claim or memorandum of appeal not otherwise provided for in this Act, or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees or part thereof, in excess of five rupees up to one hundred rupees.	Do.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees up to five thousand rupees.	Five rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees and eight annas.

Number.		Proper Fee.
<p>8. Copy of any document liable to stamp duty under the Indian Stamp Act, 1899, when left by any party to a suit or proceeding in place of the original withdrawn.</p> <p>11. Probate of a will or letters of administration with or without will annexed.</p>	When such amount or value exceeds twenty thousand rupees, for every thousand rupees, or part thereof, in excess, of twenty thousand rupees up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees up to fifty thousand rupees.	Do.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Do.
	Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.	
	(a) When the stamp duty chargeable on the original does not exceed one rupee. (b) In any other case	The amount of the duty chargeable on original. One rupee.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the part of the amount or value in excess of one thousand rupees, up to ten thousand rupees.	Two per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds ten thousand rupees, on the part of the amount or value in excess of ten thousand rupees, up to fifty thousand rupees.	Three per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds fifty thousand rupees, on the part of the amount or value in excess of fifty thousand rupees, up to one lakh of rupees.	Four per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one lakh of rupees, on the part of the amount or value in excess of one lakh of rupees, up to two lakhs of rupees.	Four and a half per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakhs of rupees, on the part of the amount or value in excess of two lakhs of rupees, up to two lakhs and fifty thousand rupees.	Five per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakhs and fifty thousand rupees, on the part of the amount or value in excess of two lakhs and fifty thousand rupees, up to three lakhs of rupees.	Five and a half per centum.

Number.		Proper Fee.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds three lakhs of rupees, on the part of the amount or value in excess of three lakhs of rupees up to four lakhs of rupees.	Six per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds four lakhs of rupees, on the part of the amount or value in excess of four lakhs of rupees, up to five lakhs of rupees.	Six and a half per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds five lakhs of rupees, on the part of the amount or value in excess of five lakhs of rupees.	Seven per centum.
12. Certificate under Part X of the Indian Succession Act, 1925.	<p>Provided that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925, or under Bombay Regulation VIII of 1827, in respect of any property included in an estate, grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.</p> <p>....</p>	<p>The fee leviable in the case of a probate (Article 11) on the amount or value of any debt or security specified in the certificate under S. 374 of the Act, and one and a half times this fee on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.</p> <p>NOTE.—(1) The amount of a debt is its amount including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.</p> <p>(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for, the negotiation or transfer of the security, or for both purposes, the value</p>

Number.	—	Proper Fee.
12-A. Certificate under Bombay Regulation VIII of 1827.	....	of the security is its market value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained. The fee leviable in the case of a probate (Article 11) on the amount or value of the property in respect of which the certificate is granted..

## TABLE OF RATES.

*Table of rates of ad valorem fees leviable on the institution of suits.*

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	350	360	27 0
5	10	0 12	360	370	27 12
10	15	1 2	370	380	28 8
15	20	1 8	380	390	29 4
20	25	1 14	390	400	30 0
25	30	2 4	400	410	30 12
30	35	2 10	410	420	31 8
35	40	3 0	420	430	32 4
40	45	3 6	430	440	33 0
45	50	3 12	440	450	33 12
50	55	4 2	450	460	34 8
55	60	4 8	460	470	35 4
60	65	4 14	470	480	36 0
65	70	5 4	480	490	36 12
70	75	5 10	490	500	37 8
75	80	6 0	500	510	38 4
80	85	6 6	510	520	39 0
85	90	6 12	520	530	39 12
90	95	7 2	530	540	40 8
95	100	7 8	540	550	41 4
100	110	8 4	550	560	42 0
110	120	9 0	560	570	42 12
120	130	9 12	570	580	43 8
130	140	10 8	580	590	44 4
140	150	11 4	590	600	45 0
150	160	12 0	600	610	45 12
160	170	12 12	610	620	46 8
170	180	13 8	620	630	47 4
180	190	14 4	630	640	48 0
190	200	15 0	640	650	48 12
200	210	15 12	650	660	49 8
210	220	16 8	660	670	50 4
220	230	17 4	670	680	51 0
230	240	18 0	680	690	51 12
240	250	18 12	690	700	52 8
250	260	19 8	700	710	53 4
260	270	20 4	710	720	54 0
270	280	21 0	720	730	54 12
280	290	21 12	730	740	55 8
290	300	22 8	740	750	56 4
300	310	23 4	750	760	57 0
310	320	24 0	760	770	57 12
320	330	24 12	770	780	58 8
330	340	25 8	780	790	59 4
340	350	26 4	790	800	60 0

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
800	810	60 12	5,000	5,250	290 0
810	820	61 8	5,250	5,500	305 0
820	830	62 4	5,500	5,750	320 0
830	840	63 0	5,750	6,000	335 0
840	850	63 12	6,000	6,250	350 0
850	860	64 8	6,250	6,500	365 0
860	870	65 4	6,500	6,750	380 0
870	880	66 0	6,750	7,000	395 0
880	890	66 12	7,000	7,250	410 0
890	900	67 8	7,250	7,500	425 0
900	910	68 4	7,500	7,750	440 0
910	920	69 0	7,750	8,000	455 0
920	930	69 12	8,000	8,250	470 0
930	940	70 8	8,250	8,500	485 0
940	950	71 4	8,500	8,750	500 0
950	960	72 0	8,750	9,000	515 0
960	970	72 12	9,000	9,250	530 0
970	980	73 8	9,250	9,500	545 0
980	990	74 4	9,500	9,750	560 0
990	1,000	75 0	9,750	10,000	575 0
1,000	1,100	80 0	10,000	10,500	597 8
1,100	1,200	85 0	10,500	11,000	620 0
1,200	1,300	90 0	11,000	11,500	642 8
1,300	1,400	95 0	11,500	12,000	665 0
1,400	1,500	100 0	12,000	12,500	687 8
1,500	1,600	105 0	12,500	13,000	710 0
1,600	1,700	110 0	13,000	13,500	732 8
1,700	1,800	115 0	13,500	14,000	755 0
1,800	1,900	120 0	14,000	14,500	777 8
1,900	2,000	125 0	14,500	15,000	800 0
2,000	2,100	130 0	15,000	15,500	822 8
2,100	2,200	135 0	15,500	16,000	845 0
2,200	2,300	140 0	16,000	16,500	867 8
2,300	2,400	145 0	16,500	17,000	890 0
2,400	2,500	150 0	17,000	17,500	912 8
2,500	2,600	155 0	17,500	18,000	935 0
2,600	2,700	160 0	18,000	18,500	957 8
2,700	2,800	165 0	18,500	19,000	980 0
2,800	2,900	170 0	19,000	19,500	1,002 8
2,900	3,000	175 0	19,500	20,000	1,025 0
3,000	3,100	180 0	20,000	21,000	1,055 0
3,100	3,200	185 0	21,000	22,000	1,085 0
3,200	3,300	190 0	22,000	23,000	1,115 0
3,300	3,400	195 0	23,000	24,000	1,145 0
3,400	3,500	200 0	24,000	25,000	1,175 0
3,500	3,600	205 0	25,000	26,000	1,205 0
3,600	3,700	210 0	26,000	27,000	1,235 0
3,700	3,800	215 0	27,000	28,000	1,265 0
3,800	3,900	220 0	28,000	29,000	1,295 0
3,900	4,000	225 0	29,000	30,000	1,325 0
4,000	4,100	230 0	30,000	32,000	1,355 0
4,100	4,200	235 0	32,000	34,000	1,385 0
4,200	4,300	240 0	34,000	36,000	1,415 0
4,300	4,400	245 0	36,000	38,000	1,445 0
4,400	4,500	250 0	38,000	40,000	1,475 0
4,500	4,600	255 0	40,000	42,000	1,505 0
4,600	4,700	260 0	42,000	44,000	1,535 0
4,700	4,800	265 0	44,000	46,000	1,565 0
4,800	4,900	270 0	46,000	48,000	1,595 0
4,900	5,000	275 0	48,000	50,000	1,625 0

and the fee increases at the rate of thirty rupees for every five thousand rupees, or part thereof up to a maximum of ten thousand rupees, for example—

Rs.	Rs. A.	Rs.	Rs. A.
1,00,000	1,925 0	5,00,000	4,325 0
2,00,000	2,525 0	6,00,000	4,925 0
3,00,000	3,125 0	7,00,000	5,525 0
4,00,000	3,725 0	8,00,000	6,125 0

Rs.  
9,00,000  
10,00,000  
11,00,000  
12,00,000

Rs.	A.	Rs.
6,725	0	13,00,000
7,325	0	14,00,000
7,925	0	15,00,000
8,255	0	

Rs.	A.
9,125	0
9,725	0
10,000	0

Amendment of Schedule II  
to Act VIII of 1870.

14. For Articles 1, 6, 7, 12, 14, 17, 18, 19, 20 and 21  
of Schedule II to the said Act the following shall be substituted,  
namely :—

#### SCHEDULE II.

##### *Fixed Fees.*

Number.		Proper Fee.
1. Application or petition.	<p>(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings :</p> <p>or when presented to any officer of land revenue by any person holding temporarily-settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement :</p> <p>or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement :</p> <p>or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Court of Small Causes constituted under the Provincial Small Causes Courts Act, 1887, or to a Collector or other officer or revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees, not being an application for assistance under section 86 of the Bombay Land Revenue Code, 1879;</p> <p>or when presented to any Civil, Criminal or Revenue Court, or to any Board or executive officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or officer, or of any other document on record in such Court or office.</p> <p>(aa) When presented to a Collector or other officer of revenue for assistance under section 86 of the Bombay Land Revenue Code, 1879.</p> <p>(b) When containing a complaint or charge of any offence other than an offence for which police officers may, under the Criminal Procedure Code, 1898, arrest without warrant, and presented to any Criminal Court :</p> <p>or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by the Act :</p>	<p>Two annas.</p> <p>Four annas.</p> <p>Eight annas.</p>



Number.		Proper Fee.
	or to deposit in Court revenue or rent : or for determination by a Court of the amount of compensation to be paid by a landlord to his tenant.	
	(c) when presented to a Chief Commis- sioner or other Chief Controlling Revenue or Executive Authority or to a Commissioner of Revenue or circuit, or to any chief officer charged with the executive administration of a division and not otherwise provided for by this Act.	Two rupees.
6. Bail bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, of the Code of Civil Pro- cedure, 1908, and not otherwise provided for by this Act.	(d) When presented to a High Court.	Four rupees. One rupee.
7. Undertaking under section 49 of the Indian Divorce Act, 1869.	....	Do.
12. Caveat ..	When the amount or value of the pro- perty involved does not exceed two thousand rupees.	Five rupees.
	When the amount or value of the pro- perty involved exceeds two thousand rupees.	Ten rupees.
14. Petition in a suit under the Native Converts' Marriage Dis- solution Act, 1866 (XXI of 1866).	....	Do.
17. Plaint or memorandum of appeal in each of the following suits :—		
(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court ;	When the amount or value of the pro- perty involved does not exceed five hundred rupees.	Do.
(ii) to alter or cancel any entry in a register of the names of proprie- tors of revenue paying estates ;	When the amount or value of the pro- perty involved exceeds five hundred rupees.	Fifteen rupees.
(iii) to obtain a declaratory decree or order where no consequential relief is prayed ;	....	Do.
(iv) to set aside alienation ;		Do.
(v) to set aside a decree or award ;	When the amount or value of the pro- perty involved does not exceed five hundred rupees.	Ten rupees.
	When the amount or value of the pro- perty involved exceeds five hundred rupees.	Fifteen rupees.
(vi) to set aside an adoption; and	....	Do.
(vii) any other suit where it is not possible to estimate at a money value the subject-matter in dis- pute and which is not otherwise provided for by the Act.	....	Do.
18. Application—		
(a) under paragraph 17 of the Se- cond Schedule to the Code of Civil Procedure, 1908 ;	....	Ten rupees.
(b) for the probate or letters of administration or for revocation thereof under the Indian Succes- sion Act, 1925.	When the amount or value of the estate does not exceed two thousand rupees.	Two rupees.
	When it exceeds two thousand rupees,	Five rupees.

Number.		Proper Fee.
(c) for a certificate under Part X of the Indian Succession Act, 1925, or Bombay Regulation, VIII of 1827 ;	but does not exceed five thousand rupees. When it exceeds five thousand rupees.	Ten rupees.
(d) for opinion or advice or for discharge from a Trust or for appointment of Trustees, under section 34, 72, 73 or 74 of the Indian Trusts Act, 1882.	....	Do.
(e) for the winding up of a company under section 166 of the Indian Companies Act, 1913.	....	Do.
(f) under Rule 58 of Order XXI of the Code of Civil Procedure, 1908 regarding a claim to attached property.	When the amount or value of the property exceeds five hundred rupees.	Do.
19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.	....	Twenty rupees.
20. Every petition under the Indian Divorce Act, 1869, except petition under section 44 of that Act and every memorandum of appeal under section 55 of that Act.	....	Thirty rupees.
21. Complaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.	....	Do.

## BOMBAY ACT NO. XV OF 1943.

[Received the assent of the Governor-General on the 29th December, 1943].

*An Act to provide for an increase in Court-fees leviable under Court-Fees Act, 1870, in its application to the Province of Bombay.*

WHEREAS it is expedient to provide for an increase in Court-fees leviable under the Court-Fees Act, 1870, in its application to the Province of Bombay.

AND WHEREAS the Governor-General of Bombay has assumed to himself under the Proclamation dated the 4th November, 1939, issued by him under S. 93 of the Government of India Act, 1935, all powers vested by or under the said Act in the Provincial Legislature ;

NOW, THEREFORE, in exercise of the said powers the Governor of Bombay is pleased to make the following Act :—

Short title, extent, commencement and duration. 1. (1) This Act may be called THE BOMBAY INCREASE OF COURT-FEES ACT, 1943.

(2) It extends to the whole of Province of Bombay.

(3) It shall come into force on the 1st of January, 1944, and shall cease to have effect on such date as the Provincial Government may by notification in the Official Gazette appoint in this behalf.

2. Notwithstanding anything contained in the Court-Fees Act, 1870, in its application to the Province of Bombay (hereinafter called the principal Act), all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the Schedule annexed hereto.

Provisions of principal Act so far as not inconsistent to apply for purposes of this Act.

3. The provisions of the Principal Act shall, save in so far as they are inconsistent with anything herein contained, apply for the purposes of this Act.

## SCHEDULE.

## Rates of surcharge.

Amount of Court-fee.	Rate of surcharge.
(1) A fraction of a rupee not exceeding four annas ..	One anna.
(2) A fraction of a rupee exceeding four annas but not exceeding eight annas ..	Two annas.
(3) A fraction of a rupee exceeding eight annas ..	Three annas.
(4) A whole rupee ..	Four annas.

## CENTRAL PROVINCES ACT NO. XVI OF 1935.

*An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court-fees in the Central Provinces.*

WHEREAS it is expedient to revise the scale of court-fees for the Central Provinces by amendment of the Court-Fees Act, 1870, in its application to the Central Provinces, in the manner hereinafter appearing;

Preamble.

AND WHEREAS the previous sanction of the Governor required under section 80-G of the Government of India Act has been obtained to the passing of this Act;

It is hereby enacted as follows:

Short title, commencement and duration.

1. (1) This Act may be called THE COURT-FEES (CENTRAL PROVINCES AMENDMENT) ACT, 1935.

(2) It shall come into force on such date as the local Government may, by notification, appoint in this behalf and shall remain in force to the 31st day of March, 1943.

Application of Act VII of 1870.

2. The Court-Fees Act, 1870 (hereinafter referred to as the said Act), shall be amended in its application to Central Provinces in the manner hereinafter provided.

Amendment of section 7, Act VII of 1870.

3. In section 7 of the said Act,—

(a) after the word "appeal" in paragraph iv, the words "with a minimum fee of rupees five in the case of suits falling under clause (c)" shall be inserted;

(b) in clause (a) of paragraph v, between the words "or" and "forms part," the words "where the land" shall be inserted;

(c) in clause (b) of paragraph v—

(i) between the words "or" and "forms part," the words "where the land" shall be inserted; and

(ii) for the word "five" the words "seven and a half" shall be substituted; and

(d) for paragraph ix, the following paragraph shall be substituted, namely:—

ix. (a) in suits against a mortgagee for the recovery of the property mortgaged,— according to the principal money expressed to be secured by the instrument of mortgage; and

(b) in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have sale declared absolute,—

according to the amount claimed as due at the date of presenting the plaint."

Amendment of Article 1, Schedule I, Act VII of 1870.

4. In Schedule I to the said Act,—

(a) before the word "presented" in the first column of Article 1, the words "in any suit between landlord and tenant for an arrear of rent" shall be inserted;

(b) after Article 1, the following Article shall be inserted, namely:—

"1-A. Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3 in suits other than those provided for in Article 1.

When the amount or value of the subject matter in dispute does not exceed five rupees.	Six annas.
When such amount or value exceeds five rupees for every five rupees or part thereof, in excess of five rupees up to one hundred rupees.	Do.
When such amount or value exceeds one hundred rupees, for every ten rupees or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Six rupees.
When such amount or value exceeds five thousand rupees for every two hundred rupees or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty rupees.
When such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof,	Thirty rupees.

in excess of twenty thousand rupees, up to thirty thousand rupees.	
When such amount or value exceeds thirty thousand rupees, for every two thousand rupees or part thereof in excess of thirty thousand rupees, up to fifty thousand rupees.	Do.
When such amount or value exceeds fifty thousand rupees for every five thousand rupees or part thereof, in excess of fifty thousand rupees.	Do.
Provided that the maximum fee leviable shall not exceed five thousand rupees.	

Amendment of Article 6, clauses (a) and (b), Schedule I, Act VII of 1870.

(c) in the third column of Article 6 for the words "Four annas" opposite clause (a), the words "Six annas," and for the words "Eight annas" opposite clause (b), the words "Twelve annas" shall be substituted;

Amendment of Article 7, Schedule I, Act VII of 1870.

(d) in the third column of Article 7 for the words "Eight annas" opposite clause (a), the words "Twelve annas," and for the words "One rupee" opposite clause (b) the words "One rupee and eight annas" shall be substituted;

Amendment of Articles 11 and 12, Schedule I, Act VII of 1870.

(e) for Articles 11 and 12 and the entries in the second and third columns thereof, the following Articles and entries shall be substituted, namely:—

"11. Probate of a will or letters of administration with or without will annexed.

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed five thousand rupees.

Two per centum on such amount or value.

When such amount or value exceeds five thousand rupees but does not ten thousand rupees.

One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees.

When such amount or value exceeds ten thousand rupees.

Two hundred and fifty rupees plus three per centum on the amount or value in excess of ten thousand rupees:

Provided that when after the grant of a certificate under Part X of the Indian Succession Act, 1925, or under Bombay Regulation VIII of 1827 in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

12. Certificate under Part X of the Indian Succession Act, 1925 (XXXIX of 1925).

When the amount or value of any debt or security specified in the certificate under section 374 of the Act exceeds one thousand rupees but does not exceed five thousand rupees.

Two per centum on such amount or value and three per centum on the amount of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.

One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees, and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds ten thousand rupees.

Two hundred and fifty rupees plus three per

centum on the amount or value in excess of ten thousand rupees and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act";

Amendment of Table of rates of *ad valorem* fees.

(f) for the Table of rates of *ad valorem* fees leviable on the institution of suits the following table shall be substituted, namely :—

When the amount or value of the subject-matter exceeds—			But does not exceed—			Proper Fee.			When the amount or value of the subject-matter exceeds—			But does not exceed—			Proper Fee.		
Rs.			Rs.			Rs.	A.		Rs.			Rs.			Rs.	A.	
..	5	0	6	410	420	31	8		410	420	31	8					
5	10	0	12	420	430	32	4		420	430	32	4					
10	15	1	2	430	440	33	0		430	440	33	0					
15	20	1	8	440	450	33	12		440	450	33	12					
20	25	1	14	450	460	34	8		450	460	34	8					
25	30	2	4	460	470	35	4		460	470	35	4					
30	35	2	10	470	480	36	0		470	480	36	0					
35	40	3	0	480	490	36	12		480	490	36	12					
40	45	3	6	490	500	37	8		490	500	37	8					
45	50	3	12	500	510	38	4		500	510	38	4					
50	55	4	2	510	520	39	0		510	520	39	0					
55	60	4	8	520	530	39	12		520	530	39	12					
60	65	4	14	530	540	40	8		530	540	40	8					
65	70	5	4	540	550	41	4		540	550	41	4					
70	75	5	10	550	560	42	0		550	560	42	0					
75	80	6	0	560	570	42	12		560	570	42	12					
80	85	6	6	570	580	43	8		570	580	43	8					
85	90	6	12	580	590	44	4		580	590	44	4					
90	95	7	2	590	600	45	0		590	600	45	0					
95	100	7	8	600	610	45	12		600	610	45	12					
100	110	8	4	610	620	46	8		610	620	46	8					
110	120	9	0	620	630	47	4		620	630	47	4					
120	130	9	12	630	640	48	0		630	640	48	0					
130	140	10	8	640	650	48	12		640	650	48	12					
140	150	11	4	650	660	49	8		650	660	49	8					
150	160	12	0	660	670	50	4		660	670	50	4					
160	170	12	12	670	680	51	0		670	680	51	0					
170	180	13	8	680	690	51	12		680	690	51	12					
180	190	14	4	690	700	52	8		690	700	52	8					
190	200	15	0	700	710	53	4		700	710	53	4					
200	210	15	12	710	720	54	0		710	720	54	0					
210	220	16	8	720	730	54	12		720	730	54	12					
220	230	17	4	730	740	55	8		730	740	55	8					
230	240	18	0	740	750	56	4		740	750	56	4					
240	250	18	12	750	760	57	0		750	760	57	0					
250	260	19	8	760	770	57	12		760	770	57	12					
260	270	20	4	770	780	58	8		770	780	58	8					
270	280	21	0	780	790	59	4		780	790	59	4					
280	290	21	12	790	800	60	0		790	800	60	0					
290	300	22	8	800	810	60	12		800	810	60	12					
300	310	23	4	810	820	61	8		810	820	61	8					
310	320	24	0	820	830	62	4		820	830	62	4					
320	330	24	12	830	840	63	0		830	840	63	0					
330	340	25	8	840	850	63	14		840	850	63	14					
340	350	26	4	850	860	64	2		850	860	64	2					
350	360	27	0	860	870	65	8		860	870	65	8					
360	370	27	12	870	880	66	0		870	880	66	0					
370	380	28	8	880	890	66	12		880	890	66	12					
380	390	29	4	890	900	67	8		890	900	67	8					
390	400	30	0	900	910	68	4		900	910	68	4					
400	410	30	12	910	920	69	0		910	920	69	0					

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper Fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
920	930	69 12	6,800	7,000	415 0
930	940	70 8	7,000	7,200	425 0
940	950	71 4	7,200	7,400	435 0
950	960	72 0	7,400	7,600	445 0
960	970	72 12	7,600	7,800	455 0
970	980	73 8	7,800	8,000	465 0
980	990	74 4	8,000	8,200	475 0
990	1,000	75 0	8,200	8,400	485 0
1,000	1,100	81 0	8,400	8,600	495 0
1,100	1,200	87 0	8,600	8,800	505 0
1,200	1,300	93 0	8,800	9,000	515 0
1,300	1,400	99 0	9,000	9,200	525 0
1,400	1,500	105 0	9,200	9,400	535 0
1,500	1,600	111 0	9,400	9,600	545 0
1,600	1,700	117 0	9,600	9,800	555 0
1,700	1,800	123 0	9,800	10,000	565 0
1,800	1,900	129 0	10,000	10,500	585 0
1,900	2,000	135 0	10,500	11,000	605 0
2,000	2,100	141 0	11,000	11,500	625 0
2,100	2,200	147 0	11,500	12,000	645 0
2,200	2,300	153 0	12,000	12,500	665 0
2,300	2,400	159 0	12,500	13,000	685 0
2,400	2,500	165 0	13,000	13,500	705 0
2,500	2,600	171 0	13,500	14,000	725 0
2,600	2,700	177 0	14,000	14,500	745 0
2,700	2,800	183 0	14,500	15,000	765 0
2,800	2,900	189 0	15,000	15,500	785 0
2,900	3,000	195 0	15,500	16,000	805 0
3,000	3,100	201 0	16,000	16,500	825 0
3,100	3,200	207 0	16,500	17,000	845 0
3,200	3,300	213 0	17,000	17,500	865 0
3,300	3,400	219 0	17,500	18,000	885 0
3,400	3,500	225 0	18,000	18,500	905 0
3,500	3,600	231 0	18,500	19,000	925 0
3,600	3,700	237 0	19,000	19,500	945 0
3,700	3,800	243 0	19,500	20,000	965 0
3,800	3,900	249 0	20,000	21,000	995 0
3,900	4,000	255 0	21,000	22,000	1,025 0
4,000	4,100	261 0	22,000	23,000	1,055 0
4,100	4,200	267 0	23,000	24,000	1,085 0
4,200	4,300	273 0	24,000	25,000	1,115 0
4,300	4,400	279 0	25,000	26,000	1,145 0
4,400	4,500	285 0	26,000	27,000	1,175 0
4,500	4,600	291 0	27,000	28,000	1,205 0
4,600	4,700	297 0	28,000	29,000	1,235 0
4,700	4,800	303 0	29,000	30,000	1,265 0
4,800	4,900	309 0	30,000	32,000	1,295 0
4,900	5,000	315 0	32,000	34,000	1,325 0
5,000	5,200	325 0	34,000	36,000	1,335 0
5,200	5,400	335 0	36,000	38,000	1,385 0
5,400	5,600	345 0	38,000	40,000	1,415 0
5,600	5,800	355 0	40,000	42,000	1,445 0
5,800	6,000	365 0	42,000	44,000	1,475 0
6,000	6,200	375 0	44,000	46,000	1,505 0
6,200	6,400	385 0	46,000	48,000	1,535 0
6,400	6,600	395 0	48,000	50,000	1,565 0
6,600	6,800	405 0			

When the amount or value of the subject-matter exceeds fifty thousand rupees, for every five thousand rupees or part thereof in excess of fifty thousand rupees :  
 Provided that the maximum fee leviable shall not exceed five thousand rupees."

Thirty Rupees.

## 5. In Schedule II to the said Act—

Amendment of Schedule II  
Article 1, clause (a) Act VII of  
1870.

Amendment of Schedule II,  
Article 1, clause (b) Act VII of  
1870.

(a) in the third column of Article 1, for the words "one anna" opposite clause (a), the words "Two annas" shall be substituted;

(b) for clause (b) of Article 1 in the second column and the entry opposite it in the third column, the following clause and entries shall be substituted, namely :—

"(b) When containing a complaint of charge of any offence other than an offence for which police officers may, under the Code of Criminal Procedure, 1898, arrest without warrant, and presented to any Criminal Court; or for orders of arrest or attachment before judgment or for temporary injunctions ;	Twelve annas.
or for compensation for arrest or attachment before judgment or in respect of a temporary injunction obtained on insufficient grounds ;	Two rupees.
or for the appointment of a receiver in a case in which the applicant has no present right of possession of the properties in dispute ;	Do.
or for setting aside decrees passed <i>ex parte</i> and for review of orders dismissing suits for default ;	Five rupees.
or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act ;	Twelve annas.
or to deposit in Court revenue or rent ;	Twelve annas.
or for determination by a Court of the amount of compensation to be paid by landlord to his tenant."	Eight annas.
	Do.

Amendment of Schedule II,  
Article 1, clauses (c) and (d),  
Act VII of 1870.

(c) for clauses (c) and (d) in the second column and for the entries in the third column opposite these clauses, the following clauses and entries have been substituted, namely :—

"(c) When presented to a Commissioner of Revenue or to any Chief Officer charged with the executive administration of a division, and not otherwise provided for by this Act.	One rupee and eight annas.
(d) When presented to a Chief Controlling Revenue Authority or Executive Authority and not otherwise provided for by this Act.	Two rupees.
(c) When presented to the Court of the Judicial Commissioner—	
(i) otherwise than under section 25 of the Provincial Small Causes Courts Act, 1877, or sec. 115 of the Code of Civil Procedure, 1908 ;	Do.
(ii) under section 25 of the Provincial Small Causes Courts Act, 1887 ;	Five rupees.
(iii) under section 115 of the Code of Civil Procedure, 1908.	Do.

Amendment of Schedule II,  
Article 10, Clauses (a) and (c),  
Act VII of 1870.

Amendment of Schedule II,  
Article 11, Clauses (a) and (b),  
Act VII of 1870.

Amendment of Schedule II,  
Articles 17, 18 and 19, Act  
VII of 1870.

(d) in the third column of Article 10, for the words "Eight annas" opposite clause (a), the words "Twelve annas," the words "two rupees" opposite clause (c), the words "Two rupees and eight annas" shall be substituted ;

(e) in the third column of Article 11, for the words "Eight annas" opposite clause (a), the words "One rupee," and for the words "Two rupees" opposite clause (b), the words "Four rupees" shall be substituted ;

(f) for Articles 17, 18 and 19, the following Articles shall be substituted, namely :—



<p>"17. Plaint or memorandum of appeal in each of the following suits:—</p> <p>(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court ;</p> <p>(ii) to alter or cancel any entry in a register of the names of proprietors or revenue-paying estates ;</p> <p>(iii) to obtain a declaratory decree where no consequential relief is prayed ;</p> <p>(iv) to set aside an award ;</p> <p>(v) to set aside an adoption ;</p> <p>(vi) every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.</p>	Fifteen rupees.
<p>18. Applications—</p> <p>(a) under paragraph 17 or 20 of the Schedule to the Code of Civil Procedure, 1908 (V of 1908) ;</p>	One rupee.
<p>(b) for opinion or advice or for discharge from a trust, or for appointment of new trustees under sections 34, 72, 73 or 74 of the Indian Trusts Act, 1882 (II of 1882) ;</p>	Ten rupees.
<p>(c) for winding up of a company, under section 166 of the Indian Companies Act, 1913 (VII of 1913) ;</p>	Ten rupees.
<p>(d) for the appointment or declaration of a person as guardian of the person or property or both, of minors, under the Guardians and Wards Act, 1890 (VIII of 1890).</p>	Do.
<p>19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908, Order 36, Rule 1.</p>	Fifteen rupees.

6. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act but which have not been issued.

#### THE C. P. AND BERAR FINANCE (ANNUAL) ACT (I of 1944).

##### PART II.—COURT-FEES.

Extension of the operation of Central Provinces and Berar Act XV of 1935.

2. In sub-S. (2) of S. 1 of the Court-Fees (Central Provinces and Berar Amendment) Act, 1935, for the figures "1944," the figures "1945" shall be substituted.

Levy of surcharge on Court-fees.

3. (1) The amount of fee payable on documents under the Court-Fees Act, 1870, as amended by the Court-Fees (Central Provinces and Berar Amendment) Act, 1935, shall be subject to a levy of a surcharge of thirty-three and one-third per cent.

(2) In levying the amount of surcharge under sub-S. (1), if there is fraction of an anna, the fraction shall be remitted.

*Explanation.*—Where in respect of any document a minimum fee is prescribed by the Court-Fees Act, 1870, as amended by the Court-Fees (Central Provinces and Berar Amendment) Act, 1935, such minimum fee shall be subject to the surcharge.

4. Notwithstanding anything contained in the Court-Fees Act, 1870, as amended by the Court-Fees (Central Provinces and Berar Amendment) Act, 1935, or S. 3 of this Act, the amount of fee payable in respect of the documents specified in column (1) of the Schedule below shall be that specified in the corresponding entry in column (2) thereof.

##### SCHEDULE.

(1) Description of the document.	(2) Amount of fee. Rs.
Memorandum of appeal presented to the High Court when the amount or value of the subject-matter in dispute does not exceed Rs. 50, or application or petition by way of appeal or revision presented to the High Court otherwise than under S. 25 of the Provincial Small Cause Courts Act, 1887, or S. 16 of the Berar Small Cause Courts Law, 1905, or S. 115 of the Code of Civil Procedure, 1908.	5
Memorandum of appeal presented to any Civil Court other than the High Court when the amount or value of the subject-matter in dispute does not exceed Rs. 50.	5

(1) Description of the document.	(2) Amount of fee Rs.
Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented to a Civil Court other than the High Court.	2
Application or petition by way of appeal or revision when presented to a Criminal Court other than the High Court.	2
Memorandum of appeal or application or petition by way of revision when presented—	
(a) to the Revenue Tribunal or Financial Commissioner or a Chief Controlling Executive or Revenue Authority;	5
(b) to a Commissioner of Division or the Settlement Commissioner or Excise Commissioner;	3
(c) to a Revenue Court or officer or an Executive Officer not otherwise provided for under clauses (a) and (b).	2
Application of the provisions of Act VII of 1870, as amended, to this Act.	5. The provisions of the Court-Fees Act, 1870, as amended by the Court-Fees (Central Provinces and Berar Amendment) Act, 1935, shall, save in so far as they are inconsistent with anything herein contained apply to this Act.

THE COURT-FEES (CENTRAL PROVINCES AND BERAR AMENDMENT) ACT,  
(XVI OF 1935).

[Published in the *Central Provinces Gazette*, dated the 7th June, 1935.]

An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court-fees in the Central Provinces and Berar.

WHEREAS it is expedient to revise the scale of court-fees for the Central Provinces and Berar, by amendment of the Court-Fees Act, 1870, in its application to the Central Provinces and Berar, in the manner hereinafter appearing;

AND WHEREAS the previous sanction of the Governor required under section 80-C of the Government of India Act has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title, commencement and duration. 1. (1) This Act may be called THE COURT-FEES (CENTRAL PROVINCES AND BERAR AMENDMENT) ACT, 1935.

(2) It shall come into force on such date as the Provincial Government may, by notification, appoint in this behalf and shall remain in force to the 31st day of March, 1944.<sup>1</sup>

Application of Act VII of 1870. 2. The Court-fees Act, 1870 (hereinafter referred to as the said Act), shall be amended, in its application to the Central Provinces and Berar, in the manner hereinafter provided.

Amendment of section 7, Act VII of 1870. 3. In section 7 of the said Act,—

(a) after the word “appeal” in paragraph iv, the words “with a minimum fee of rupees five in the case of suits falling under clause (c)” shall be inserted;

(b) in clause (a) of paragraph v, between the words “or” and “forms part,” the words “where the land” shall be inserted;

(c) in clause (b) of paragraph v—  
(i) between the words “or” and “forms part,” the words “where the land” shall be inserted; and

(ii) for the word “five” the words “seven and half” shall be substituted; and

(d) for paragraph ix, the following paragraph shall be substituted, namely:—

(ix. (a) “In suits against a mortgagee for the recovery of the property mortgaged,— according to the principal money expressed to be secured by the instrument of mortgage; and

(b) in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute,— according to the amount claimed as due at the date of presenting the plaint.”

Amendment of Article 1, Schedule I, Act VII of 1870. 4. In Schedule I to the said Act,—

(a) before the word “presented” in the first column of Article 1, the words “in any suit between landlord and tenant for an arrear of rent” shall be inserted;

(b) after article 1, the following article shall be inserted, namely:—

“1-A. Plaint, written statement) pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act)	When the amount or value of the subject matter in dispute does not exceed five rupees.	Six annas.
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1[**] presented to any Civil or Revenue Court except those mentioned in section 3 in suits other than those provided for in Article 1.	When such amount or value exceeds five rupees for every five rupees or part thereof, in excess of five rupees up to one hundred rupees.	Do.
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When such amount or value exceeds one hundred rupees, for every ten	Twelve annas.
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<sup>1</sup> As amended by the Central Provinces and Berar Court-Fees (Amendment) Act, 1943 (III of 1943).

rupees or part thereof, in excess of one hundred rupees, up to one thousand rupees.	
When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Six rupees.
When such amount or value exceeds five thousand rupees for every two hundred rupees or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty rupees.
When such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
When such amount or value exceeds thirty thousand rupees, for every two thousand rupees or part thereof in excess of thirty thousand rupees, up to fifty thousand rupees.	Do.
When such amount or value exceeds fifty thousand rupees for every five thousand rupees or part thereof, in excess of fifty thousand rupees : Provided that the maximum fee leviable shall not exceed five thousand rupees ;	Do.

Amendment of Article 6, clauses (a) and (b), Schedule I, Act VII of 1870.

Amendment of Article 7, Schedule I, Act VII of 1870.

Amendment of Articles 11 and 12, Schedule I, Act VII of 1870.

" 11. Probate of a will or letters of administration with or without will annexed.

(c) in the third column of Article 6 for the words " Four annas " opposite clause (a), the words " Six annas ", and for the words " Eight-annas " opposite clause (b) the words " Twelve annas," shall be substituted ;

(d) in the third column of Article 7 for the words " Eight annas " opposite clause (a), the words " Twelve annas " and for the words " One rupee " opposite clause (b) the words " one rupee and eight annas " shall be substituted ;

(e) for Articles 11 and 12 and the entries in the second and third columns thereof, the following articles and entries shall be substituted, namely :—

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed five thousand rupees.	Two per centum on such amount or value.
When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.	One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees.
When such amount or value exceeds ten thousand rupees.	Two hundred and fifty rupees plus three per centum on the amount or value in excess of ten thousand rupees :

Provided that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925, or under Bombay Regulation VIII of 1827, in respect of any property included in an estate, a grant or probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

#### LEG. REF.

<sup>1</sup> The words " or of cross-objection " were omitted by section 4 of the Central Provinces and Berar Court-Fees (Amendment) Act, 1941 (IX of 1941).

# THE COURT-FEES (C. P. AND BERAR AM.) ACT (XVI OF 1935). 2043

12. Certificate under Part X of the Indian Succession Act, 1925 (XXXIX of 1925).

When the <sup>1</sup>[total amount or value of the debts or securities] specified in the certificate under section 374 of the Act exceeds one thousand rupees but does not exceed five thousand rupees.

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.

One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees, and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds ten thousand rupees.

Two hundred and fifty rupees plus three per centum on the amount or value in excess of ten thousand rupees and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under sec. 376 of the Act."

Amendment of Table of rates of *ad valorem* fees.

(f) for the Table of rates of *ad valorem* fees leviable on the institution of suits, the following table shall be substituted, namely :—

"Table of rates of *ad valorem* fees leviable on the institution of suits."

When the amount or value of the subject-matter exceeds— But does not exceed— Proper fee.

When the amount or value of the subject-matter exceeds— But does not exceed— Proper fee.

Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
..	5	0	6	190	200	15	0
5	10	0	12	200	210	15	12
10	15	1	2	210	220	16	8
15	20	1	8	220	230	17	4
20	25	1	14	230	240	18	0
25	30	2	4	240	250	18	12
30	35	2	10	250	260	19	8
35	40	3	0	260	270	20	4
40	45	3	6	270	280	21	0
45	50	3	12	280	290	21	12
50	55	4	2	290	300	22	8
55	60	4	8	300	310	23	4
60	65	4	14	310	320	24	0
65	70	5	4	320	330	24	12
70	75	5	10	330	340	25	8
75	80	6	0	340	350	26	4
80	85	6	6	350	360	27	0
85	90	6	12	360	370	27	12
90	95	7	2	370	380	28	8
95	100	7	8	380	390	29	4
100	110	8	4	390	400	30	0
110	120	9	0	400	410	30	12
120	130	9	12	410	420	31	8
130	140	10	8	420	430	32	4
140	150	11	4	430	440	33	0
150	160	12	0	440	450	33	12
160	170	12	12	450	460	34	8
170	180	13	8	460	470	35	4
180	190	14	4	470	480	36	0

<sup>1</sup> These words were substituted for the words "amount or value of any debt or security" by the C. P. & Berar Court-Fees (Amendment) Act (XVI of 1940).

When the amount or  
value of the subject-  
matter exceeds—

But does not  
exceed—

Proper fee.

When the amount or  
value of the subject-  
matter exceeds—

But does not  
exceed—

Proper fee.

Rs.	Rs.	Rs.	A.	Rss	Rs.	Rs.	A.
480	490	36	12	2,600	2,700	177	0
490	500	37	8	2,700	2,800	183	0
500	510	38	4	2,800	2,900	189	0
510	520	39	0	2,900	3,000	195	0
520	530	39	12	3,000	3,100	201	0
530	540	40	8	3,100	3,200	207	0
540	550	41	4	3,200	3,300	213	0
550	560	42	0	3,300	3,400	219	0
560	570	42	12	3,400	3,500	225	0
570	580	43	8	3,500	3,600	231	0
580	590	44	4	3,600	3,700	237	0
590	600	45	0	3,700	3,800	243	0
600	610	45	12	3,800	3,900	249	0
610	620	46	8	3,900	4,000	255	0
620	630	47	4	4,000	4,100	261	0
630	640	48	0	4,100	4,200	267	0
640	650	48	12	4,200	4,300	273	0
650	660	49	8	4,300	4,400	279	0
660	670	50	4	4,400	4,500	285	0
670	680	51	0	4,500	4,600	291	0
680	690	51	12	4,600	4,700	297	0
690	700	52	8	4,700	4,800	303	0
700	710	53	4	4,800	4,900	309	0
710	720	54	0	4,900	5,000	315	0
720	730	54	12	5,000	5,200	325	0
730	740	55	8	5,200	5,400	335	0
740	750	56	4	5,400	5,600	345	0
750	760	57	0	5,600	5,800	355	0
760	770	57	12	5,800	6,000	365	0
770	780	58	8	6,000	6,200	375	0
780	790	59	4	6,200	6,400	385	0
790	800	60	0	6,400	6,600	395	0
800	810	60	12	6,600	6,800	405	0
810	820	61	8	6,800	7,000	415	0
820	830	62	4	7,000	7,200	425	0
830	840	63	0	7,200	7,400	435	0
840	850	63	12	7,400	7,600	445	0
850	860	64	8	7,600	7,800	455	0
860	870	65	4	7,800	8,000	465	0
870	880	66	0	8,000	8,200	475	0
880	890	66	12	8,200	8,400	485	0
890	900	67	8	8,400	8,600	495	0
900	910	68	4	8,600	8,800	505	0
910	920	69	0	8,800	9,000	515	0
920	930	69	12	9,000	9,200	525	0
930	940	70	8	9,200	9,400	535	0
940	950	71	4	9,400	9,600	545	0
950	960	72	0	9,600	9,800	555	0
960	970	72	12	9,800	10,000	565	0
970	980	73	8	10,000	10,500	585	0
980	990	74	4	10,500	11,000	605	0
990	1,000	75	0	11,000	11,500	625	0
1,000	1,100	81	0	11,500	12,000	645	0
1,100	1,200	87	0	12,000	12,500	665	0
1,200	1,300	93	0	12,500	13,000	685	0
1,300	1,400	99	0	13,000	13,500	705	0
1,400	1,500	105	0	13,500	14,000	725	0
1,500	1,600	111	0	14,000	14,500	745	0
1,600	1,700	117	0	14,500	15,000	765	0
1,700	1,800	123	0	15,000	15,500	785	0
1,800	1,900	129	0	15,500	16,000	805	0
1,900	2,000	135	0	16,000	16,500	825	0
2,000	2,100	141	0	16,500	17,000	845	0
2,100	2,200	147	0	17,000	17,500	865	0
2,200	2,300	153	0	17,500	18,000	885	0
2,300	2,400	159	0	18,000	18,500	905	0
2,400	2,500	165	0	18,500	19,000	925	0
2,500	2,600	171	0				

When the amount or value of the subject-matter exceeds— Rs.	But does not exceed— Rs.	Proper fee. Rs. A.	When the amount or value of the subject-matter exceeds— Rs.	But does not exceed— Rs.	Proper fee. Rs. A.
19,000	19,500	945 0	29,000	30,000	1,265 0
19,500	20,000	965 0	30,000	32,000	1,295 0
20,000	21,000	995 0	32,000	34,000	1,325 0
21,000	22,000	1,025 0	34,000	36,000	1,355 0
22,000	23,000	1,055 0	36,000	38,000	1,385 0
23,000	24,000	1,085 0	38,000	40,000	1,415 0
24,000	25,000	1,115 0	40,000	42,000	1,445 0
25,000	26,000	1,145 0	42,000	44,000	1,475 0
26,000	27,000	1,175 0	44,000	46,000	1,505 0
27,000	28,000	1,205 0	46,000	48,000	1,535 0
28,000	29,000	1,235 0	48,000	50,000	1,565 0

When the amount or value of the subject-matter exceeds fifty thousand rupees, for every five thousand rupees or part thereof in excess of fifty thousand rupees—Thirty-rupees :

Provided that the maximum fee leviable shall not exceed five thousand rupees."

5. In Schedule II of the said Act,—

Amendment of Schedule II,  
Article 1, clause (a) Act VII of  
1870.

(a) in the third column of Article 1, for the words "One anna" opposite clause (a), the words "Two annas" shall be substituted ;

Amendment of Schedule II,  
Article 1, clause (b) Act VII  
of 1870.

(b) for clause (b) of Article 1, in the second column and the entry opposite it in the third column, the following clause and entries shall be substituted, namely :—

" (b) When containing a complaint of charge of any offence other than an offence for which police officers may, under the Code of Criminal Procedure, 1898, arrest without warrant, and presented to any Criminal Court; or for orders of arrest or attachment before judgment or for temporary injunctions ;	Twelve annas.
or for compensation for arrest or attachment before judgment or in respect of a temporary injunction obtained on insufficient grounds ;	Two rupees.
or for the appointment of a receiver in a case in which the applicant has no present right of possession of the properties in dispute ;	Do.
or for setting aside decrees passed <i>ex parte</i> and for review of orders dismissing suits for default ;	Five rupees.
or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act ;	Twelve annas.
or to deposit in Court revenue or rent: or for determination by a Court of the amount of compensation to be paid by landlord to his tenant " ;	Do.
	Eight annas.
	Do.

Amendment of Schedule II,  
Article 1, clauses (c) and (d),  
Act VII of 1870.

(c) for clauses (c) and ((d) in the second column of Article 1 and for the entries in the third column opposite these clauses, the following clauses and entries shall be substituted, namely :—

" (c) When presented to a Commissioner of Revenue or to any Chief Officer charged with the executive administration of a division, and not otherwise provided for by this Act.	One rupee and eight annas.
(d) When presented to a Chief Controlling Revenue Authority or Exe-	Two rupees.

# LEG. REF.

1 These words were substituted for the words " Court of the Judicial Commissioner " by the Adaptation Order.

	<p>cutive Authority and not otherwise provided for by this Act.</p> <p>(a) When presented to the <sup>1</sup>[High Court]—</p> <p>(i) otherwise than under section 25 of the Provincial Small Causes Courts Act, 1887, (IX of 1887), <sup>2</sup>[or section 16 of the Berar Small Cause Courts Law, 1905] or section 115 of the Code of Civil Procedure, 1908 (V of 1908);</p> <p>(ii) under section 25 of the Provincial Small Cause Courts Act, 1887 (IX of 1887), <sup>2</sup>[or section 16 of the Berar Small Cause Courts Law, 1905];</p> <p>(iii) under section 115 of the Code of Civil Procedure, 1908 (V of 1908).</p>	<p>Two rupees.</p> <p>Five rupees.</p> <p>Do.</p>
Amendment of Schedule II, Article 10, clauses (a) and (c), Act VII of 1870.	<p>(d) in the third column of Article 10, for the words "Eight annas" opposite clause (a), the words "Twelve annas," and for the words "Two rupees" opposite clause (c), the words "Two rupees and eight annas" shall be substituted;</p> <p>(e) in the third column of Article 11, for the words "Eight annas" opposite clause (a) the words "One rupee", and for the words "Two rupees," opposite clause (b) the words "Four rupees" shall be substituted;</p> <p>(f) for Articles 17, 18 and 19, the following articles shall be substituted, namely :—</p>	
Amendment of Schedule II, Article 11, clauses (a) and (b), Act VII of 1870.		
Amendment of Schedule II, Articles 17, 18 and 19, Act VII of 1870.	<p>" 17. Complaint or memorandum of appeal in each of the following suits :—</p> <p>(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court ;</p> <p>(ii) to alter or cancel any entry in a register of the names of proprietors or revenue-paying estates ;</p> <p>(iii) to obtain a declaratory decree where no consequential relief is prayed ;</p> <p>(iv) to set aside an award ;</p> <p>(v) to set aside an adoption ;</p> <p>(vi) every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.</p> <p>18. Applications—</p> <p>(a) under paragraph 17 or 20 of the Second Schedule to the Code of Civil Procedure, 1908 (V of 1908) ;</p> <p>(b) for opinion or advice or for discharge from a trust, or for appointment of new trustees under sections 34, 72, 73 or 74 of the Indian Trusts Act, 1882 (II of 1882) ;</p> <p>(c) for the winding up of a company, under section 166 of the Indian Companies Act, 1913 (VII of 1913) ;</p> <p>(d) for the appointment or declaration of a person as guardian of the person or property or both, of minors, under the Guardians and Wards Act, 1890 (VIII of 1890).</p> <p>19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908, Order 36, Rule 1.</p>	<p>Fifteen rupees.</p> <p>One rupee.</p> <p>Ten rupees.</p> <p>Do.</p> <p>Two rupees.</p> <p>Fifteen rupees.</p>

## LEG. REF.

<sup>1</sup> These words were substituted for the words "Court of the Judicial Commissioner" by the A.O.

<sup>2</sup> These words were inserted and added by the Berar (Provincial) Laws Act, 1911 (XV of 1911).



6. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act but which have not been issued.

## C. P. &amp; BERAR ACT No. IX OF 1938.

THE CENTRAL PROVINCES AND BERAR COURT-FEES (AMENDMENT) ACT, 1938.

[Published in the *Central Provinces and Berar Gazette*, dated the 29th April, 1938.]

*An Act further to amend the Court-Fees Act, 1870, in its application to the Central Provinces and Berar.*

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the Central Provinces and Berar, in the manner hereinafter appearing;

Preamble.

It is hereby enacted as follows:—

Short title.

1. This Act may be cited as THE CENTRAL PROVINCES AND BERAR COURT-FEES (AMENDMENT) ACT, 1938.

Insertion of section 28-A in Act VII of 1870.

2. After section 28 of the Court-Fees Act, 1870, the following section shall be deemed to be inserted, namely:—

“28-A. (1) If, on examination of the records of a civil, criminal or revenue case which has been disposed of, a public officer finds that the fee payable under the Act or the rules made thereunder on any document filed, exhibited or recorded therein has not been paid or has been insufficiently paid, he shall report the fact to the presiding officer of the Court or to the revenue officer concerned.

(2) Such presiding officer or revenue officer, after satisfying himself of the correctness of such report, shall record a provisional finding that the proper fee has not been paid and determine the amount of the fee payable and the person from whom the fee or the difference thereof, if any, shall be recoverable.

(3) After recording a finding under sub-section (2), the presiding officer or revenue officer shall issue a notice to the person referred to in that sub-section to show cause why he should not be ordered to pay the fee determined thereunder, and, if sufficient cause is not shown, the presiding officer or revenue officer shall confirm the finding and make an order requiring such person to pay the proper fee before a date to be specified in that notice.

(4) If such person fails to pay the fee in accordance with the notice issued under sub-section (3), it shall, on the certificate of such presiding officer or revenue officer, be recoverable as an arrear of land revenue.”

## C. P. and BERAR ACT No. IX of 1941.

THE CENTRAL PROVINCES AND BERAR COURT-FEES (AMENDMENT) ACT, 1941.

[Received the assent of the Governor on the 30th April, 1941; assent first published in the *Central Provinces and Berar Gazette* on the 19th May, 1941.]

*An Act further to amend the Court-Fees Act, 1870, in its application to the Central Provinces and Berar.*

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the Central Provinces and Berar, for the purposes hereinafter appearing;

Preamble.

AND WHEREAS the Governor of the Central Provinces and Berar has assumed to himself under the Proclamation, dated the 10th November, 1939, issued by him under S. 93 of the Government of India Act, 1935, all powers vested by or under that Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the said powers, the Governor of the Central Provinces and Berar is pleased to make the following Act:—

Short title.

1. This Act may be cited as THE CENTRAL PROVINCES AND BERAR COURT-FEES (AMENDMENT) ACT, 1941.

Insertion of section 1-B, Act VII of 1870.

2. After section 1-A of the Court-Fees Act, 1870, in its application to the Central Provinces and Berar (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

Definition of “memorandum of cross-objection.”

“1-B. In this Act, unless there is anything repugnant in the subject or context, ‘memorandum of appeal’ shall include ‘memorandum of cross-objection’.”

Substitution of section 17, Act VII of 1870.

3. For section 17 of the said Act, the following section shall be substituted, namely:—

“17. (1) In any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaintiff shall be chargeable with the aggregate amount of the fees chargeable under this Act if separate suits were instituted in respect of each such cause of action:

Multifarious suits.

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, 1908, [1\* \*] to order separate trials.

(2) Where more reliefs than one based on the same cause of action are sought jointly in any suit, the plaintiff shall be chargeable with the aggregate amount of the fees with which the plaintiff would be chargeable under this Act if separate suits were instituted in respect of each such relief:

## LEG REF.

<sup>1</sup> The words “or the same Code as applied to “Berar” were omitted by the Berar (Provincial) Laws Act, 1941 (XVI of 1941.)

Provided that if a relief is sought only as ancillary to the main relief the plaint shall be chargeable only in respect of the main relief.

(3) Where more reliefs than one based on the same cause of action are sought in the alternative in any suit, the plaint shall be chargeable with the largest of the fees with which the plaints would be chargeable under this Act if separate suits were instituted in respect of each such relief.

(4) The provisions of this section shall apply *mutatis mutandis* to appeals and cross-objections." Amendment of schedule I, 4. In the first column of Arts. 1 and 1-A of Sch. I, to the Act VII of 1870. said Act, the words "or of cross-objection" shall be omitted.

## THE MADRAS COURT-FEES (AMENDMENT) ACT (V OF 1922).

[Amended by Act Madras Act XVII of 1945.]

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the Presidency of Madras; It is hereby enacted as follows:—

Short title and application. 1. (a) This Act may be called THE MADRAS COURT-FEES (AMENDMENT) ACT, 1922.

(b) It extends to the whole of the Presidency of Madras.

Interpretation clause. 2. (1) In this Act "the principal Act" shall mean "the Court-Fees Act, 1870."

(2) In this Act, and in the principal Act, unless there is anything repugnant in the subject or context, 'Memorandum of Appeal,' shall include memorandum of cross-objection.

Amendment of section 5 of the Principal Act.

3. In the second paragraph of section 5 of the principal Act, the words 'Registrar' and 'Chief Judge' shall be substituted for 'clerk of the Court' and 'first Judge,' respectively.

4. In section 7 of the principal Act the words "except suits for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908," shall be added between the words 'mentioned' and 'shall.'

Amendment of section 7.

Amendment of section 7 (ii).

5. In section 7 (ii) of the principal Act, after the words "shall be deemed to be" the words "in suits for maintenance, the amount claimed to be payable for one year and in other suits" shall be added.

Addition of a proviso to section 7 (iv).

6. The following shall be added after the words 'Memorandum of appeal' in section 7, paragraph (iv) of the principal Act:—

"Provided that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any immovable property, such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of this section."

Addition to section 7.

7. In section 7 of the principal Act between paragraphs (iv) and (v) the following paragraph shall be added as (iv-A):—

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit, and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed, or the other document executed, if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property."

Amendment of section 7 (v).

8. In section 7 (v) of the principal Act,—

in (a) for the word 'ten' the word 'twenty' shall be substituted;

in (b) for the word 'five' the word 'ten' shall be substituted;

and after clause (d) the following proviso shall be substituted for the existing proviso:—

"Provided that if rules are framed under section 3 of the Suits Valuation Act, 1887, for determining the value of land for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph."

Amendment of section 11.

9. For the second paragraph of section 11 of the principal Act, the following paragraphs shall be substituted:—

"Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable, had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Courts for sufficient cause, extends the time for payment.

"Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

Amendment of section 18.

10. In section 18 of the principal Act for the words 'Eight annas' the words 'One rupee' shall be substituted.

Amendment of Schedules I and II.

11. For Schedules I and II of the principal Act, the following Schedules shall be substituted:—

## SCHEDULE I.

*Ad. valorem Fees.*

Number.		Proper Fee.
1. Complaint, or written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in sections.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Eight annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Nine annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees up to five thousand rupees.	Seven rupees, eight annas.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty-thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees for every one thousand rupees, or part thereof, in excess of twenty thousand rupees up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees up to fifty thousand rupees.	Do.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Do.
	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
2. Complaint, or written statement pleading a set-off or counter-claim presented to a Court outside the Presidency Town in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter does not exceed Rs. 500.	When such amount or value exceeds five rupees for every five rupees, or part thereof, in excess of five rupees up to one hundred rupees.	Do.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees up to five hundred rupees.	Twelve annas.
3. Complaint in a suit for possession under the Specific Relief Act, 1877, section 9.		An amount of one half the scale of fee prescribed in article 1 above.
4. Application for review of judgment, if presented on or after the ninetieth day from the date of the decree.		The fee leviable on the plaint or memorandum of appeal.
5. Application for review of judgment, if presented before the ninetieth day from the date of the decree.		One half of the fee leviable on the plaint or memorandum of appeal.
6. Copy or translation of a judgment or order not being or having the force of a decree.	When such judgment or order is passed by any Civil Court other than a High Court or by the presiding officer of	

Number.		Proper Fee.
	<p>any Revenue Court or Office, or by any other judicial or Executive Authority—</p> <p>(a) If the amount or value of the subject-matter is fifty or less than fifty rupees.</p> <p>(b) If such amount or value exceeds fifty rupees.</p> <p>When such judgment or order is passed by a High Court.</p>	<p>Six annas.</p> <p>Twelve annas.</p> <p>One rupee eight annas.</p> <p>Eight annas.</p>
6-A. Copy or translation of a judgment or order of a Criminal Court.		
7. Copy of a decree or order having the force of a decree.	<p>When such decree or order is made by any Civil Court other than a High Court or by any Revenue Court—</p> <p>(a) If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees.</p> <p>(b) If such amount or value exceeds fifty rupees.</p> <p>When such decree or order is made by a High Court.</p>	<p>Do.</p> <p>One rupee.</p> <p>Four rupees.</p>
8. Copy of any document liable to stamp-duty under the Indian Stamp Act, 1899, when left by any party to a suit or proceeding in place of the original withdrawn.	<p>(a) When the stamp-duty chargeable on the original does not exceed eight annas.</p> <p>(b) In any other case.</p>	<p>The amount of the duty chargeable on the original.</p> <p>Eight annas.</p>
9. Copy of any revenue or judicial proceeding or order not otherwise 'provided for by this Act, or copy of any account, statement, report or the like, taken out of any Civil or Criminal or Revenue Court or office, or from the office of any chief officer charged with the executive administration of a division.	<p>For every three hundred and sixty words or fraction of three hundred and sixty words.</p>	<p>Do.</p>
10. <i>[Repealed by the Guardians and Wards Act, 1890 (VII of 1890).]</i>		
11. Probate of a will or letters of administration with or without will annexed.	<p>When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees but does not exceed five thousand rupees.</p> <p>When such amount or value exceeds five thousand rupees:</p> <p>Provided that, when after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code, No. VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.</p>	<p>Three per centum on such amount or value.</p> <p>Do.</p>
12. Certificate under the Succession Certificate Act, 1889.	<p>When the amount or value of any debt or security specified in the certificate under section 8 of the Act does not exceed five thousand rupees.</p>	<p>Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.</p>

Number.		Proper Fee.
	When such amount or value exceeds five thousand rupees.	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

NOTE.—(1) The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

(2) Whether or not any power with respect to security specified in a certificate has been conferred under the Act, and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.

## SCHEDULE.

## MADRAS.

## Table of rates of ad valorem fees leviable.

(a) On plaints, etc., mentioned in Article 1 of this schedule.

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 8	300	310	34 13
5	10	1 1	310	320	35 15
10	15	1 10	320	330	37 1
15	20	2 3	330	340	38 5
20	25	2 12	340	350	39 3
25	30	3 5	350	360	40 7
30	35	3 14	360	370	41 9
35	40	4 7	370	380	42 11
40	45	5 0	380	390	43 13
45	50	5 9	390	400	44 15
50	55	6 2	400	410	46 1
55	60	6 11	410	420	47 3
60	65	7 4	420	430	48 5
65	70	7 13	430	440	49 7
70	75	8 6	440	450	50 9
75	80	8 15	450	460	51 11
80	85	9 8	460	470	52 13
85	90	10 1	470	480	53 15
90	95	10 10	480	490	55 1
95	100	11 3	490	500	56 3
100	110	12 5	500	510	57 5
110	120	13 7	510	520	58 7
120	130	14 9	520	530	59 9
130	140	15 11	530	540	60 11
140	150	16 13	540	550	61 13
150	160	17 15	550	560	62 15
160	170	19 1	560	570	64 1
170	180	20 3	570	580	65 3
180	190	21 5	580	590	66 5
190	200	22 7	590	600	67 7
200	210	23 9	600	610	68 9
210	220	24 11	610	620	69 11
220	230	25 13	620	630	70 13
230	240	26 15	630	640	71 15
240	250	28 1	640	650	73 1
250	260	29 3	650	660	74 3
260	270	30 5	660	670	75 5
270	280	31 7	670	680	76 7
280	290	32 9	680	690	77 9
290	300	33 11	690	700	78 11

When the amount or value of the subject-matter exceeds—		But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—		But does not exceed—	Proper fee.
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
700	710	79	13	4,500	4,600	382	7
710	720	80	15	4,600	4,700	389	15
720	730	82	1	4,700	4,800	397	7
730	740	83	3	4,800	4,900	404	15
740	750	84	5	4,900	5,000	412	7
750	760	85	7	5,000	5,250	427	7
760	770	86	9	5,250	5,500	442	7
770	780	87	11	5,500	5,750	457	7
780	790	88	13	5,750	6,000	472	7
790	800	89	15	6,000	6,250	487	7
800	810	91	1	6,250	6,500	502	7
810	820	92	3	6,500	6,750	517	7
820	830	93	5	6,750	7,000	532	7
830	840	94	7	7,000	7,250	547	7
840	850	95	9	7,250	7,500	562	7
850	860	96	11	7,500	7,750	577	7
860	870	97	13	7,750	8,000	592	7
870	880	98	15	8,000	8,250	607	7
880	890	100	1	8,250	8,500	622	7
890	900	101	3	8,500	8,750	637	7
900	910	102	5	8,750	9,000	652	7
910	920	103	7	9,000	9,250	667	7
920	930	104	9	9,250	9,500	682	7
930	940	105	11	9,500	9,750	697	7
940	950	106	13	9,750	10,000	712	7
950	960	107	15	10,000	10,500	734	15
960	970	109	1	10,500	11,000	757	7
970	980	110	3	11,000	11,500	779	15
980	990	111	5	11,500	12,000	802	7
990	1,000	112	7	12,000	12,500	824	15
1,000	1,100	119	15	12,500	13,000	847	7
1,100	1,200	127	7	13,000	13,500	869	15
1,200	1,300	134	15	13,500	14,000	892	7
1,300	1,400	142	7	14,000	14,500	914	15
1,400	1,500	149	15	14,500	15,000	937	7
1,500	1,600	157	7	15,000	15,500	959	15
1,600	1,700	164	15	15,500	16,000	982	7
1,700	1,800	172	7	16,000	16,500	1,004	15
1,800	1,900	179	15	16,500	17,000	1,027	7
1,900	2,000	187	7	17,000	17,500	1,049	15
2,000	2,100	194	15	17,500	18,000	1,072	7
2,100	2,200	202	7	18,000	18,500	1,094	15
2,200	2,300	209	15	18,500	19,000	1,117	7
2,300	2,400	217	7	19,000	19,500	1,139	15
2,400	2,500	224	15	19,500	20,000	1,162	7
2,500	2,600	232	7	20,000	21,000	1,192	7
2,600	2,700	240	15	21,000	22,000	1,222	7
2,700	2,800	247	7	22,000	23,000	1,252	7
2,800	2,900	254	15	23,000	24,000	1,282	7
2,900	3,000	262	7	24,000	25,000	1,312	7
3,000	3,100	269	15	25,000	26,000	1,342	7
3,100	3,200	277	7	26,000	27,000	1,372	7
3,200	3,300	284	15	27,000	28,000	1,402	7
3,300	3,400	292	7	28,000	29,000	1,432	7
3,400	3,500	299	15	29,000	30,000	1,462	7
3,500	3,600	307	7	30,000	32,000	1,492	7
3,600	3,700	314	15	32,000	34,000	1,522	7
3,700	3,800	322	7	34,000	36,000	1,552	7
3,800	3,900	329	15	36,000	38,000	1,582	7
3,900	4,000	337	7	38,000	40,000	1,612	7
4,000	4,100	344	15	40,000	42,000	1,642	7
4,100	4,200	352	7	42,000	44,000	1,672	7
4,200	4,300	359	15	44,000	46,000	1,702	7
4,300	4,400	367	7	46,000	48,000	1,732	7
4,400	4,500	374	15	48,000	50,000	1,762	7

When the amount or value of the subject-matter exceeds Rs. 50,000 for every five thousand rupees, or part thereof, in excess of thousand rupees—thirty rupees.

(b) On plaints etc., mentioned in Article 2 of this Schedule.					
When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper Fee.
Rs.	Rs.	Rs. A. P.	Rs.	Rs.	Rs. A. P.
..	5	0 6 0	200	210	15 12 0
5	10	0 12 0	210	220	16 8 0
10	15	1 2 0	220	230	17 4 0
15	20	1 8 0	230	240	18 0 0
20	25	1 14 0	240	250	18 12 0
25	30	2 4 0	250	260	19 8 0
30	35	2 10 0	260	270	20 4 0
35	40	3 0 0	270	280	21 2 0
40	45	3 6 0	280	290	21 10 0
45	50	3 12 0	290	300	22 8 0
50	55	4 2 0	300	310	23 4 0
55	60	4 8 0	310	320	24 0 0
60	65	4 14 0	320	330	24 12 0
65	70	5 4 0	330	340	25 8 0
70	75	5 10 0	340	350	26 4 0
75	80	6 0 0	350	360	27 0 0
80	85	6 6 0	360	370	27 12 0
85	90	6 12 0	370	380	28 8 0
90	95	7 2 0	380	390	29 4 0
95	100	7 8 0	390	400	30 0 0
100	110	8 4 0	400	410	30 12 0
110	120	9 0 0	410	420	31 8 0
120	130	9 12 0	420	430	32 4 0
130	140	10 8 0	430	440	33 0 0
140	150	11 4 0	440	450	33 12 0
150	160	12 0 0	450	460	34 8 0
160	170	12 12 0	460	470	35 4 0
170	180	13 8 0	470	480	36 0 0
180	190	14 4 0	480	490	36 12 0
190	200	15 0 0	490	500	37 8 0

## SCHEDULE II.

*Fixed Fees.*

Number.		Proper Fee.
1. Application or petition.	<p>(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings;</p> <p>or when presented to any officer of land revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement;</p> <p>or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place if the application or petition relates solely to such conservancy or improvement;</p> <p>or when presented to any Civil Court other than a principal Civil Court of original jurisdiction or to any Court of Small Causes constituted under Act No. IX of 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the</p>	<p>One anna.</p> <p>Two annas.</p> <p>One anna.</p> <p>Two annas.</p>



Number.		Proper Fee.
	<p>amount or value of the subject-matter is less than fifty rupees ; or when presented to any Civil, Criminal or Revenue Court, or to any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer, or of any other document on record in such Court or office.</p> <p>(b) When containing a complaint or charge of any offence other than an offence for which police officers, may, under the Criminal Procedure Code, arrest without warrant, and presented to any Criminal Court ; or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act ; or to deposit in Court Revenue or rent ; or for determination by a Court of the amount of compensation to be paid by landlord to his tenant.</p> <p>(c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a division and not otherwise provided for by this Act.</p> <p>(d) (i) When presented to a High Court under section 115 of the Code of Civil Procedure, 1908, for revision of an order—</p> <p>(a) when the value of the suit or proceeding to which the order relates does not exceed thousand rupees ;</p> <p>(b) when the value of the suit or proceeding exceeds thousand rupees.</p> <p>(ii) When presented to a High Court otherwise than under that section.</p>	<p>Two annas.</p> <p>In the case of a criminal complaint one rupee and in other cases twelve annas.</p> <p>Do.</p> <p>Eight annas. Do.</p> <p>One rupee eight annas.</p> <p>Five rupees.</p> <p>Ten rupees.</p> <p>Two rupees.</p>
<p>1-A. Application to any Civil Court that records may be called for from another Court.</p>	<p>When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.</p>	<p>Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Art. 1 of this Schedule.</p>
<p>2. Application for leave to sue as a pauper.</p>		<p>Eight annas.</p>
<p>3. Application for leave to appeal as a pauper.</p>	<p>(a) When presented to a District Court or a Sub-Court.</p>	<p>One rupee.</p>
	<p>(b) When presented to a Commissioner or a High Court.</p>	<p>Two rupees.</p>
<p>4.</p>	<p>Omitted.</p>	
<p>5. Plaint or memorandum of appeal in a suit to establish or disprove a right of occupancy.</p>		<p>Eight annas.</p>
<p>6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Pro-</p>		<p>Do.</p>

Number.		Proper fee.
cedure, 1908, and not otherwise provided for in this Act.		
7. Undertaking under section 49 of the Indian Divorce Act, 1869.		Eight annas.
8. [Rep. by the Repealing and Amending Act, 1891 (XII of 1891)]		
9. [Rep. by Act XII of 1891.]		
10. Muhktarnama, Vakalatnama or any paper signed by an Advocate signifying or intimating that he is retained for a party.	When presented for the conduct of any one case— (a) to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except those mentioned in clauses (b) and (c) of this number; (b) to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a division, not being the Chief Revenue or Executive Authority; (c) to a High Court, Chief Commissioner, Board of Revenue, or other Chief Controlling Revenue or Executive Authority.	One rupee.
11. Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908, and is presented.	(a) to any Civil Court other than a High Court, or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority; (b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.	One rupee. Two rupees.
12. Caveat.	..	Ten rupees.
13.	Omitted.	..
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.	..	Five rupees.
15. [Rep. by Act V of 1908.]	..	..
16. [Rep. by Act VI of 1889, S. 18 (1).]	..	..
17. Complaint or memorandum of appeal in a suit— (i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court; (ii) to alter or cancel any entry in a register of the names of proprietors of revenue-paying estates; (iii) for relief under section 14 of the Religious Endowments Act, 1863 or under section 91 of section 92 of the Code of Civil Procedure, 1908.	..	Fifteen rupees.
17-A. Complaint or memorandum of appeal in a suit— (i) to obtain a declaratory decree where no consequential relief is prayed; (ii) to set aside an award; (iii) to obtain a declaration that an alleged adoption is invalid or never in fact took place or to obtain	When the complaint is presented to or the memorandum or appeal is against the decree of— a District Munsiff's Court or the City Civil Court. a District Court or a Sub-Court	Do. Do. Hundred rupees, if the value for purposes of jurisdiction is less

Number.		Proper.
a declaration that an adoption is valid.		than ten thousand rupees; five hundred rupees if such value is ten thousand rupees or upwards.
17-B. Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value, the subject-matter in dispute and which is not otherwise provided for by this Act.	When the plaint is presented to or the memorandum of appeal is against the decree of—  a Revenue Court a District Munsiff's Court or the City Civil Court. a District Court or a sub-Court.	Ten rupees. Fifteen rupees. One hundred rupees. Fifteen rupees.
18. Applications under <sup>1</sup> [section 14 or section 20 of the Arbitration Act, 1940, for a direction for filing an award or for an order for filing an agreement].	When presented to a District Munsiff's Court or the City Civil Court.	
19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.	When presented to a District Court or a Sub-Court.	One hundred rupees.
20. Every petition under the Indian Divorce Act, 1869, except petitions under section 44 of the same Act and every memorandum of appeal under section 55 of the same Act.	..	Twenty rupees.
21. Plaint or memorandum of appeal under the Parsi Marriage, and Divorce Act, 1865.	..	Do.

*Extracts from the Madras Religious Endowments Act (II of 1927).*

81. (1) Notwithstanding anything contained in the first or second schedule to the Madras Court-Fees Amendment Act, 1922, the proper fees for the documents described in columns 1 and 2 of Schedule II shall be the fees indicated in column 3 thereof.
- (2) The provisions of the Madras Court-Fees Amendment Act, 1922, shall otherwise, so far as may be, apply to the documents mentioned in Schedule II.

### SCHEDULE II.

[See Section 81].

Section. (1)	Description of the document. (2)	Proper fee. (3)
43 (2)	Appeal to <sup>1</sup> [the Assistant Commissioner] by any office-holder or servant against an order of punishment by a trustee under sub-section (1).	Rs.
43 (3)	Further appeal to the Board by a hereditary office-holder or servant against an order of <sup>2</sup> [the Assistant Commissioner] on appeal under sub-section (2)	2
43 (4)	Appeal to the Board by an office-holder or servant of an excepted temple	2
44	Application to Court by the trustee to recover the amount from the person in possession or by the person in possession from the person responsible in law	..
<sup>1</sup> [53 (3).	Appeal to the Board against an order of suspension, dismissal or removal by the Assistant Commissioner, of a non-hereditary trustee	25
53-A (4).	Application to Court against the order of suspension, dismissal or removal by the Board, of a hereditary trustee	25

The fee leviable on a plaint for the amount claimed under the Madras Court-Fees Amendment Act, 1922.

LEG. REF.

<sup>1</sup> Substituted by Madras Act XVI 12, 1945.

<sup>2</sup> Substituted by Madras Act X of 1946.

Section (1).	Description of the document (2).	Proper fee (3).
55 (4)	Appeal to the Board by a trustee or person having interest against the order of [an Assistant Commissioner] <sup>1</sup> under sub-section (3) fixing standard scales of expenditure ..	20
55 (4)	Suit under the sub-section ..	50
57 (3)	Suit under the sub-section ..	50
57 (4)	Suit under the sub-section ..	50
62	Application to the Board by not less than 20 persons having interest for framing a scheme of administration for a math or excepted temple ..	50
63 (4)	Suit under the sub-section ..	50
65	Suit under the section ..	50
67 (4)	Suit under the sub-section ..	50
67 (5)	Suit under the sub-section ..	50
70 (2)	Application to court to recover from the funds of the endowment the contribution leviable by the Board or Committee ..	2
73	Suits under the section ..	50
76 (2)	Application to the Court by the trustee of a math or temple or any person having interest for modifying or cancelling any order of the Board sanctioning alienation of immovable property under sub-section (1) ..	The fee leviable on a plaint under article 17, schedule II of the Madras Court-Fees Amendment Act, 1922.
77 (2)	Application to a Court to modify or set aside an order of the Board under sub-section (1) allocating any endowment, property or the income therefrom to religious and secular purposes ..	20
78	Application to the Court for delivery of possession of endowments to a trustee appointed by the Committee ..	2
84 (2)	Application to modify or set aside the decision of the Board under sub-section (1) ..	The fee leviable on a plaint under article 17, Schedule II of the Madras Court Fees Amendment Act, 1922

82. The President of a Board or <sup>1</sup>[an Assistant Commissioner] may grant copies of proceedings or other records of his office on payment of such fees and subject to such conditions as may be determined by the Board. Copies shall be certified by the President of the Board or <sup>1</sup>[Assistant Commissioner] or by such officer as may be authorised in this behalf by the President of such Board or Committee, in the manner provided in section 76 of the Indian Evidence Act, 1872.

#### THE PUNJAB COURT-FEES (AMENDMENT) ACTS (VII OF 1922, IV OF 1939 and IV OF 1942.

*An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court-fees in the Punjab.*

WHEREAS it is necessary to revise the scale of court-fees provided in the Court-Fees Act, 1870, in its application to the Punjab, in the manner hereinafter appearing; It is hereby enacted as follows :—

Preamble.

Short title, extent and commencement.

1. (1) This Act may be called THE COURT-FEES (PUNJAB AMENDMENT) ACT, 1922.

(2) It extends to the Punjab.

(3) It shall come into force on such date as the Local Government may by notification appoint in this behalf.

Application of Act.

2. (1) The Court-Fees Act, 1870, shall be amended in its application to the Punjab in the manner hereinafter provided.

<sup>1</sup> Substituted by Madras Act X of 1946.

(2) The sections and schedules hereinafter referred to by number mean the sections and schedules respectively so numbered in the Court-Fees Act, 1870, unless it shall appear to the contrary.

Amendment of section 4. 3. In section 4 the word "one" shall be substituted for the word "two" between the word "of" and the word "or."

Amendment of section 18. 4. In section 18 between the word "of" and the word "unless" for the words "eight annas" the words "one rupee" shall be substituted.

By Punjab Act IV of 1939 the following section was inserted as S. 20-A :

"20-A. (1) Notwithstanding anything contained in the preceding section or in the rules made thereunder, no fees shall be charged for serving and executing processes on behalf of the prosecution in any criminal proceedings taken on information presented or complaint made by a public officer acting in his official capacity.

(2) The Provincial Government may by notification determine what persons shall be deemed to be public officers for the purpose of the preceding sub-section."

By Punjab Act I of 1942 the following amendment to S. 20-A was inserted.

2. In sub-section (1) of section 20-A of the said Act :—

(a) after the word "of" the brackets and letter "(a)" shall be inserted,

(b) after the words "capacity" the following shall be added namely :—

"and (b) a liquidator or an arbitrator appointed under the provisions of the Co-operative Societies Act, 1912."

Amendment of Schedule I, Article 1.

5. (1) In the third column of Article 1 of Schedule I,—

(a) for the words "six annas," opposite the first entry in the second column, the words "nine annas," shall be substituted ;

(b) for the words "six annas" opposite the second entry in the second column, the words "nine annas" shall be substituted ;

(c) for the words "twelve annas" opposite the third entry in the second column, the words "one rupee two annas" shall be substituted ;

(d) for the words "five rupees" opposite the fourth entry in the second column, the words "seven rupees eight annas" shall be substituted ;

(e) for the words "ten rupees" opposite the fifth entry in the second column, the words "fifteen rupees" shall be substituted ;

(f) for the words "fifteen rupees" opposite the sixth entry in the second column, the words "twenty-two rupees eight annas" shall be substituted ;

(g) for the words "twenty rupees" opposite the seventh entry in the second column the words "thirty rupees" shall be substituted ;

(h) for the words "twenty rupees" opposite the eighth entry in the second column the words "thirty rupees" shall be substituted ;

(i) for the words "twenty-five rupees" opposite the ninth entry in the second column the words "thirty rupees" shall be substituted ;

(2) The proviso as to maximum, after the ninth entry in the second column of the said article in the same schedule, shall be omitted.

6. Article 13 of schedule I which was repealed by the Punjab Courts (Amendment) Act, 1912, in so far as it affected the Punjab, is hereby re-enacted, save that for the words "Chief Court in the Punjab," the words "High Court of Judicature at Lahore;" for the figures "70" the figures "44" and for the figures "1884" the figures "1918" shall be substituted, and the words and figures "as amended by the Punjab Courts Act, 1899," shall be omitted.

Amendment of Table of rates of *ad valorem* fees. 7. For the Table of rates of *ad valorem* fees leviable on the institution of suits set forth at the end of Schedule I, the table set forth in the Schedule to this Act shall be substituted.

8. In Article 1 of Schedule II—

Amendment of Sch. II, Art. 1 cls. (a) and (b). (1) For the words "one anna" in the third column, opposite clause (a) in the second column, the words "two annas" shall be substituted ;

(2) for the words "eight annas" in the third column, opposite clause (b) in the second column, the words "one rupee" shall be substituted ;

Amendment of Sch. II, Art. 1, cl. (d). (3) for clause (d), in the second column and the corresponding entry in the third column shall be substituted the following clause and entries, namely :—

(d) When presented to the High Court—

(i) Under the Indian Companies Act, 1912, for winding up a Company. One hundred rupees.

(ii) Under the same Act for taking some other judicial action. Five rupees.

(iii) In all other cases. Two rupees.

Amendment of Sch. II, Arts.

4, 5 and 7. 9. In the third column of Articles 4, 5 and 7 respectively of Schedule II—

for the words "eight annas" the words "one rupee" shall be substituted.

Amendment of Sch. II, Art. 10, Cl. (a).

10. In the third column of Article 10 of Schedule II—

for the words "eight annas" opposite clause (a) in the second column, the words "one rupee" shall be substituted.

Amendment of Sch. II, Art.  
11, cls. (a) and (b).

11. In the third column of Article 11 of Schedule II—

(1) for the words "eight annas" opposite clause (a) in the second column, the words "one rupee" shall be substituted;

(2) for the words "two rupees" opposite clause (b) in the second column, the words "four rupees" shall be substituted.

New article to Sch. II.

12. The following new article with the corresponding entry in the third column shall be added to the first column of Schedule II, namely:—

22. **Plaint or memorandum of appeal in a suit by a reversioner under the Punjab Customary Law for a declaration in respect of an alienation of ancestral land.** Twenty rupees.

#### SCHEDULE.

##### TABLE OF RATES OF AD VALOREM FEES LEVIABLE ON THE INSTITUTION OF SUITS.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 0	370	380	42 12
5	10	1 2	380	390	43 14
10	15	1 11	390	400	45 0
15	20	2 4	400	410	46 2
20	25	2 13	410	420	47 4
25	30	3 6	420	430	48 6
30	35	3 15	430	440	49 8
35	40	4 8	440	450	50 10
40	45	5 1	450	460	51 12
45	50	5 10	460	470	52 14
50	55	6 3	470	480	54 0
55	60	6 12	480	490	55 2
60	65	7 5	490	500	56 4
65	70	7 14	500	510	57 6
70	75	8 7	510	520	58 8
75	80	9 0	520	530	59 10
80	85	9 9	530	540	60 12
85	90	10 2	540	550	61 14
90	95	10 12	550	560	63 0
95	100	11 4	560	570	64 2
100	110	12 6	570	580	65 4
110	120	13 8	580	590	66 6
120	130	14 10	590	600	67 8
130	140	15 12	600	610	68 10
140	150	16 14	610	620	69 12
150	160	18 0	620	630	70 14
160	170	19 2	630	640	72 0
170	180	20 4	640	650	73 2
180	190	21 6	650	660	74 4
190	200	22 8	660	670	75 6
200	210	23 10	670	680	76 8
210	220	24 12	680	690	77 10
220	230	25 14	690	700	78 12
230	240	27 0	700	710	79 14
240	250	28 2	710	720	81 0
250	260	29 4	720	730	82 2
260	270	30 6	730	740	83 4
270	280	31 8	740	750	84 6
280	290	32 10	750	760	85 8
290	300	33 12	760	770	86 10
300	310	34 14	770	780	87 12
310	320	36 0	780	790	88 10
320	330	37 2	790	800	90 2
330	340	38 4	800	810	91 4
340	350	39 6	810	820	92 0
350	360	40 8	820	830	93 6
360	370	41 10	830	840	94 8

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
840	850	95 10	7,250	7,500	562 8
850	860	96 12	7,500	7,750	577 8
860	870	97 14	7,750	8,000	592 8
870	880	99 0	8,000	8,250	607 8
880	890	100 2	8,250	8,500	622 8
890	900	101 4	8,500	8,750	637 8
900	910	102 6	8,750	9,000	652 8
910	920	103 8	9,000	9,250	667 8
920	930	104 10	9,250	9,500	682 8
930	940	105 12	9,500	9,750	697 8
940	950	106 14	9,750	10,000	712 8
950	960	108 0	10,000	10,500	735 0
960	970	109 2	10,500	11,000	757 8
970	980	110 4	11,000	11,500	780 0
980	990	111 6	11,500	12,000	802 8
990	1,000	112 8	12,000	12,500	825 0
1,000	1,100	120 0	12,500	13,000	847 8
1,100	1,200	127 8	13,000	13,500	870 0
1,200	1,300	135 0	13,500	14,000	892 8
1,300	1,400	142 8	14,000	14,500	915 0
1,400	1,500	150 0	14,500	15,000	937 8
1,500	1,600	157 8	15,000	15,500	960 0
1,600	1,700	165 0	15,500	16,000	982 8
1,700	1,800	172 8	16,000	16,500	1,005 0
1,800	1,900	180 0	16,500	17,000	1,027 8
1,900	2,000	187 8	17,000	17,500	1,050 0
2,000	2,100	195 0	17,500	18,000	1,072 8
2,100	2,200	202 8	18,000	18,500	1,095 0
2,200	2,300	210 0	18,500	19,000	1,117 8
2,300	2,400	217 8	19,000	19,500	1,140 0
2,400	2,500	225 0	19,500	20,000	1,162 8
2,500	2,600	232 8	20,000	20,500	1,192 8
2,600	2,700	240 0	20,500	21,000	1,222 8
2,700	2,800	247 8	21,000	22,000	1,252 8
2,800	2,900	255 0	22,000	23,000	1,282 8
2,900	3,000	262 8	23,000	24,000	1,312 8
3,000	3,100	270 0	24,000	25,000	1,342 8
3,100	3,200	277 8	25,000	26,000	1,372 8
3,200	3,300	285 0	26,000	27,000	1,402 8
3,300	3,400	292 8	27,000	28,000	1,432 8
3,400	3,500	300 0	28,000	29,000	1,462 8
3,500	3,600	307 8	29,000	30,000	1,492 8
3,600	3,700	315 0	30,000	32,000	1,522 8
3,700	3,800	322 8	32,000	34,000	1,552 8
3,800	3,900	330 0	34,000	36,000	1,582 8
3,900	4,000	337 8	36,000	38,000	1,612 8
4,000	4,100	345 0	38,000	40,000	1,642 8
4,100	4,200	352 8	40,000	42,000	1,672 8
4,200	4,300	360 0	42,000	44,000	1,702 8
4,300	4,400	367 8	44,000	46,000	1,732 8
4,400	4,500	375 0	46,000	48,000	1,762 8
4,500	4,600	382 8	48,000	50,000	1,792 8
4,600	4,700	390 0	50,000	55,000	1,822 8
4,700	4,800	397 8	55,000	60,000	1,852 8
4,800	4,900	405 0	60,000	65,000	1,882 8
4,900	5,000	412 8	65,000	70,000	1,912 8
5,000	5,250	427 0	70,000	75,000	1,942 8
5,250	5,500	442 8	75,000	80,000	1,972 8
5,500	5,750	457 8	80,000	85,000	2,002 8
5,750	6,000	472 8	85,000	90,000	2,032 8
6,000	6,250	487 8	90,000	95,000	2,062 8
6,250	6,500	502 8	95,000	1,00,000	2,092 8
6,500	6,750	517 8	1,00,000	1,05,000	2,122 8
6,750	7,000	532 8	1,05,000	1,10,000	2,152 8
7,000	7,250	547 8	1,10,000	1,15,000	2,182 8
			1,15,000	1,20,000	2,212 8
			1,20,000	1,25,000	2,242 8
			1,25,000	1,30,000	



When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
1,30,000	1,35,000	2,272 8	2,65,000	2,70,000	3,082 8
1,35,000	1,40,000	2,302 8	2,70,000	2,75,000	3,112 8
1,40,000	1,45,000	2,332 8	2,75,000	2,80,000	3,142 8
1,45,000	1,50,000	2,362 8	2,80,000	2,85,000	3,172 8
1,50,000	1,55,000	2,392 8	2,85,000	2,90,000	3,202 8
1,55,000	1,60,000	2,422 8	2,90,000	2,95,000	3,232 8
1,60,000	1,65,000	2,452 8	2,95,000	3,00,000	3,262 8
1,65,000	1,70,000	2,482 8	3,00,000	3,05,000	3,292 8
1,70,000	1,75,000	2,512 8	3,05,000	3,10,000	3,322 8
1,75,000	1,80,000	2,542 8	3,10,000	3,15,000	3,352 8
1,80,000	1,85,000	2,572 8	3,15,000	3,20,000	3,382 8
1,85,000	1,90,000	2,602 8	3,20,000	3,25,000	3,412 8
1,90,000	1,95,000	2,632 8	3,25,000	3,30,000	3,442 8
1,95,000	2,00,000	2,662 8	3,30,000	3,35,000	3,472 8
2,00,000	2,05,000	2,692 8	3,35,000	3,40,000	3,502 8
2,05,000	2,10,000	2,722 8	3,40,000	3,45,000	3,532 8
2,10,000	2,15,000	2,752 8	3,45,000	3,50,000	3,562 8
2,15,000	2,20,000	2,782 8	3,50,000	3,55,000	3,592 8
2,20,000	2,25,000	2,812 8	3,55,000	3,60,000	3,622 8
2,25,000	2,30,000	2,842 8	3,60,000	3,65,000	3,652 8
2,30,000	2,35,000	2,872 8	3,65,000	3,70,000	3,682 8
2,35,000	2,40,000	2,902 8	3,70,000	3,75,000	3,712 8
2,40,000	2,45,000	2,932 8	3,75,000	3,80,000	3,742 8
2,45,000	2,50,000	2,962 8	3,80,000	3,85,000	3,772 8
2,50,000	2,55,000	2,992 8	3,85,000	3,90,000	3,802 8
2,55,000	2,60,000	3,022 8	3,90,000	3,95,000	3,832 8
2,60,000	2,65,000	3,052 8	3,95,000	4,00,000	3,862 8

And when the amount or value of the subject-matter exceeds Rs. 4,00,000 the proper fee leviable shall be Rs. 3,862 annas 8 plus Rs. 30 for each five thousand rupees or part thereof in excess of Rs. 4,00,000.

### THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT (III OF 1932).

*An Act further to amend the Court-Fees Act, 1870 (VII of 1870) in its application to the United Provinces.*

Preamble.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces;

AND WHEREAS the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3), of the Government of India Act (5 and 6 Geo. V, c. 61; 6 and 7 Geo. V, c. 37; 9 and 10 Geo. V, c. 101), to the passing of this Act;

It is hereby enacted as follows:—

Title, extent and commencement.

1. This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1932.

(2) It extends to the territories for the time being administered by the local Government of the United Provinces.

(3) It shall come into force on the first day of May, 1932, and shall remain in force up till June 30, 1936.<sup>1</sup>

Amendment of section 6 of Act VII of 1870.

2. To section 6 of the Court-Fees Act, 1870, hereinafter referred to as "the said Act", the following proviso shall be added, namely:—

<sup>1</sup> The word and figures 30th June, 1936, have been substituted for the word and figures "March, 1934" by Act XI of 1934.

"Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1926, or the United Provinces Land Revenue Act, 1901, the proper fee shall be three-quarters of the fee indicated in either of the said schedules except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds the value of Rs. 500 :

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the commencement of this Act."

Amendment of paragraph (v) of section 7 of Act VII of 1870. 3. In paragraph (v) of section 7 of the said Act the word "ten" in clause (a) shall be read as "twenty" and the word "five" in clause (b) shall be read as "six."

Amendment of paragraph 9 of section 7 of Act VII of 1870. 4. For paragraph (ix) of section 7 of the said Act the following clauses shall be substituted, namely :—

(ix) In suits against a mortgagee for the recovery of the property mortgaged according to the principal money expressed to be secured by the instrument of mortgage.

(ix-A) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute, according to the total amount claimed by way of principal and interest."

Amendment of section 18 of Act VII of 1870. 5. In section 18 of the said Act for the words "eight annas" the words "twelve annas" shall be substituted.

Amendment of schedule I to Act VII of 1870. 6. In Schedule I to the said Act the following amendments shall be made, namely :—

(i) In article 1 for the entries in the second and third columns the entries shown in the first and second columns of Schedule A to this Act shall be substituted.

(ii) In article 6 for the words "four," "eight" and "one rupee," in the third column the words "six," "twelve" and "one rupee eight annas," respectively, shall be substituted.

(iii) In article 7 for the words "eight" and "one rupee" in the third column the words "twelve" and "one rupee eight annas," respectively, shall be substituted.

(iv) In article 8 for the word "eight" in the third column the word "twelve" shall be substituted.

(v) In article 11 for the entries above the proviso in the second and third columns the following shall be substituted :—

1. When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees ; Two per centum on such amount or value.

and  
2. When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees ; Two and one-half per centum on such amount or value.

and  
3. When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees ; Three per centum on such amount or value.

and  
4. When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees ; Four per centum on such amount or value.

(vi) In article 12 for the entries in the first and second columns and for the first paragraph in the third column the following shall be substituted :—

12. Certificate under the Indian Succession Act, 1925.

1. When the amount or value of any debt or security specified in the certificate under section 374 of the Act does not exceed twenty thousand rupees ;

and

2. When such amount or value exceeds twenty thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of twenty thousand rupees ;

and

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

Two and half per centum on such amount or value and three and three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

3. When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees ;	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
and	
4. When such amount or value exceeds a lakh of rupees for the portion of such amount or value which is in excess of a lakh of rupees.	Four per centum on such amount or value and six per centum on the amount or value of any debt or security which the certificate is extended under section 376 of the Act.

(viii) For the table of *ad valorem* fees leviable on the institution of suits the table shown in Schedule B to this Act shall be substituted.

Amendment of Schedule II 7. In Schedule II to the said Act the following amendments shall be made, namely:—

(i) In article 1 for the words "one anna," "eight annas" and "one rupee" in third column the words "two annas," "twelve annas," "one rupee and eight annas," respectively shall be substituted ; and the following clauses shall be substituted for clause (d) :—

(d) (i) When presented to the Board of Revenue for revision of a judgment or order. Three rupees.

(ii) When presented to a High Court—

(1) Under the Indian Companies Act, 1913 (Act VII of 1913) for winding up a company ; Fifty rupees.

and

(2) Under section 115 of the Code of Civil Procedure, 1908 (Act V of 1908) for revision of an order ; Four rupees.

(3) In any other case Three rupees.

(ii) In article 1-A for the words "twelve annas" in the third column the words "one rupee two annas" shall be substituted.

(iii) In articles 5, 6 and 7 for the word "eight" in the third column the word "twelve" shall be substituted.

(iv) In article 10 for the words "eight annas," "one rupee" and "two rupees" in the third column, the words "twelve annas," "one rupee and eight annas" and "three rupees" respectively shall be substituted.

(v) For article 11, the following shall be substituted :—

11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented.

(a) to any Civil Court other than a High Court or to any Revenue Court or Executive Officer other than a Commissioner of the division or Chief Controlling Revenue or Executive Authority. Twelve annas.

(b) to a Commissioner of the division. Two rupees.

(c) to a High Court or to a Chief Controlling Executive or Revenue Authority. Three rupees.

(vi) The bracket opposite articles 12, 13 and 14 in the second column shall be omitted and for article 12 the following shall be substituted :—

12. Caveat.

Where the amount or value of the property in respect of which the caveat is lodged—

(a) does not exceed five thousand rupees ; Five rupees.

(b) exceeds five thousand rupees. Ten rupees.

(vii) For article 14 the following shall be substituted, namely :—

14. Petition in a suit under the Native Convert's Marriage Dissolution Act, 1886.

Seven rupees eight annas.

(viii) In article 17 for the words "Ten rupees" in the third column, the words "Fifteen rupees" shall be substituted, and the following proviso shall be added :—

"Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this article shall be one hundred rupees."

(ix) In articles 18 and 19 for the word "ten" in the third column the word "fifteen" shall be substituted.

(x) In articles 20 and 22, for the word "twenty" in the third column the word "thirty" shall be substituted.

#### SCHEDULE.

When the amount or value of the subject-matter in dispute does not exceed five rupees.

Six annas.

When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees up to one hundred rupees.

Six annas.

When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees up to two hundred rupees.

Twelve annas.

When such amount or value exceeds two hundred rupees, for every ten rupees, or part thereof, in excess of two hundred rupees up to five hundred rupees.

One rupee.

When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees, to one thousand rupees.

One rupee four annas.

When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees up to five thousand rupees.

Six rupees four annas.

When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees up to ten thousand rupees.

Twelve rupees eight annas.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees up to twenty thousand rupees.

Eighteen rupees twelve annas.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees up to thirty thousand rupees.

Twenty-five rupees.

When such amount or value exceeds thirty thousand rupees, for every two thousand rupees or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.

Twenty-five rupees.

When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.

Thirty one rupees four annas.

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be four thousand five hundred rupees.

#### SCHEDULE B.

TABLE OF RATES OF AD VALOREM FEES LEVIABLE ON THE INSTITUTION OF SUITS.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	130	140	10 8
5	10	0 12	140	150	11 4
10	15	1 2	150	160	12 0
15	20	1 8	160	170	12 12
20	25	1 14	170	180	13 8
25	30	2 4	180	190	14 4
30	35	2 10	190	200	15 0
35	40	3 0	200	210	16 0
40	45	3 6	210	220	17 0
45	50	3 12	220	230	18 0
50	55	4 2	230	240	19 0
55	60	4 8	240	250	20 0
60	65	4 14	250	260	21 0
65	70	5 4	260	270	22 0
70	75	5 10	270	280	23 0
75	80	6 0	280	290	24 0
80	85	6 6	290	300	25 0
85	90	6 12	300	310	26 0
90	95	7 2	310	320	27 0
95	100	7 8	320	330	28 0
100	110	8 4	330	340	29 0
110	120	9 0	340	350	30 0
120	130	9 12			

When the amount  
or value of the  
subject-matter  
exceeds—

But does not  
exceed—

Proper fee.

When the amount  
or value of the  
subject-matter  
exceeds—

But does not  
exceed—

Proper fee.

Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
350	360	31	0	1,100	1,200	120	0
360	370	32	0	1,200	1,300	126	4
370	380	33	0	1,300	1,400	132	8
380	390	34	0	1,400	1,500	138	12
390	400	35	0	1,500	1,600	145	0
400	410	36	0	1,600	1,700	151	4
410	420	37	0	1,700	1,800	157	8
420	430	38	0	1,800	1,900	163	12
430	440	39	0	1,900	2,000	170	0
440	450	40	0	2,000	2,100	176	5
450	460	41	0	2,100	2,200	182	8
460	470	42	0	2,200	2,300	188	12
470	480	43	0	2,300	2,400	195	0
480	490	44	0	2,400	2,500	201	4
490	500	45	0	2,500	2,600	207	8
500	510	46	4	2,600	2,700	213	12
510	520	47	8	2,700	2,800	220	0
520	530	48	12	2,800	2,900	226	4
530	540	50	0	2,900	3,000	232	8
540	550	51	4	3,000	3,100	238	12
550	560	52	8	3,100	3,200	245	0
560	570	53	12	3,200	3,300	251	4
570	580	55	0	3,300	3,400	257	8
580	590	56	4	3,400	3,500	263	12
590	600	57	8	3,500	3,600	270	0
600	610	58	12	3,600	3,700	276	4
610	620	60	0	3,700	3,800	282	8
620	630	61	4	3,800	3,900	288	12
630	640	62	8	3,900	4,000	295	0
640	650	63	12	4,000	4,100	301	4
650	660	65	0	4,100	4,200	307	8
660	670	66	4	4,200	4,300	313	12
670	680	67	8	4,300	4,400	320	0
680	690	68	12	4,400	4,500	326	4
690	700	70	0	4,500	4,600	332	8
700	710	71	4	4,600	4,700	338	12
710	720	72	8	4,700	4,800	345	0
720	730	73	12	4,800	4,900	351	4
730	740	75	0	4,900	5,000	357	8
740	750	76	4	5,000	5,250	370	0
750	760	77	8	5,250	5,500	382	8
760	770	78	12	5,500	5,750	395	0
770	780	80	0	5,750	6,000	407	8
780	790	81	4	6,000	6,250	420	0
790	800	82	8	6,250	6,500	432	8
800	810	83	12	6,500	6,750	445	0
810	820	85	0	6,750	7,000	457	8
820	830	86	4	7,000	7,250	470	0
830	840	87	8	7,250	7,500	482	8
840	850	88	12	7,500	7,750	495	0
850	860	90	0	7,750	8,000	507	8
860	870	91	4	8,000	8,250	520	0
870	880	92	8	8,250	8,500	532	8
880	890	93	12	8,500	8,750	545	0
890	900	95	0	8,750	9,000	557	8
900	910	96	4	9,000	9,250	570	0
910	920	97	8	9,250	9,500	582	8
920	930	98	12	9,500	9,750	595	0
930	940	100	0	9,750	10,000	607	8
940	950	101	4	10,000	10,500	626	4
950	960	102	8	10,500	11,000	645	0
960	970	103	12	11,000	11,500	663	12
970	980	105	0	11,500	12,000	682	8
980	990	106	4	12,000	12,500	701	4
990	1,000	107	8	12,500	13,000	720	0
1,000	1,100	113	12	13,000	13,500	738	12

When the amount or value of the subject- matter exceeds—				When the amount or value of the subject- matter exceeds—			
But does not exceed—		Proper fee.		But does not exceed—		Proper fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
13,500	14,000	757	8	29,000	30,000	1,232	8
14,000	14,500	776	4	30,000	32,000	1,257	8
14,500	15,000	795	0	32,000	34,000	1,282	8
15,000	15,500	813	12	34,000	36,000	1,307	8
15,500	16,000	832	8	36,000	38,000	1,332	8
16,000	16,500	851	4	38,000	40,000	1,357	8
16,500	17,000	870	0	40,000	42,000	1,382	8
17,000	17,500	888	12	42,000	44,000	1,407	8
17,500	18,000	907	8	44,000	46,000	1,432	8
18,000	18,500	926	4	46,000	48,000	1,457	8
18,500	19,000	945	0	48,000	50,000	1,482	8
19,000	19,500	963	12	50,000	55,000	1,513	12
19,500	20,000	982	8	55,000	60,000	1,545	0
20,000	21,000	1,007	8	60,000	65,000	1,576	4
21,000	22,000	1,032	8	65,000	70,000	1,607	8
22,000	23,000	1,057	8	70,000	75,000	1,638	12
23,000	24,000	1,082	8	75,000	80,000	1,670	0
24,000	25,000	1,107	8	80,000	85,000	1,701	4
25,000	26,000	1,132	8	85,000	90,000	1,732	8
26,000	27,000	1,157	8	90,000	95,000	1,763	12
27,000	28,000	1,182	8	95,000	1,00,000	1,795	0
28,000	29,000	1,207	8				
Rs.		Rs.	A.	Rs.		Rs.	A.
2,00,000		2,420	0	5,00,000		4,295	0
3,00,000		3,045	0	5,35,000		4,500	0
4,00,000		3,670	0				

### THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT (VII OF 1933).

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the United Provinces for the purpose hereinafter appearing, it is hereby enacted as follows :

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1933.  
(2) It extends to the territories for the time being administered by the Local Government of the United Provinces.

2. In Schedule II to the Court-Fees Act, 1870, the following Article shall be added after article 21 :

22. Election petition.

- |  |                      |
|--|----------------------|
| (a) A petition presented to the Commissioner of a division or to the Collector of a district (or to some other person or tribunal specially appointed by rule in this behalf) under sub-section (2) of the section 22 of the United Provinces Municipalities Act (Act II of 1916) questioning the election of any person as a member of a Municipal Board. | One hundred rupees.. |
| (b) A petition presented to a District Judge (or to some other person or tribunal specially appointed by rule in this behalf) or to a Munsiff under sub-section (2) of section 18 of the District Boards Act (Act X of 1922) questioning the election of any person as a member of a District Board.   | One hundred rupees.  |

### THE ORISSA COURT-FEES (AMENDMENT) ACT (V OF 1939).

[31st October, 1939.]

*An Act to amend the law relating to court-fees in its application to the Province of Orissa.*

WHEREAS it is expedient to amend the law relating to court-fees in its application to the Province of Orissa ;

It is hereby enacted as follows :

Short title and commencement.

1. (i) This Act may be called THE ORISSA COURT-FEES (AMENDMENT) ACT, 1939.

(ii) It extends to the whole of Orissa.

(iii) It shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint.

2. The Acts mentioned in Schedule A to this Act, so far as they apply to the whole or any part of the Province of Orissa, are hereby repealed to the extent specified in the third column of that Schedule.

Repeal of enactments.  
Amendment of section 2 of Act VII of 1870.

3. For section 2 of the Court-Fees Act, 1870, hereinafter called the principal Act, the following section shall be substituted :—

Definitions.

"2. In this Act, unless there is anything repugnant in subject or context,—

(1) 'appeal' includes a cross objection ;

(2) 'suit' includes an appeal from a decree except in section 8-A."

Amendment of section 6 of Act VII of 1870.

4. Section 6 of the principal Act shall be renumbered as sub-section (1) of section 6 and, after the said sub-section, the following sub-section shall be inserted :—

"(2) Notwithstanding anything contained in sub-S. (1), the Provincial Government may, by notification, direct that a copy of a document, specified as chargeable in Schedules I and II to this Act annexed, shall be furnished by a public officer without payment of the fee indicated by either of the said Schedules as the proper fee for such copy and the copy so furnished shall be chargeable with the requisite fee only when it is filed, exhibited or recorded in any Court of justice or received by a public officer as mentioned in sub-S. (1)."

Amendment of section 7 of Act VII of 1870.

5. In S. 7 of the principal Act, for the words "in the suits next hereinafter mentioned" the words "in the suits next hereinafter mentioned except suits for relief under S. 14 of the Religious Endowments Act, 1863, or under S. 91 or S. 92 of the Code of Civil Procedure, 1908," shall be substituted.

Amendment of section 7 (ii) of Act VII of 1870.

6. In S. 7 (ii) of the principal Act, after the words "shall be deemed to be" the words "in suits for maintenance five times and in other" shall be inserted.

Omission of clause (b) of section 7 (iv) of Act VII of 1870.

7. Clause (b) of S. 7 (iv) of the principal Act shall be omitted.

Insertion of new paragraph (iv-A) in section 7 of Act VII of 1870.

8. In S. 7 of the principal Act, after paragraph (iv) the following paragraph shall be inserted :—

"(iv-A) In a suit for cancellation of a decree for money or other property having a money-value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit, and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed ;

if a part of the decree or other document is sought to be cancelled such part of the amount or value of the property.

*Explanation.*—In any case where a suit for the cancellation of a whole decree for money or other property having a money value, or other document securing money or other property having such value has to be instituted, but the substantial relief claimed is only in respect of a part of the amount or the value of the property for which the decree was passed or the other document was executed, the value of the subject-matter of the suit shall be deemed to be such part of the amount or value of the property in respect of which the relief is sought."

Amendment of paragraph (v) of section 7 of Act VII of 1870.

9. In paragraph (v) of S. 7 of the principal Act—

(1) In clause (a), for the word "ten" the word "twenty" shall be substituted ;

(2) in clause (b), for the word "five" the word "ten" shall be substituted ;

(3) the following proviso shall be inserted after the existing proviso :—

"Provided further that in suits for possession of land if rules are framed under S. 3 of the Suits Valuation Act, 1887, for determining the value for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph ; and

(3) the existing Explanation shall be re-numbered as Explanation I, and, after the Explanation so re-numbered, the following Explanation shall be added, namely :—

"*Explanation II.*—In this paragraph 'building' includes a house, outhouse, stable, privy, urinal shed, hut, wall, and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever."

Insertion of new paragraph (vi-A) in section 7 of Act VII of 1870.

10. In S. 7 of the principal Act after paragraph (vi) the following paragraph shall be inserted :—

"(vi-A) In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff alleges that he has been excluded from possession of the property of which he claims to be a coparcener or co-owner—according to the market value of the share in respect of which the suit is instituted.

*Explanation.*—The word 'possession' for the purposes of this paragraph includes constructive possession."

Insertion of new section 8-A in Act VII of 1870.

11. After S. 8 of the principal Act, the following section shall be inserted :—



"8-A. In every suit in which an *ad valorem* Court-fee is payable under this Act on the plaint,

Statement of particulars of subject-matters of suits and plaintiff's valuation thereof.

the plaintiff shall file with the plaint a statement of particulars of the subject-matter of the suit and his own valuation thereof unless such particulars and the valuation are contained in the plaint. The statement shall be in such form and shall contain such particulars as may be prescribed by the Provincial Government by notification in the Gazette. In every such suit the plaintiff shall also, if the Court so directs, file a duplicate copy of the plaint and of the said statement."

Amendment of section 11 of Act VII of 1870.

12. For the second paragraph of S. 11 of the principal Act the following paragraph shall be substituted :—

"Where a decree directs an enquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

Amendment of section 12 of Act VII of 1870.

13. (i) In S. 12 of the principal Act, for paragraph (ii) the following paragraph shall be substituted :—

"(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, it shall—

(a) in any case in which the decision is to the detriment of revenue, require the party by whom such fee has been paid, to pay so much additional fee as would have been payable had the question been rightly decided and thereafter—

(i) if the party required to pay is the appellant or petitioner, the appeal or petition shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the appeal or petition shall be dismissed ;

(ii) if the party required to pay is the respondent or the opposite party, the Court shall fix a date before which such party shall pay the amount of court-fee due from him and, if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as if it were an arrear of land revenue. Where the Court considers that the amount of such fee should be paid to the respondent or the opposite party by the appellant or the petitioner, as the case may be, the Court may provide for such payment in the order as to cost in the said appeal or petition ; and

(b) in any case in which the decision is that any excess fee has been levied, direct the refund of so much excess fee to the party who paid it as would not have been payable had the question been rightly decided.

*Explanation.*—For the purposes of this section a question relating to the classification of any suit in regard to S. 7 shall not be deemed to be a question relating to the valuation."

Amendment of section 18 of Act VII of 1870.

14. In S. 18 of the principal Act, for the words "eight annas" the words "one rupee" shall be substituted.

Amendment of section 35 of Act VII of 1870.

15. For S. 35 of the principal Act, the following section shall be substituted :—

"35. (1) The Provincial Government may from time to time subject to such conditions or restrictions as it may think fit to impose, by notification in the Gazette suspend the payment of or reduce or remit, in the whole of Orissa or in any part thereof, all or any of the fees mentioned in Schedules I and II to this Act annexed and may in like manner cancel or vary such order.

(2) The Provincial Government may from time to time by rules prescribe the manner in which any fee the payment of which is suspended under sub-S. (1) may be realised and for this purpose direct that such fee may be recovered as if it were an arrear of land revenue."

Amendment of Article 1 of Schedule I of Act VII of 1870.

16. For Article 1 of Schedule I of the principal Act the following Article shall be substituted :—

Number.		Proper fee.
"(1) Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to five hundred rupees.	One rupee.

Number.		Proper fee.
	When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to seven thousand and five hundred rupees.	Seven rupees eight annas.
	When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Thirty-seven rupees eight annas."

Insertion of new Articles 3 and 3-A in Schedule I of Act VII of 1870.

17. In Schedule I of the principal Act after Article 2<sup>a</sup> the following Articles shall be inserted :

Number.		Proper fee.
"3. Plaint or written statement pleading a set-off or counter-claim in any suit of the nature cognisable by a Court of Small Causes when the amount or value of the subject-matter does not exceed Rs. 500.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to five hundred rupees.	Twelve annas.
3-A. Plaint or memorandum of appeal in each of the following suits:	When the value for purposes of jurisdiction does not exceed three thousand rupees.	Fifteen rupees.
(1) to obtain a declaratory decree where no consequential relief prayed ;	When the value exceeds three thousand rupees but does not exceed four thousand rupees.	Fifty rupees.
(2) to set aside an award ;	When such value exceeds four thousand rupees, for every two thousand rupees, or part thereof, in excess of four thousand rupees, up to ten thousand rupees.	Fifty rupees.
(3) to obtain a declaration that an alleged adoption is invalid or never in fact took place or to obtain a declaration that an adoption is valid.	When such value exceeds ten thousand rupees, for every ten thousand rupees, or part thereof, in excess of ten thousand rupees, up to fifty thousand rupees.	Fifty rupees.

Number.		Proper fee.
	When such value exceeds fifty thousand rupees, for every fifty thousand rupees or part thereof, in excess of fifty thousand rupees.	One hundred rupees.

Amendment of Article 6 of Schedule I of Act VII of 1870. 18. In the third column of Article 6 of Schedule I of the principal Act—

- (a) for the words "four annas" the words "six annas" shall be substituted ;  
 (b) for the words "eight annas" the words "twelve annas" shall be substituted ;  
 (c) for the words "one rupee" the words "one rupee eight annas" shall be substituted.

Amendment of Article 7 of Schedule I of Act VII of 1870. 19. For Article 7 of Schedule I of the principal Act the following Article shall be substituted :—

Number.		Proper fee.
"Copy of decree or order having the force of a decree.	When such a decree or order is made by a Munsiff's Court or a Court of Small Causes, or a Revenue Court— (a) if the amount or value of the subject-matter of the suit wherein such decree or order is made does not exceed one hundred rupees ; (b) if such amount or value exceeds one hundred rupees but does not exceed one thousand rupees ; (c) if such amount or value exceeds one thousand rupees. When such decree or order is made by the Court of a District Judge or of a Subordinate Judge. When such decree or order is made by High Court.	Eight annas.  One rupee.  One rupee eight annas.  Three rupees.  Three rupees if the amount or value of the subject-matter of the suit wherein such decree or order is made does not exceed one thousand rupees ; six rupees, if such amount or value exceeds one thousand rupees."

Amendment of Article 9 of Schedule I of Act VII of 1870.

Amendment of table of rates and insertion of new tables in Schedule I of Act VII of 1870.

Amendment of Article 1 of Schedule II of Act VII of 1870.

(a) in the third column opposite clause (a) for the words "one anna" the words "two annas" shall be substituted ;  
 (b) in the third column opposite clause (b) for the words "eight annas" the words "in the case of a criminal complaint and appeal one rupee and in other cases twelve annas" shall be substituted ;

(c) in the third column opposite clause (c) for the words "one rupee" the words "one rupee eight annas" shall be substituted ;

(d) in the second and third columns, for clause (d) and the words opposite the said clause the following shall be substituted :—

"(d) (i) When presented to a High Court under section 115 of the Code of Civil Procedure, 1908, for revision of an order—

(a) When the value of the suit or proceedings to which the order relates does not exceed one thousand rupees ; Five rupees.

(b) When the value of the suit or proceeding exceeds one thousand rupees. Ten rupees.

(ii) When presented to a High Court otherwise than under that section. Two rupees."

Amendment of Article 1-A of Schedule II of Act VII of 1870.

Amendment of Article 10 of Schedule II of Act VII of 1870.

20. In the third column of Article 9 of Schedule I of the principal Act, for the words "eight annas" the words "twelve annas" shall be substituted.

21. For the table of rates of *ad valorem* fees annexed to Schedule I of the principal Act, the tables set forth in Schedule B to this Act shall be substituted.

22. In Article I of Schedule II of the principal Act,—

23. In the third column of Article 1-A of Schedule II of the principal Act, for the words "twelve annas" the words "one rupee" shall be substituted.

24. In Article 10 of Schedule II of the principal Act,—

in the third column—

- (i) for the words "eight annas" the words "one rupee" shall be substituted ;
- (ii) for the words "one rupee" the words "two rupees" shall be substituted ;
- (iii) for the words "two rupees" the words "three rupees" shall be substituted.

Amendment of Article 11 of Schedule II of Act VII of 1870.

25. In Article 11 of Schedule II of the principal Act,—

(a) for the entry in the first column, the following entry shall be substituted :—

"Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or S. 144 of the Code of Civil Procedure and is presented."

(b) in the third column—

- (i) for the words "eight annas" the words "one rupee" shall be substituted ;
- (ii) for the words "two rupees" the words "four rupees" shall be substituted.

Amendment of Article 12 of Schedule II of Act VII of 1870.

26. In the third column in Article 12 of Schedule II of the principal Act, for the words "five rupees" the words "ten rupees" shall be substituted.

Amendment of Article 14 of Schedule II of Act VII of 1870.

27. In the third column in Article 14 of Schedule II of the principal Act, for the words "five rupees" the words "ten rupees" shall be substituted.

Amendment of Article 17 and insertion of new Article 17-A in Schedule II of Act VII of 1870.

28. For Article 17 of Schedule II of the principal Act the following two Articles shall be substituted :—

Number.		Proper fee.
"17. Plaint or memorandum of appeal in a suit,—		
(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court ;		Fifteen rupees.
(ii) to alter or cancel any entry in a register of the names of the proprietors of revenue-paying estates ;		Fifteen rupees.
(iii) for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908.		Fifteen rupees.
17-A. Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided for by this Act.	When the plaint is presented to, or the memorandum of appeal is against the decree of—	
	(a) a Revenue Court in the district of Ganjam or Koraput ;	Ten rupees.
	(b) any other Revenue Court, or any Court of a District Judge, Subordinate Judge or Munsiff.	Fifteen rupees if the value for purposes of jurisdiction does not exceed four thousand rupees, one hundred rupees if such value exceeds four thousand rupees."

Amendment of Article 18 of Schedule II of Act VII of 1870.

29. In Article 18 of Schedule II of the principal Act—

(a) for the entry in the first column, the following entry shall be substituted :—

"Application under paragraph 17 or paragraph 20 of the second Schedule to the Code of Civil Procedure, 1908" ;

(b) in the third column for the words "ten rupees" the words "fifteen rupees" shall be substituted.

Amendment of Article 19 of Schedule II of Act VII of 1870.

30. In the third column in Article 19 of Schedule II of the principal Act, for the words "ten rupees" the words "fifteen rupees" shall be substituted.

Amendment of Article 20 of Schedule II of Act VII of 1870.

31. In the third column in Article 20, Schedule II of the principal Act, for the words "twenty rupees" the words "thirty rupees" shall be substituted.

Amendment of Article 21 of Schedule II of Act VII of 1870.

32. In the third column in Article 21, Schedule II of the principal Act, for the words "twenty rupees" the words "thirty rupees" shall be substituted.

## SCHEDULE A.

(See section 2).

Province, year and number.	Title.	Extent of Repeal.
1	2	3
Bihar and Orissa Act I of 1922.	Bihar and Orissa Court-Fees (Amendment) Act, 1922.	The whole Act, except sections 6, 9, 10 and 13.
Madras Act V of 1922.	Madras Court-Fees (Amendment) Act, 1922.	The whole Act, except section 11 in respect of Articles 11 and 12, Schedule I.
Central Provinces Act XVI of 1935.	Court-Fees (Central Provinces Amendment) Act, 1935.	The whole Act, except section 4 (a).

## SCHEDULE B

(See section 21.)

(a) Table of rates of *ad valorem* fees leviable on plaints, etc., mentioned in Article 1 of Schedule I.

When the amount or value of the subject-matter exceeds—

But does not exceed—

Proper fee.

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	410	420	39 8
5	10	0 12	420	430	40 8
10	15	1 2	430	440	41 8
15	20	1 8	440	450	42 8
20	25	1 14	450	460	43 8
25	30	2 4	460	470	44 8
30	35	2 10	470	480	45 8
35	40	3 0	480	490	46 8
40	45	3 6	490	500	47 8
45	50	3 12	500	510	48 10
50	55	4 2	510	520	49 12
55	60	4 8	520	530	50 14
60	65	4 14	530	540	52 0
65	70	5 4	540	550	53 2
70	75	5 10	550	560	54 4
75	80	6 0	560	570	55 6
80	85	6 6	570	580	56 8
85	90	6 12	580	590	57 10
90	95	7 2	590	600	58 12
95	100	7 8	600	610	59 14
100	110	8 8	610	620	61 0
110	120	9 8	620	630	62 2
120	130	10 8	630	640	63 4
130	140	11 8	640	650	64 6
140	150	12 8	650	660	65 8
150	160	13 8	660	670	66 10
160	170	14 8	670	680	67 12
170	180	15 8	680	690	68 14
180	190	16 8	690	700	70 0
190	200	17 8	700	710	71 2
200	210	18 8	710	720	72 4
210	220	19 8	720	730	73 6
220	230	20 8	730	740	74 8
230	240	21 8	740	750	75 10
240	250	22 8	750	760	76 12
250	260	23 8	760	770	77 14
260	270	24 8	770	780	79 0
270	280	25 8	780	790	80 2
280	290	26 8	790	800	81 4
290	300	27 8	800	810	82 6
300	310	28 8	810	820	83 8
310	320	29 8	820	830	84 10
320	330	30 8	830	840	85 12
330	340	31 8	840	850	86 14
340	350	32 8	850	860	88 0
350	360	33 8	860	870	89 2
360	370	34 8	870	880	90 4
370	380	35 8	880	890	91 6
380	390	36 8	890	900	92 8
390	400	37 8	900	910	93 10
400	410	38 8	910	920	94 12

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
920	930	95 14	6,400	6,500	516 4
930	940	97 0	6,500	6,600	523 12
940	950	98 2	6,600	6,700	531 4
950	960	99 4	6,700	6,800	538 12
960	970	100 6	6,800	6,900	546 4
970	980	101 8	6,900	7,000	555 12
980	990	102 10	7,000	7,100	561 4
990	1,000	103 12	7,100	7,200	568 12
1,000	1,100	111 4	7,200	7,300	576 4
1,100	1,200	118 12	7,300	7,400	583 12
1,200	1,300	106 4	7,400	7,500	591 4
1,300	1,400	133 12	7,500	7,750	606 4
1,400	1,500	141 4	7,750	8,000	621 4
1,500	1,600	148 12	8,000	8,250	636 4
1,600	1,700	156 4	8,250	8,500	651 4
1,700	1,800	163 12	8,500	8,750	666 4
1,800	1,900	171 4	8,750	9,000	681 4
1,900	2,000	178 12	9,000	9,250	696 4
2,000	2,100	186 4	9,250	9,500	711 4
2,100	2,200	193 12	9,500	9,750	726 4
2,200	2,300	201 4	9,750	10,000	741 4
2,300	2,400	208 12	10,000	10,500	763 12
2,400	2,500	216 4	10,500	11,000	786 4
2,500	2,600	223 12	11,000	11,500	808 12
2,600	2,700	231 4	11,500	12,000	831 4
2,700	2,800	238 12	12,000	12,500	852 12
2,800	2,900	246 4	12,500	13,000	876 4
2,900	3,000	253 12	13,000	13,500	898 12
3,000	3,100	261 4	13,500	14,000	921 12
3,100	3,200	268 12	14,000	14,500	943 12
3,200	3,300	276 4	14,500	15,000	966 4
3,300	3,400	283 12	15,000	15,500	988 12
3,400	3,500	291 4	15,500	16,000	1,011 4
3,500	3,600	298 12	16,000	16,500	1,033 12
3,600	3,700	306 4	16,500	17,000	1,056 4
3,700	3,800	313 12	17,000	17,500	1,078 12
3,800	3,900	321 4	17,500	18,000	1,101 4
3,900	4,000	328 12	18,000	18,500	1,123 12
4,000	4,100	336 4	18,500	19,000	1,146 4
4,100	4,200	343 12	19,000	19,500	1,168 12
4,200	4,300	351 4	19,500	20,000	1,191 4
4,300	4,400	358 12	20,000	21,000	1,221 4
4,400	4,500	366 4	21,000	22,000	1,251 4
4,500	4,600	373 12	22,000	23,000	1,281 4
4,600	4,700	381 4	23,000	24,000	1,311 4
4,700	4,800	388 12	24,000	25,000	1,341 4
4,800	4,900	396 4	25,000	26,000	1,371 4
4,900	5,000	403 12	26,000	27,000	1,401 4
5,000	5,100	411 4	27,000	28,000	1,431 4
5,100	5,200	418 12	28,000	29,000	1,461 4
5,200	5,300	426 4	29,000	30,000	1,491 4
5,300	5,400	433 12	30,000	32,000	1,521 4
5,400	5,500	441 4	32,000	34,000	1,551 4
5,500	5,600	448 12	34,000	36,000	1,581 4
5,600	5,700	456 4	36,000	38,000	1,611 4
5,700	5,800	463 12	38,000	40,000	1,641 4
5,800	5,900	471 4	40,000	42,000	1,671 4
5,900	6,000	478 12	42,000	44,000	1,701 4
6,000	6,100	486 4	44,000	46,000	1,731 4
6,100	6,200	493 12	46,000	48,000	1,761 4
6,200	6,300	501 4	48,000	50,000	1,791 4
6,300	6,400	508 12			

When the amount or value exceeds Rs. 50,000 for every five thousand rupees or part thereof in excess of fifty thousand rupees—thirty-seven rupees eight annas.

(b) Table of rates of *ad valorem* fees leviable on plaints, etc., mentioned in Article 3 of Schedule I.

When the amount or value of the subject-matter exceeds—		But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—		But does not exceed—	Proper fee.
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
..	5	0	6	200	210	15	12
5	10	0	12	210	220	16	8
10	15	1	2	220	230	17	4
15	20	1	8	230	240	18	0
20	25	1	14	240	250	18	12
25	30	2	4	250	260	19	8
30	35	2	10	260	270	20	4
35	40	3	0	270	280	21	0
40	45	3	6	280	290	21	12
45	50	3	12	290	300	22	8
50	55	4	2	300	310	23	4
55	60	4	8	310	320	24	0
60	65	4	14	320	330	24	12
65	70	5	4	330	340	25	8
70	75	5	10	340	350	26	4
75	80	6	0	350	360	27	0
80	85	6	6	360	370	27	12
85	90	6	12	370	380	28	8
90	95	7	2	380	390	29	4
95	100	7	8	390	400	30	0
100	110	8	4	400	410	30	12
110	120	9	7	410	420	31	8
120	130	9	12	420	430	32	4
130	140	10	8	430	440	33	0
140	150	11	4	440	450	33	12
150	160	12	0	450	460	34	8
160	170	12	12	460	470	35	4
170	180	13	8	470	480	36	0
180	190	14	4	480	490	36	12
190	200	15	0	490	500	37	8

U. P. COURT-FEES (AMENDMENT) ACT (II OF 1936).<sup>1</sup>[PASSED BY THE LOCAL LEGISLATURE OF THE UNITED PROVINCES OF AGRA AND OUDH.]<sup>1</sup>*An Act further to amend the Court-Fees Act, 1870 (VII of 1870) in its application to the United Provinces.*

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the United Provinces;

AND WHEREAS the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3) of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows :—

Title, extent, commencement and duration. 1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1936.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on the first day of May, 1936, and shall remain in force up to the thirtieth day of April, 1939.

Amendment of s. 6 of Act referred to as "the said Act," the following provisos shall be added, Act VII of 1870. namely :—

"Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1926, or the United Provinces Land Revenue Act, 1901, the fee payable shall be three-quarters of the fee indicated in either of the said schedules except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds Rs. 500 ;

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the commencement of this Act."

Amendment of Paragraph (v) of S. 7 of Act VII of 1870. 3. In paragraph (v) of section 7 of the said Act for the word "ten" in Clause (a) the word "twenty" shall be substituted and for the word "five" in Clause (b) the word "six" shall be substituted.

<sup>1</sup> Published in Government Gazette, dated Allahabad, 11th April, 1936.



Amendment of paragraph (ix) of S. 7 of Act VII of 1870.

4. For Paragraph (ix) of section 7 of the said Act, the following shall be substituted, namely :—  
“(ix) In suits against a mortgagee for the recovery of the property mortgaged ; according to the principal money expressed to be secured by the instrument of mortgage.

“(ix) In suits by a mortgagee to foreclose the mortgage or where the mortgage is made by conditional sale, to have the sale declared absolute ; according to the total amount claimed by way of principal and interest ;

Amendment of S. 18 of Act VII of 1870.

5. In section 18 of the said Act for words “ eight annas ” the words “ twelve annas ” shall be substituted.

Amendment of Schedule I to Act VII of 1870.

6. In Schedule I to the said Act the following amendments shall be made, namely :—

(i) In Article 1 for the entries in the second and third columns, the entries shown in the first and second columns respectively of Schedule A to this Act shall be substituted.

(ii) After Article 2 the following shall be added as Article 2-A namely :—

“ 2-A. Application or written statement by a defendant in a suit for partition praying for partition of his share in the property sought to be partitioned.

The same fee which would have been payable on a plaint if such defendant instituted a suit for partition.”

(iii) In Article 6 for the words “ four,” “ eight ” and “ one rupee ” in the third column, the words “ six,” “ twelve ” and “ one rupee eight annas,” respectively, shall be substituted.

(iv) In Article 7 for the words “ eight ” and “ one rupee ” in the third column, the words “ twelve ” and “ one rupee eight annas,” respectively, shall be substituted.

(v) In Article 8 for the word “ eight ” in the third column the word “ twelve ” shall be substituted.

(vi) In Article 11 for the entries above the proviso in the second column and the entries in the third column, the following shall be substituted :

“ When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees ;

Two per centum on such amount or value.

“ When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees ;

Two and one-half per centum on such amount or value.

“ When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees ;

Three per centum on such amount or value.

“ When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees ;

Four per centum on such amount or value.”

(vii) In Article 12 for the entries in the first and second columns and for the first paragraph in the third column, the following shall be substituted :

“ 12. Succession Certificate under the Indian Succession Act, 1925.

When the amount or value of the debt or security or the aggregate amount of the debts or securities specified in the certificate under Section 374 of the Act does not exceed twenty thousand rupees ;

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds twenty thousand rupees, but does not exceed fifty thousand rupees, or the portion of such amount or value which is in excess of twenty thousand rupees ;

Two and half per centum on such amount or value and a three and three-quarter per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees.

Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds a lakh of rupees for the portion of such amount or value which is in excess of a lakh of rupees.

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 736 of the Act."

(vii) For the table of *ad valorem* fees leviable on the institution of suits, the table shown in Schedule B to this Act shall be substituted.

Amendment of Schedule II 7. In Schedule II to the said Act the following amendments shall be made, namely:—

(i) In Article 1 for the words "one anna," "eight annas" and "one rupee" in the third column the words "two annas," "twelve annas" and "one rupee and eight annas," respectively, shall be substituted; and the following shall be substituted for Clause (d) in the second column and the entry against the same in the third column:

"(d) When presented to the Board of Revenue for revision of a judgment or order. Three rupees.

(e) When presented to a High Court:

(1) Under the Indian Companies Act, 1913 (Act VII of 1913), for winding up a company. Fifty rupees.

(2) Under section 115 of the Code of Civil Procedure, 1908 (Act V of 1908), for revision of an order. Four rupees.

(3) In any other case

Three rupees."

(ii) In Article 1-A for the words "twelve annas" in the third column the words "one rupee two annas" shall be substituted.

(iii) In Articles 5, 6 and 7 for the word "eight" in the third column the word "twelve" shall be substituted.

(iv) In Article 10 for the words "eight annas," "one rupee" and "two rupees" in the third column the words "twelve annas," "one rupee eight annas" and "three rupees," respectively, shall be substituted.

(v) For Article 11, the following shall be substituted:

11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented.

(a) to any Civil Court other than a High Court or to any Revenue Court or executive Officer other than a Commissioner of the division or Chief Controlling Revenue or Executive Authority.

Twelve annas.

(b) to a Commissioner of the division

Two rupees.

(c) to a High Court or to a Chief Controlling Executive or Revenue Authority.

Three rupees."

(vi) The bracket opposite Articles 12, 13, and 14 in the second column shall be omitted; and for Article 12 the following shall be substituted:

12. Caveat.

Where the amount or value of the property in respect of which the caveat is lodged—

(a) does not exceed five thousand rupees

Five rupees.

(b) exceeds five thousand rupees.

Ten rupees.

(vii) For Article 14, the following shall be substituted, namely,—

14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1886.

....

Seven rupees eight annas.

(viii) In Article 17 for the words "Ten rupees" in the third column, the words "Fifteen rupees" shall be substituted, and the following proviso shall be added:

"Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this Article shall be one hundred rupees.

(ix) For Article 18, the following shall be substituted, namely:—

18. Application under Paragraph 17 or Paragraph 20 of the Second Schedule of the Code of Civil Procedure, 1908.

Fifteen rupees."

(x) In Article 19 for the word "ten" in the third column, the word "fifteen" shall be substituted.

(xi) In Articles 20 and 21 for the word "twenty" in the third column the word "thirty" shall be substituted.

8. "Nothing in this Act shall apply to any application or proceeding under the United Provinces Agriculturists' Relief Act, 1934, the United Provinces Encumbered Estates Act, 1934, the United Provinces Regulation of Execution Act, 1934, and the United Provinces Regulation of Sales Act, 1934, which shall continue to be governed by the Court-Fees Act, 1870, as if it had not been amended by this Act.

## SCHEDULE A.

when the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
when such amount or value exceeds five rupees, for every five rupees or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
when such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to two hundred rupees.	Twelve annas.
when such amount or value exceeds two hundred rupees, for every ten rupees, or part thereof, in excess of two hundred rupees, up to five hundred rupees.	One rupee.
when such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees, up to one thousand rupees.	One rupee four annas.
when such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Six rupees four annas.
when such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Twelve rupees eight annas.
when such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Eighteen rupees twelve annas.
when such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Twenty-five rupees.
when such amount or value exceeds thirty thousand rupees, for every rupees, two thousand rupees or part thereof in excess of thirty thousand up to fifty thousand rupees.	Twenty-five rupees.
when such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees :	Thirty-one rupees four annas.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be four thousand five hundred rupees.	

## SCHEDULE B.

*Table of rates of ad valorem fees leviable on the institution of suits.*

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds.	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6			
5	10	0 12	110	120	9 0
10	15	1 2	120	130	9 12
15	20	1 8	130	140	10 8
20	25	1 14	140	150	11 4
25	30	2 4	150	160	12 0
30	35	2 10	160	170	12 12
35	40	3 0	170	180	13 8
40	45	3 6	180	190	14 4
45	50	3 12	190	200	15 0
50	55	4 2	200	210	16 0
55	60	4 8	210	220	17 0
60	65	4 14	220	230	18 0
65	70	5 4	230	240	19 0
70	75	5 10	240	250	20 0
75	80	6 0	250	260	21 0
80	85	6 6	260	270	22 0
85	90	6 12	270	280	23 0
90	95	7 2	280	290	24 0
95	100	7 8	290	300	25 0
100	110	8 4	300	310	26 0

When the amount or value of the subject-matter exceeds		But does not exceed		Proper fee.	When the amount or value of the subject-matter exceeds		But does not exceed		Proper fee.
Rs.	Rs.	Rs.	A.		Rs.	Rs.	Rs.	A.	
310	320	27	0						
320	330	28	0		970	980	105	0	
330	340	29	0		980	990	106	4	
340	350	30	0		990	1,000	107	8	
350	360	31	0		1,000	1,100	113	12	
360	370	32	0		1,100	1,200	120	0	
370	380	33	0		1,200	1,300	126	4	
380	390	34	0		1,300	1,400	132	8	
390	400	35	0		1,400	1,500	138	12	
400	410	36	0		1,500	1,600	145	0	
410	420	37	0		1,600	1,700	151	4	
420	430	38	0		1,700	1,800	157	8	
430	440	39	0		1,800	1,900	163	12	
440	450	40	0		1,900	2,000	170	0	
450	460	41	0		2,000	2,100	176	4	
460	470	42	0		2,100	2,200	182	8	
470	480	43	0		2,200	2,300	188	12	
480	490	44	0		2,300	2,400	195	0	
490	500	45	0		2,400	2,500	201	4	
500	510	46	0		2,500	2,600	207	8	
510	520	47	0		2,600	2,700	213	12	
520	530	48	12		2,700	2,800	220	0	
530	540	50	8		2,800	2,900	226	4	
540	550	51	4		2,900	3,000	232	8	
550	560	52	8		3,000	3,100	238	12	
560	570	53	12		3,100	3,200	245	0	
570	580	55	0		3,200	3,300	251	4	
580	590	56	4		3,300	3,400	257	8	
590	600	57	8		3,400	3,500	263	12	
600	610	58	12		3,500	3,600	270	0	
610	620	60	0		3,600	3,700	276	4	
620	630	61	4		3,700	3,800	282	8	
630	640	62	8		3,800	3,900	288	12	
640	650	63	12		3,900	4,000	295	0	
650	660	65	0		4,000	4,100	301	4	
660	670	66	4		4,100	4,200	307	8	
670	680	67	8		4,200	4,300	313	12	
680	690	68	12		4,300	4,400	320	0	
690	700	70	0		4,400	4,500	326	4	
700	710	71	4		4,500	4,600	332	8	
710	720	72	8		4,600	4,700	338	12	
720	730	73	12		4,700	4,800	345	0	
730	740	75	0		4,800	4,900	351	4	
740	750	76	4		4,900	5,000	357	8	
750	760	77	8		5,000	5,250	370	0	
760	770	78	12		5,250	5,500	382	8	
770	780	80	0		5,500	5,750	395	0	
780	790	81	4		5,750	6,000	407	8	
790	800	82	8		6,000	6,250	420	0	
800	810	83	12		6,250	6,500	432	8	
810	820	85	0		6,500	6,750	445	0	
820	830	86	4		6,750	7,000	457	0	
830	840	87	8		7,000	7,250	470	0	
840	850	88	12		7,250	7,500	482	8	
850	860	90	0		7,500	8,750	495	0	
860	870	91	4		7,750	8,000	507	8	
870	880	92	8		8,000	8,250	520	0	
880	890	93	12		8,250	8,500	532	8	
890	900	95	0		8,500	8,750	545	0	
900	910	96	4		8,750	9,000	557	8	
910	920	97	8		9,000	9,250	570	0	
920	930	98	12		9,250	9,500	582	8	
930	940	100	0		9,500	9,750	595	8	
940	950	101	4		9,750	10,000	607	0	
950	960	102	8		10,000	10,500	626	4	
960	970	103	12		10,500	11,000	645	12	

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
But does not exceed—		Proper fee.		But does not exceed—		Proper fee.	
Rr.	Rs.	Rs.	A.	Rr.	Rs.	Rs.	A.
11,000	11,500	663	12	26,000	27,000	1,157	8
11,500	12,000	682	8	27,000	28,000	1,182	8
12,000	12,500	701	4	28,000	29,000	1,207	8
12,500	13,000	720	0	29,000	30,000	1,232	8
13,000	13,500	738	12	30,000	32,000	1,257	8
13,500	14,000	757	8	32,000	34,000	1,282	8
14,000	14,500	776	4	34,000	36,000	1,307	8
14,500	15,000	795	0	36,000	38,000	1,332	8
15,000	15,500	813	12	38,000	40,000	1,357	8
15,500	16,000	832	8	40,000	42,000	1,382	8
16,000	16,500	851	4	42,000	44,000	1,407	8
16,500	17,000	870	0	44,000	46,000	1,432	8
17,000	17,500	888	12	46,000	48,000	1,457	8
17,500	18,000	907	8	48,000	50,000	1,482	8
18,000	18,500	926	4	50,000	55,000	1,513	12
18,500	19,000	945	0	55,000	60,000	1,545	4
19,000	19,500	963	12	60,000	65,000	1,576	0
19,500	20,000	982	8	65,000	70,000	1,607	8
20,000	21,000	1,007	8	70,000	75,000	1,638	12
21,000	22,000	1,032	8	75,000	80,000	1,670	8
22,000	23,000	1,057	8	80,000	85,000	1,701	4
23,000	24,000	1,082	8	85,000	90,000	1,732	8
24,000	25,000	1,107	8	90,000	95,000	1,763	12
25,000	26,000	1,132	8	95,000	1,00,000	1,795	0

And the fee increases at the rate of thirty-one rupees four annas for every thousand rupees, or part thereof, for example.—

Rr.	Rs.	A.	Rr.	Rs.	A.
2,00,000	2,420	0	5,00,000	4,295	0
3,00,000	3,045	0	5,35,000	4,500	0
4,00,000	3,670	0			

### U. P. COURT-FEES (AMENDMENT) ACT (XIX of 1938).

[Assented by Governor-General on 9th January, 1939, and published in U. P. Gazette, dated 14th January, 1939.]

*An Act further to amend the Court-Fees Act, 1870 (as amended by the United Provinces Court-Fees Amendment Act, 1936) in its application to the United Provinces.*

Preamble.

WHEREAS it is expedient to amend the Court-Fees Act, 1870, as (amended by the United Provinces Court Fees Amendment Act, 1936), in its application to the United Provinces in the manner hereinafter appearing ;

It is hereby enacted as follows :

Short title, extent and commencement.

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1938.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on such date as the Provincial Government may by notification direct, and shall remain in force up to the thirtieth day of June, 1941.

Amendment of Section 1 (3), United Provinces Act II of 1936.

2. In sub-section (3) of section 1 of the United Provinces Court-Fees (Amendment) Act, 1936, for the words 'April, 1939,' the words 'June, 1941,' shall be substituted.

Amendment of Section 2, Act VII of 1870.

3. For section 2 of the Court-Fees Act, 1870, the following section shall be substituted, namely :—

"Definitions.—2 In this Act, unless there is anything repugnant in the subject or context,—

(i) "Appeal" includes a cross-objection.

(ii) "Collector" includes any officer, not below the rank of a Deputy Collector, appointed by the Collector, with the previous sanction of the Chief Controlling Revenue Authority, to perform the functions of a Collector under this Act.

(iii) "Revenue" means land revenue as recorded in the Collector's register and does not include cesses of any kind.

(iv) "Suit" includes a first or second appeal from a decree in a suit."

4. The existing section 6 of the Court-Fees Act, 1870, (as amended by section 2 of the United Provinces Court-Fees Amendment Act, 1936), shall be numbered as sub-section (1) of section 6, from the first proviso thereto the words "the document is of any of the kinds specified as chargeable in the first schedule and" shall be omitted, and the following sub-sections shall be added to it as sub-sections (2), (3), (4), (5) and (6), namely :—

"(2) Notwithstanding the provisions of sub-section (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in Court-fee within such time as may from time to time be fixed by the Court.

(3) If a question of deficiency in Court-fee in respect of any plaint or memorandum of appeal is raised by an officer mentioned in section 24-A the Court shall, before proceeding further with the suit or appeal record a finding whether the court-fee is sufficient or not. If the Court finds that the Court-fee paid is insufficient, it shall call upon the plaintiff or the appellant as the case may be, to make good the deficiency within such time as it may fix, and in case of default shall reject the plaint or memorandum of appeal :

Provided that the Court may, for sufficient reasons to be recorded proceed with the suit or appeal if the plaint or the appellant, as the case may be, gives security, to the satisfaction of the Court, for payment of the deficiency in court-fee within such further time as the Court may allow. In no case, however, shall judgment be delivered unless the deficiency in court-fee has been made good, and if the deficiency is not made good within such time as the Court may from time to time allow, the Court may dismiss the suit or appeal.

(4) Whenever a question of the proper amount of court-fee payable is raised otherwise than under sub-section (3), the Court shall decide such question before proceeding with any other issue.

(5) In case the deficiency in court-fee is made good within the time allowed by the Court the date of the institution of the suit or appeal shall be deemed to be the date on which the suit was filed or the appeal presented.

(6) In all cases in which the report of the officer referred to in sub-section (3) is not accepted, by the Court, a copy of the finding, of the Court shall forthwith be sent to the Chief Inspector of Stamps."

Insertion of new section 6-A, 5. After section 6 of the Court-Fees Act, 1870, the following sections shall be inserted as sections 6-A, 6-B, and 6-C, namely :—

"6-A. (1) Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under section 104 of the Code of Civil Procedure.

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under sub-section (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed and all interim orders made, including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of appeal shall be sent forthwith by the appellate Court to the Chief Inspector of Stamps.

(4) If such order is varied or reversed in appeal, the appellate Court shall if the deficiency has been made good before the appeal is decided, grant to the appellant a certificate, authorizing him to receive back from the Collector such amount as is determined by the appellate Court to have been paid in excess of the proper court-fee.

(5) The Court may such order for the payment of costs of such appeal as it deems fit and, where such costs are payable to the Government, they shall be recoverable as arrears of land revenue.

"6-B. (1) If the order of the Court passed under sub-section (3) of section 6 is at variance with the opinion of the officer by whom the question of deficiency in court-fee has been raised, the Chief Inspector of Stamps may, within three months from the date of receipt of such order, move, by an application in writing, the Court to which an appeal lies from a decree in the suit or appeal in which such order has been passed, for revision of such order.

(2) If such Court is of opinion that the proper court-fee has not been paid on the plaint or the memorandum of appeal to which such order relates, it shall record a declaration to that effect and determine the amount of deficiency in court-fee. No appeal shall lie from such order :

Provided that no such declaration shall be made until the party liable to pay the court-fee has had an opportunity of being heard.

(3) The Court, while recording a declaration under sub-section (2) may make such order for the payment of costs as it deems fit. Where such costs are payable to the Government, they shall be recoverable in the manner laid down in sub-section (4) for the recovery of deficiency in court-fee.

(4) When a declaration has been recorded under sub-section (2), the Court recording the same shall, unless the suit or appeal has come up in appeal before such Court, in which case the deficiency in court-fee shall be recovered in the manner laid down in sub-section (2) of section 12, send forthwith a copy of such declaration to the Court which passed the order under sub-section (3) of section 6. Such Court shall, if the suit or appeal is still pending before it, follow the procedure prescribed in sub-section (3) of section 6. If the suit or appeal has already been disposed of, the Court shall forward a copy of such declaration to the Collector who shall recover the deficiency from the party concerned as if it were an arrear of land revenue.

"6-C. (1) When the Chief Controlling Revenue Authority is of opinion that the court-fee paid on any document filed in any Civil Court in a pending suit, appeal or other proceeding is insufficient, and that the question is one of general importance and no action under section 6-B has been taken, it may refer the case, with its own opinion thereon, to the High Court to which such Civil Court is subordinate.

(2) Every such case shall be decided by not less than two Judges of the High Court to which it is referred.

(3) The High Court upon the hearing of any such case shall decide the question raised thereby and shall deliver its judgment thereof containing the grounds on which the decision is founded.

(4) If the High Court finds that the court-fee paid was insufficient, the procedure prescribed by sub-section (4) of section 6-B for realization of the deficiency shall be followed as if the decision of the High Court were a declaration under that section."

Amendment of S. 7 (iv), Act VII of 1870.

6. For sub-section (ii) of section 7 of the Court-Fees Act, 1870 the following shall be substituted—

"(ii) (a) In suits for maintenance and annuities or other sums payable periodically :—

according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount claimed to be payable for one year ;

Provided that in suits for personal maintenance by females and minors, such value shall be deemed to be the amount claimed to be payable for one year.

(b) In suits for reduction or enhancement of maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount sought to be reduced or enhanced for one year."

Amendment of S. 7 (iv), Act VII of 1870.

7. For sub-section (iv) of section 7 of the Court-Fees Act, 1870, the following sub-section shall be substituted, namely :—

"(iv) In suits—

(a) to obtain a declaratory decree or order, where consequential relief is prayed ; and

(b) for accounts ;

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal :

Provided that in suits falling under clause (a), where the relief sought is with reference to any immovable property such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-section (v), (v-A) or (v-B) of this section as the case may be :

Provided further, that in suits falling under clause (b), such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit.

"(iv-A) In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value.

(1) where the plaintiff or his predecessor-in-title, was a party to the decree or the instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be—  
if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

*Explanation.*—"The value of the property," for the purposes of this sub-section, shall be the market-value, which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-sections (v), (v-A) or (v-B) as the case may be.

"(iv-B) In suits—

(a) for a right to some benefit (not herein otherwise provided for) to arise out of land ;

(b) to obtain an injunction ;

(c) to establish an adoption or to obtain a declaration that an alleged adoption is valid ;

(d) to set aside an adoption or to obtain a declaration that an alleged adoption is invalid or never, in fact, took place ;

(e) to set aside an award not being an award mentioned in section 8 ;

according to the amount at which the relief sought is valued in the plaint :

Provided that in the case of (a), (b) and (c) such amount shall be not less than one-tenth of the market-value of the property involved in or affected by the relief sought or Rs. 50 whichever is greater, and in the case of the remaining classes of suits not less than one fifth of such value or Rs. 200 whichever is greater :

And provided further that in the case of (a) and (b), the amount of court-fee leviable shall in no case exceed Rs. 200.

*Explanation 1.*—When the relief sought is with reference to any immovable property the market-value of such property shall be deemed to be the value computed in accordance with sub-section (v), (v-A) or (v-B) of this section as the case may be.

*Explanation 2.*—In the case of suits—

(i) falling under clauses (a) and (b) the property which is affected by the relief sought, and where properties of both the plaintiff and defendant are affected the property of the plaintiff so affected ;



(ii) falling under clauses (c) and (d) the property to which title by succession or otherwise may be diverted or affected by the alleged adoption ; and

(iii) falling under clause (e) the property which forms the subject-matter of the award, shall be deemed to be the property involved in or affected by the relief sought within the meaning of the proviso to this sub-section.

“(iv-C) In suits—

(a) for the restitution of conjugal rights ;

(b) for establishing or annulling or dissolving a marriage ;

(c) for establishing a right to the custody or guardianship of any person such as minor, including guardianship for the purpose of marriage ;

according to the amount at which the relief sought is valued in the plaint but in no case shall such amount be less than Rs. 200.

*Explanation.*—Clauses (a) and (b) do not include petitions or suits under any special Act relating to the dissolution of marriage.”

Amendment of sub-Section

(v) of Section 7, Act VII of 1870, as amended by Section 3, U. P. Act II of 1936.

8. For sub-section (v) of section 7 of the Court-Fees Act, 1870, the following shall be substituted namely :—

“(v) In suits for the possession of land, buildings or gardens—

according to the value of the subject-matter ; and such value shall be deemed to be—

(I) where the subject-matter is land, and

(a) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such an estate, and is recorded in the Collector's register as separately assessed with such revenue and such revenue is permanently settled, thirty times the revenue so payable ;

(b) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid and such revenue is settled but not permanently,

ten times the revenue so payable ;

(c) where the land pays no such revenue or has been partially exempted from such payment or is charged with any fixed payment in lieu of such revenue, and net profits have arisen from the and during the three years immediately preceding the date of presenting the plaint,

twenty times the annual average of such net profits ;

but when no such net profits have arisen therefrom, the market-value which shall be determined by multiplying by twenty the annual average net profits or similar land for the three years immediately preceding the date of presenting the plaint ;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and does not come under clauses (a), (b) or (c) above— the market-value of the land, which shall be determined by multiplying by fifteen the rental value of the land including assumed rent on proprietary cultivation, if any ;

(II) where the subject-matter is a building or garden—

according to the market-value of the building or garden, as the case may be.

*Explanation.*—The word “estate” as used in this sub-section, means any land subject to the payment of revenue for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government or which, in the absence of such engagement shall have been separately assessed with revenue.”

Insertion of new sub-sections after sub-section (v) of section 7, Act VII of 1870, as amended by the foregoing clause.

9. After sub-section (v) of section 7 of the Court-Fees Act, 1870, the following shall be inserted as sub-sections (v-A) and (v-B), namely :—

(v-A) In suits for possession—

(i) of superior proprietary rights where under-proprietary or sub-proprietary rights exist in the land—

according to the market-value of the subject-matter, and such value shall be determined by multiplying by fifteen the annual nett profits of the superior proprietor ;

(a) of under-proprietary or sub-proprietary land as such—

according to the value of the subject-matter, and such value shall be determined by multiplying by ten the annual under-proprietary or sub-proprietary rent, as the case may be, recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-Section (c) of this section save that the multiple will be ten.

*Explanation.*—Land held by any permanent lessees shall be treated for the purposes of this sub-section as under-proprietary or sub-proprietary land.”

“(v-B) In suits for possession of land between rival tenants and by tenants against trespassers—

according to the value of the subject-matter and such value shall be determined if such land is the land of

(a) a permanent tenure holder or a fixed rate tenant—

by multiplying by twenty the annual rent recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint ;

(b) an ex-proprietary or occupancy tenant—by multiplying by two such rent in case of suits for possession of land between rival tenants, and by annual rent in suits by tenants against trespassers.

(c) any other tenant—by annual rent.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-section (v) of this section save that the multiple shall be that entered in clauses (a), (b) and (c) of this sub-section according as the class of tenancy affected is governed by clauses (a) or (b) or (c) of this sub-section."

Amendment of sub-section 10. In sub-section (vi) of section 7 of the Court-Fees Act, 1870, the word "building" shall be substituted for the word "house."

Insertion of a new sub-section after sub-section (vi) of section 7, Act VII of 1870. 11. After sub-section (vi) of section 7 of the Court-Fees Act, 1870, the following sub-section shall be inserted, as sub-section (vi-A), namely :—

"(vi-A) In suits for partition—

according to one-quarter of the value of the plaintiff's share of the property,

and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a coparcener or co-owner and his claim to be a coparcener or co-owner on such date is denied.

*Explanation.*—The value of the property for the purposes of this sub-section shall be the market-value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be."

Amendment of sub-section 12. For sub-section (viii) of section 7 of the Court-Fees Act, 1870, the following sub-section shall be substituted, namely :—

"(viii) in suits to set aside or restore an attachment including suits to set aside an order passed under Order 21, Rules 60, 61 or 62 of the Code of Civil Procedure, according to half of the amount for which attachment was made, or according to half of the value of the property or interest attached, whichever is less.

*Explanation.*—The value of the property or interest for the purposes of this sub-section, shall be the market-value which in the case of immovable property or interest in such property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be."

Amendment of clause (d) of sub-section (x) of section 7, Act VII of 1870. 13. In clause (d) of sub-section (x) of section 7 of the Court-Fees Act, 1870, a comma shall be substituted for the semi-colon at the end and the following shall be added thereafter, namely :—

"and such value shall be the market-value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be."

Amendment of sub-section 14. In sub-section (xi) of section 7 of the Court-Fees Act, 1870, the word "and" at the end of clause (e) and the dash at the end of clause (f) shall be deleted and the following two clauses shall be added after clause (f), namely :—

"(g) for the commutation of rent ; and

"(h) for determination of rent—"

A comma shall be substituted for the full-stop occurring at the end of this sub-section and the following words shall be added at the end of the sub-section :—

"except in the case of suits falling under clause (h) in which, according to twice the amount claimed by the plaintiff to be the annual rent."

Amendment of section 8, Act VII of 1870. 15. In section 8 of the Court-Fees Act, 1870, the following words shall be inserted between the words "public purposes" and "shall be computed," namely :—

"or against an award made by a tribunal constituted under the United Provinces Town Improvement Act or any other similar statute."

Amendment of section 9, Act VII of 1870. 16. In the beginning of section 9 of the Court-Fees Act, 1870, the following sentence shall be added, namely :—

"in every suit the plaintiff shall file with the plaint a statement, in such form as may be prescribed for the purpose, of particulars and valuation of the subject-matter of the suit, unless such particulars and valuation are contained in the plaint itself."

Amendment of section 11, Act VII of 1870. 17. For the second paragraph of section 11 of the Court-Fees Act, 1870, the following paragraphs shall be substituted, namely :—

"Where a decree directs an inquiry as to mesne profits which have accrued in respect of the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If such difference is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment."

Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

Amendment of sub-section (ii) of section 12, Act VII of 1870.

18. For sub-section (ii) of section 12 of the Court-Fees Act, 1870, the following sub-section shall be substituted, namely :—

"(ii) But whenever any such suit comes before a Court of appeal reference or revision, if such Court considers that the said question has been wrongly decided to the detriment to the revenue it shall require the party by whom such fee has been paid to pay, within such time as may be fixed by it, so much additional fee as would have been payable had the question been rightly decided. If such additional fee is not paid within the time fixed and the defaulter is the appellant, the appeal shall be dismissed, but if the defaulter is the respondent, the Court shall inform the Collector who shall recover the deficiency as if it were an arrear of land revenue."

Amendment of section 17, Act VII of 1870.

19. For section 17 of the Court-Fees Act, 1870, the following section shall be substituted, namely :—

"17. (1) In any suit in which two or more separate and distinct causes of action are joined, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memoranda of appeal would be chargeable under this Act if separate suits were instituted in respect each such cause of action :

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, to order separate trials.

(2) When more reliefs than one based on the same cause of action are sought in the alternative the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

Amendment of section 19 (iii), Act VII of 1870.

20. For clause (iii) of section 19 of the Court-Fees Act, 1870, the following shall be substituted, namely :—

"(iii) Written statement not being one mentioned in Article 2-A, Schedule I, nor one containing a counter-claim, set-off, or a prayer other than a prayer for instalments or relating to costs of the suit."

Amendment of section 19-A, Act VII of 1870.

21. At the end of clause (c) of section 19-A of the Court-Fees Act, 1870, a comma shall be substituted for the full-stop and the following words shall be added, namely :—

"after deducting one anna for each rupee or fraction thereof."

Amendment of section 19-H, Act VII of 1870.

22. In section 19-H of the Court-Fees Act, 1870, the following proviso shall be substituted for the existing proviso to sub-section (iv), and sub-section (8) shall be deleted :

"Provided that no such motion shall be made after the expiration of one year from the date of the exhibition of the inventory required by section 317 of the Indian Succession Act."

Amendment of sub-section (1) of section 19-I, Act VII of 1870.

23. For sub-section (1) of section 19-I of the Court-Fees Act, 1870, the following sub-section shall be substituted, namely :—

"(1) No order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court, in the form set forth in the third schedule, a valuation, according to the market-rates current on the date of the application of all the assets and liabilities of the deceased in British India, at the time of the latter's death, and the Court is satisfied that the fee mentioned in Article 11 of the First Schedule has been paid on such valuation.

*Explanation.*—If at the time of his death, the deceased was a member of a joint Hindu family governed by the Mitakshara Law, such portion of the assets and liabilities of the family as would have been allotted to the deceased in a partition made immediately before his death, shall be deemed to be the assets and liabilities of the deceased within the meaning of this sub-section."

Amendment of heading of Chapter IV and substitution of sections 20 and 21 in place of the sections 19-H (8), 20—23, 27, 34 (1) and 34 (2) and deletions of sections 22, 23 and 27, Act VII of 1870.

24. (1) For the heading of Chapter IV the words "Power to make rules" shall be substituted for "Process fees," and the following shall be substituted for sections 20 and 21 :—

"20. The High Court may make rules to provide for or regulate all or any of the following matters, namely :—

(a) the fees payable for serving and executing processes issued by such Court in its appellate jurisdiction and by the Civil and Criminal Courts established within the local limits of such jurisdiction ;

(b) the remuneration of persons employed by the Courts mentioned in clause (a) in the service or execution of processes ;

(c) the fixing by District and Sessions Judges and District Magistrates of the number, of process-servers necessary to be employed for the service and execution of processes issued from their respective Courts and Courts subordinate thereto ; and

(d) the display in each Court of a table in the English and Vernacular languages showing the fees payable for the service and execution of processes.

All such rules shall be subject to the confirmation of the Provincial Government and on such confirmation, shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

"21. (1) The Chief Controlling Revenue Authority may, with the previous sanction of the Provincial Government, make rules consistent with this Act to provide for or regulate all or any of the following matters, namely :—

(a) the fees chargeable for serving and executing processes issued by the Chief Controlling Revenue Authority and by the Revenue Courts established within the local limits of its jurisdiction ;

(b) the remuneration of the persons necessary to be employed for the service and execution of such processes ;

(c) the fixing by Collectors of the number of persons necessary to be employed for the service and execution of such processes ;

(d) the guidance of Collectors in the exercise of the powers conferred on them by sub-section (iii) of section 19-H :

(e) the supply of stamps to be used under this Act ;

(f) the number of stamps to be used for denoting any fee chargeable under this Act ;

(g) the keeping of accounts of all stamps used under this Act ;

(h) the circumstances in which stamps may be held to be damaged or spoiled ;

(i) the circumstances in which and the manner in which allowance used, for damaged or spoiled stamps may be made ; and

(j) the regulation of the sale of stamps to be used under this Act, the person by whom alone such stamps may be sold, and the duties and remuneration of such persons ;

Provided that, in the case of stamps used under section 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

(2) All rules made under this section shall be published in the Official Gazette, and on such publication, shall have effect as if enacted in this Act."

(II) Sections 22, 23 and 27 of the Court-Fees Act, 1870, shall be deleted.

Insertion of a new section at the beginning of Chapter V, Act VII of 1870.

25. At the beginning of Chapter V of the Court-Fees Act, 1870, the following shall be inserted as section 24-A, namely :—

"24-A. The levy of fees under this Act shall be under the general control and superintendence of the Chief Controlling Revenue Authority, who may be assisted in their supervision thereof by the Chief Inspector of Stamps and by as many Inspectors of Stamps as the Provincial Government may appoint in this behalf or by any other subordinate agency appointed for the purpose.

The Chief Inspector of Stamps and Inspectors of Stamps shall have access to all records, and shall be furnished with all such information as may be required by them for the performance of their duties under this Act."

Insertion of a new section 30-A, after section 30, Act VII of 1870.

26. After section 30 of the Court Fees Act, 1870, the following shall be inserted as section 30-A namely :—

"30-A. Where allowance is made in this Act, for damaged or spoiled stamps or where refund is permitted on the strength of a certificate granted by a Court, the Collector may, on the application of the holder of the same and after satisfying himself about the genuineness of the certificate or the stamps produced, give in lieu thereof the same amount or value in stamps of the same or any other description, or if the applicant desires, the same amount or value in money, provided that in the latter case a deduction shall be made of one anna for each rupee or fraction thereof. No such deduction shall, however, be made where refund is claimed in respect of Court-fee paid in pursuance of an order of the Court which has been varied or reversed in appeal."

Amendment of section 34, Act VII of 1870.

27. For section 34 of the Court Fees Act, 1870, the following shall be substituted, namely :—

"34. Any person appointed to sell stamps who disobeys any rule made under this Act, and any person, not so appointed, who sells or offers for sale any stamps, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees or with both."

Deletion of section 8 of the United Provinces Act, II of 1936.

28. Section 8 of the United Provinces Court-Fees (Amendment) Act, 1936, shall be deleted.

Amendment of Schedule I, Act VII of 1870, as amended by section 6 of the United Provinces Act, II of 1936.

29. In schedule I to the Court-Fees Act, 1870, as amended by section 6 of the United Provinces Court-Fees Amendment Act, 1936, the following amendments shall be made namely :—

(i) In the first column of Article 1, the words "or of a cross-objection" shall be omitted.

(ii) In the proviso to Article 1, the words "ten thousand" shall be substituted for words "four thousand five hundred", and in the second column of the article, the words "two hundred rupees" wherever they occur be substituted by the words "three hundred rupees" and in the last column of this article the words "fourteen annas", "seven rupees eight annas" "fifteen rupees", "twenty two rupees eight annas", "thirty rupees", and "thirty-seven rupees eight annas", shall be substituted respectively for the words "one rupee", "six rupees four annas", "twelve rupees eight annas", "eighteen rupees twelve annas", "twenty-five rupees", and "thirty-one rupees four annas".

(iii) After Article 2-A the following shall be inserted as article 2-B, namely :—  
 “2-B.—Memorandum of appeal filed under Section 23 of the United Provinces Agriculturists’ Relief Act, 1934. the same fee as would be leviable on a memorandum appeal, under Article 1.”

(iv) Between Articles 8 and 9 the following shall be inserted as Article 8-A, namely :  
 “8-A.—A copy of a power of attorney when filed in any suit or proceedings.

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 0 12 0.”

(v) In Article 11, for the entries in the second and third columns, above the proviso, the following shall be substituted, namely :—

“When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees ;	Two per centum on such amount or value.
When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees ;	Two and a half per centum on such amount or value.
When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees ;	Three per centum on such amount or value.
When such amount or value exceeds one lakh of rupees on the portion of such amount or value which is in excess of a lakh of rupees up to two lakhs of rupees ;	Four per centum.
When such amount or value exceeds two lakhs of rupees, on the portion of such amount or value which is in excess of two lakhs of rupees up to three lakhs of rupees ;	Five per centum.
When such amount or value exceeds three lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs of rupees ;	Six per centum.
When such amount or value exceeds four lakhs of rupees, on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees ; and	Six and a half per centum.
When such amount or value exceeds five lakhs of rupees, on the portion of such amount or value which is in excess of five lakhs of rupees.	Seven per centum.

(vi) In Article 12 for the entries in the first and second columns and for the first paragraph in the third column, the following shall be substituted :—

When the amount or value of the debt or security or the aggregate amount of the debts or securities specified in the certificate under section 374 of Act does not exceed twenty thousand rupees ;	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
When such amount or value exceeds twenty thousand rupees but does not exceed fifty thousand rupees, on the portion of such amount or value which is in excess of twenty thousand rupees ;	Two and a half per centum on such amount or value, and three and a three quarters per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
When such amount or value exceeds fifty thousand rupees but does not exceed a lakh of rupees, on the portion of such amount or value which is in excess of fifty thousand rupees ;	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which certificate is extended under section 376 of the Act.
When such amount or value exceeds a lakh of rupees but does not exceed two lakhs of rupees, on the portion of such amount or value which is in excess of a lakh rupees ;	Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
When such amount or value exceeds two lakhs of rupees but does not exceed three lakhs of rupees, on the portion of such amount or value which is in excess of two lakhs of rupees ;	Five per centum on such amount or value and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
When such amount or value exceeds three lakhs of rupees but does not exceed four lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees ;	Six per centum on such amount or value and nine per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds four lakhs of rupees but does not exceed five lakhs of rupees on the portion of such amount or value which is in excess of four lakhs of rupees ;

and

When such amount or value exceeds five lakhs of rupees, on the portion of such amount or value which is in excess of five lakhs of rupees.

Six and a half per centum on such amount or value and eight and a quarter per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

Seven per centum on such amount or value and ten and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act."

Amendment of Schedule II, Act VII of 1870, as amended by the United Provinces Act, II of 1936.

30. In Schedule II to the Court-Fees Act, 1870, as amended by section 7 of the United Provinces Court-Fees (Amendment) Act, 1936, the following amendment shall be made, namely :—

"From Article 1 (a), the clause, "when presented to any Municipal Commissioner under any Act, for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement" shall be omitted and in its place the following new clause shall be inserted, namely :—

"when presented to the District Magistrate or any other officer for the correction of an electoral roll."

(ii) In Article 1 (b) the words "other than an offence for which police officer may, under the Code of Criminal Procedure arrest without warrant" shall be deleted from the first paragraph and the following paragraphs shall be inserted between the first and second paragraphs :—

"or when presented to a Collector containing a request from a local body, such as the Municipal Board, the District Board or the Notified Area Committee, for the realization of any dues by issue of warrant or any other distress ;

"or when presented to a District Magistrate for permission to have displays of fireworks or for a police escort ;

"or when presented to a District Magistrate, in the form of a programme or in any other form, for the exhibition of a film at a shorter notice than that permitted by the conditions of the licence issued to cinema companies for exhibiting films ;

"or when presented to a District Magistrate or Collector or any officer subordinate to him, under the Village Panchayat Act, the Indian Arms Act, the Poisons Act, the Explosives Act, the Stage Carriage Act, the Indian Cinematograph Act ; or any other enactment for the time being in force unless specifically exempted from payment of Court-fee."

(iii) In clause (i) of Article 17, in column 1, put a comma, after the word "order" and insert thereafter the following namely :—

"not being one under Order 21, Rules 60, 61 or 62 of the Code of Civil Procedure."

(iv) To article 17 (iii) in column 1, the following words shall be added at the end :

"in any suit not otherwise provided for by this Act."

(v) From Article 17, the following sub-articles shall be deleted, namely —

"(iv) to set aside an award ;

(v) to set aside an adoption ;"

(vi) For Article 22, the following Article shall be substituted, namely :—

"22.—Election petition questioning the election of any person.

(a) as a member of a local board other than a notified or Town Area Committee. One hundred rupees.

(b) as a member of a Notified or Town Area Committee ... Ten rupees."

## THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT (IX OF 1941).

[19th June, 1941.]

*An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces, the United Provinces Court-Fees (Amendment) Act, 1936, and the United Provinces Court-Fees (Amendment) Act, 1938.*

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces, the United Provinces Court-Fees (Amendment) Act, 1936, and the United Provinces Court-Fees (Amendment) Act, 1938, for the purposes hereinafter appearing ;

AND WHEREAS by the proclamation, dated the third day of November 1939, promulgated under S. 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act in the Provincial Legislature :

AND WHEREAS the continuance in force of the said Proclamation has been approved by resolutions of both the Houses of Parliament.

NOW, THEREFORE, the Governor in exercise of the powers aforesaid is pleased to make the following Act :—

**Short title.**

1. This Act may be called THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT, 1941.

Amendment of section 1, U. P. Act II of 1936.

2. (1) In sub-section (3) of section 1 of the United Provinces Court-Fees (Amendment) Act, 1936, all the words and commas *after* the word and "figure May, 1936," shall be omitted.

Amendments of Sections 1 and 2, U. P. Act XIX of 1938.

(2) In the United Provinces Court-Fees (Amendment) Act, 1938—

(a) in sub-section (3) of section 1 all the words and commas *after* the word "direct" shall be omitted; and

(b) Section 2 shall be omitted.

Amendment of section 6, Act VII of 1870.

3. To sub-section (iv) of section 2 of the Court-Fees Act, 1870 (hereinafter referred to as the said Act), the following words shall be added *after* the word "suit" where it occurs for the second time, namely :—

"and also a Letters Patent Appeal."

Amendment of Section 6, Act VII of 1870.

4. In section 6 of the said Act,—

(1) in sub-section (1)—

(a) in the first proviso *for* the words and figures "Oudh Rent Act," 1886, the Agra Tenancy Act, 1926 the words and figure "United Provinces Tenancy Act, 1939," shall be substituted; and

(b) in the second proviso *for* the words "the commencement of this Act" the words and figure "the first day of May, 1936" shall be substituted; and

(2) in sub-section (6) *after* the words "of the Court" the following words shall be inserted, namely :—"together with a copy of the plaint."

Amendment of Section 6-A, Act VII of 1870.

5. In sub-section (3) of section 6-A, of the said Act, *after* the word "appeal" the following words shall be inserted, namely :—

"together with a copy of the plaint and of the order appealed against."

Amendment of Section 7, Act VII of 1870.

6. In clause (a), sub-section (iv) of section 7 of the said Act, *after* the word 'relief' the words "other than reliefs specified in sub-section (iv-A)" shall be added.

Amendment of Section 21, Act VII of 1870.

7. *After* sub-section (1) if section 21 of the said Act, the following shall be added as sub-section (1-A) namely :—

"(1-A) The Provincial Government may under rules to carry out generally the purposes of this Act."

Amendment of Schedule II, Act VII of 1870.

8. In Schedule II of the said Act,—

(a) in article 1, *after* clause (e) the following shall be added as clause (f), namely :—

"(f) When presented under Chapter VI of the Motor Vehicles Act, 1939—

(i) to a Regional Transport Authority or its Chairman or Secretary. One rupee eight annas.

(ii) to the Provincial Transport Authority or its Chairman or Secretary. Three rupees.

(b) in article 11, *after* (c) the following shall be added as clause (c), namely :—

"(d) in accordance with the provisions of the Motor Vehicles Act, 1939 :—

(i) under sub-section (2) of section 15 or sub-section (3) of section 15 from an order of a licensing authority. Twelve annas.

(ii) under sub-Section (2) of Section 16 from an order of a Regional Transport Authority. Three rupees.

(iii) under sub-Section (1) of Section 35 from an order of a registering authority or a prescribed Authority, as the case may be. Twelve annas.

(iv) under Section 64 from an order of a Regional Transport Authority. Three rupees.

(v) under Section 64 from an order of the Provincial Transport Authority. Five rupees."

## THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT (XIV OF 1942).

*An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces.*

**Preamble.**

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces for the purpose hereinafter appearing :

AND WHEREAS by the Proclamation dated the third day of November, 1939, promulgated under section 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act in the Provincial Legislature :



AND WHEREAS the continuance in force of the said Proclamation has been approved by resolution of both the Houses of Parliament :

Now, THEREFORE, the Governor in exercise of the powers aforesaid is pleased to make the following Act :

Short title and commencement.

1. (1) This Act may be called THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT, 1942.

(2) This Act shall be deemed to have effect from the date of commencement of the United Provinces Court-Fees (Amendment) Act, 1938.

2. In Schedule I of the Court-Fees Act, 1870, as amended, in its application to the United Provinces by the United Provinces Court-Fees (Amendment) Act, 1936, the United Provinces Court-Fees (Amendment) Act, 1938, and the Court-Fees (United Provinces Amendment) Act, 1941, for the table of rates of *ad valorem* fees leviable on the institution of suits as amended by clause (viii) of section 6 of the United Provinces Court-Fees (Amendment) Act, 1936, the table given in the Schedule annexed hereto shall be substituted.

#### SCHEDULE.

(See section 2.)

*Table of rates of ad valorem fees leviable on the institution of suits.*

When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—		
Rs.	But does not exceed—	Proper Fee.	Rs.	But does not exceed—	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	350	360	27 12
5	10	0 12	360	370	28 10.
10	15	1 2	370	380	29 8.
15	20	1 8	380	390	30 6.
20	25	1 14	390	400	31 4
25	30	2 4	400	410	32 2
30	35	2 10	410	420	33 0.
35	40	3 0	420	430	33 14.
40	45	3 6	430	440	34 12.
45	50	3 12	440	450	35 10.
50	55	4 2	450	460	36 8.
55	60	4 8	460	470	37 6.
60	65	4 14	470	480	38 4
65	70	5 4	480	490	39 2
70	75	5 10	490	500	40 0.
75	80	6 0	500	510	41 4.
80	85	6 6	510	520	42 2
85	90	6 12	520	530	43 12.
90	95	7 2	530	540	44 0.
95	100	7 8	540	550	45 4.
100	110	8 4	550	560	46 8.
110	120	9 0	560	570	47 12.
120	130	9 12	570	580	48 0.
130	140	10 8	580	590	49 4.
140	150	11 4	590	600	50 8.
150	160	12 0	600	610	51 12.
160	170	12 12	610	620	52 0.
170	180	13 8	620	630	53 4.
180	190	14 4	630	640	54 8.
190	200	15 0	640	650	55 12.
200	210	15 12	650	660	56 0.
210	220	16 8	660	670	57 4.
220	230	17 4	670	680	58 8.
230	240	18 0	680	690	59 12.
240	250	18 12	690	700	60 0.
250	260	19 8	700	710	61 4.
260	270	20 4	710	720	62 8.
270	280	21 0	720	730	63 12.
280	290	21 12	730	740	64 0.
290	300	22 8	740	750	65 4.
300	310	23 6	750	760	66 8.
310	320	24 4	760	770	67 12.
320	330	25 2	770	780	68 0.
330	340	26 0	780	790	69 4.
340	350	26 14	790	800	70 8.

When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—		
Rs.	But does not exceed—	Proper fee.	Rs.	But does not exceed—	Proper fee.
800	810	78 12	7,000	7,250	537 8
810	820	80 0	7,250	7,500	552 8
820	830	81 4	7,500	7,750	567 8
830	840	82 8	7,750	8,000	582 8
840	850	83 12	8,000	8,250	597 8
850	860	85 0	8,250	8,500	612 8
860	870	86 4	8,500	8,750	627 8
870	880	87 8	8,750	9,000	642 8
880	890	88 12	9,000	9,250	657 8
890	900	90 0	9,250	9,500	672 8
900	910	91 4	9,500	9,750	687 8
910	920	92 8	9,750	10,000	702 8
920	930	93 12	10,000	10,500	725 0
930	940	95 0	10,500	11,000	747 8
940	950	96 4	11,000	11,500	770 0
950	960	97 8	11,500	12,000	792 8
960	970	98 12	12,000	12,500	815 0
970	980	100 0	12,500	13,000	837 8
980	990	101 4	13,000	13,500	860 0
990	1,000	102 8	13,500	14,000	882 8
1,000	1,100	110 0	14,000	14,500	905 0
1,100	1,200	117 8	14,500	15,000	927 8
1,200	1,300	125 0	15,000	15,500	950 0
1,300	1,400	132 8	15,500	16,000	972 8
1,400	1,500	140 0	16,000	16,500	995 0
1,500	1,600	147 8	16,500	17,000	1,017 8
1,600	1,700	155 0	17,000	17,500	1,040 8
1,700	1,800	162 8	17,500	18,000	1,062 0
1,800	1,900	170 0	18,000	18,500	1,085 0
1,900	2,000	177 8	18,500	19,000	1,107 8
2,000	2,100	185 0	19,000	19,500	1,130 0
2,100	2,200	192 8	19,500	20,000	1,152 8
2,200	2,300	200 0	20,000	21,000	1,182 8
2,300	2,400	207 8	21,000	22,000	1,212 8
2,400	2,500	215 0	22,000	23,000	1,242 8
2,500	2,600	222 8	23,000	24,000	1,272 8
2,600	2,700	230 0	24,000	25,000	1,302 8
2,700	2,800	237 8	25,000	26,000	1,332 8
2,800	2,900	245 0	26,000	27,000	1,362 8
2,900	3,000	252 8	27,000	28,000	1,392 8
3,000	3,100	260 0	28,000	29,000	1,422 8
3,100	3,200	267 8	29,000	30,000	1,452 8
3,200	3,300	275 0	30,000	32,000	1,482 8
3,300	3,400	282 8	32,000	34,000	1,512 8
3,400	3,500	290 0	34,000	36,000	1,542 8
3,500	3,600	297 8	36,000	38,000	1,572 8
3,600	3,700	305 0	38,000	40,000	1,602 8
3,700	3,800	312 8	40,000	42,000	1,632 8
3,800	3,900	320 0	42,000	44,000	1,662 8
3,900	4,000	327 8	44,000	46,000	1,692 8
4,000	4,100	335 0	46,000	48,000	1,722 8
4,100	4,200	342 8	48,000	50,000	1,752 8
4,200	4,300	350 0	50,000	55,000	1,790 0
4,300	4,400	357 8	55,000	60,000	1,827 8
4,400	4,500	365 0	60,000	65,000	1,865 0
4,500	4,600	372 8	65,000	70,000	1,902 8
4,600	4,700	380 0	70,000	75,000	1,940 0
4,700	4,800	387 8	75,000	80,000	1,977 8
4,800	4,900	395 0	80,000	85,000	2,015 0
4,900	5,000	402 8	85,000	90,000	2,052 8
5,000	5,250	417 8	90,000	95,000	2,090 0
5,250	5,500	432 8	95,000	1,00,000	2,127 8
5,500	5,750	447 8	1,00,000	1,05,000	2,165 0
5,750	6,000	462 8	1,05,000	1,10,000	2,202 8
6,000	6,250	477 8	1,10,000	1,15,000	2,240 0
6,250	6,500	492 8	1,15,000	1,20,000	2,277 8
6,500	6,750	507 8	1,20,000	1,25,000	2,315 0
6,750	7,000	522 8	1,25,000	1,30,000	2,352 8

When the amount or value of the subject- matter exceeds—	But does not exceed—	Proper fee.		When the amount or value of the subject- matter exceeds—	But does not exceed—	Proper fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
1,30,000	1,35,000	2,390	0	4,70,000	4,75,000	4,940	0
1,35,000	1,40,000	2,427	8	4,75,000	4,80,000	4,977	8
1,40,000	1,45,000	2,465	0	4,80,000	4,85,000	5,015	0
1,45,000	1,50,000	2,502	8	4,85,000	4,90,000	5,052	8
1,50,000	1,55,000	2,540	0	4,90,000	4,95,000	5,090	0
1,55,000	1,60,000	2,577	8	4,95,000	5,00,000	5,127	8
1,60,000	1,65,000	2,615	0	5,00,000	5,05,000	5,165	0
1,65,000	1,70,000	2,652	8	5,05,000	5,10,000	5,202	8
1,70,000	1,75,000	2,690	0	5,10,000	5,15,000	5,240	0
1,75,000	1,80,000	2,727	8	5,15,000	5,20,000	5,277	8
1,80,000	1,85,000	2,765	0	5,20,000	5,25,000	5,315	0
1,85,000	1,90,000	2,802	8	5,25,000	5,30,000	5,352	8
1,90,000	1,95,000	2,840	0	5,30,000	5,35,000	5,390	0
1,95,000	2,00,000	2,877	8	5,35,000	5,40,000	5,427	8
2,00,000	2,05,000	2,915	0	5,40,000	5,45,000	5,465	0
2,05,000	2,10,000	2,952	8	5,45,000	5,50,000	5,502	8
2,10,000	2,15,000	2,990	0	5,50,000	5,55,000	5,540	0
2,15,000	2,20,000	3,027	8	5,55,000	5,60,000	5,577	8
2,20,000	2,25,000	3,065	0	5,60,000	5,65,000	5,615	0
2,25,000	2,30,000	3,102	8	5,65,000	5,70,000	5,652	8
2,30,000	2,35,000	3,140	0	5,70,000	5,75,000	5,690	0
2,35,000	2,40,000	3,177	8	5,75,000	5,80,000	5,727	8
2,40,000	2,45,000	3,215	0	5,80,000	5,85,000	5,765	0
2,45,000	2,50,000	3,252	8	5,85,000	5,90,000	5,802	8
2,50,000	2,55,000	3,290	0	5,90,000	5,95,000	5,840	0
2,55,000	2,60,000	3,327	8	5,95,000	6,00,000	5,877	8
2,60,000	2,65,000	3,365	0	6,00,000	6,05,000	5,915	0
2,65,000	2,70,000	3,402	8	6,05,000	6,10,000	5,952	8
2,70,000	2,75,000	3,440	0	6,10,000	6,15,000	5,990	0
2,75,000	2,80,000	3,477	8	6,15,000	6,20,000	6,027	8
2,80,000	2,85,000	3,515	0	6,20,000	6,25,000	6,065	0
2,85,000	2,90,000	3,552	8	6,25,000	6,30,000	6,102	8
2,90,000	2,95,000	3,590	0	6,30,000	6,35,000	6,140	0
2,95,000	3,00,000	3,627	8	6,35,000	6,40,000	6,177	8
3,00,000	3,05,000	3,665	0	6,40,000	6,45,000	6,215	0
3,05,000	3,10,000	3,702	8	6,45,000	6,50,000	6,252	8
3,10,000	3,15,000	3,740	0	6,50,000	6,55,000	6,290	0
3,15,000	3,20,000	3,777	8	6,55,000	6,60,000	6,327	8
3,20,000	3,25,000	3,815	0	6,60,000	6,65,000	6,365	0
3,25,000	3,30,000	3,852	8	6,65,000	6,70,000	6,402	8
3,30,000	3,35,000	3,890	0	6,70,000	6,75,000	6,440	0
3,35,000	3,40,000	3,927	8	6,75,000	6,80,000	6,477	8
3,40,000	3,45,000	3,965	0	6,80,000	6,85,000	6,515	0
3,45,000	3,50,000	4,002	8	6,85,000	6,90,000	6,552	8
3,50,000	3,55,000	4,040	0	6,90,000	6,95,000	6,590	0
3,55,000	3,60,000	4,077	8	6,95,000	7,00,000	6,627	8
3,60,000	3,65,000	4,115	0	7,00,000	7,05,000	6,665	0
3,65,000	3,70,000	4,152	8	7,05,000	7,10,000	6,702	8
3,70,000	3,75,000	4,190	0	7,10,000	7,15,000	6,740	0
3,75,000	3,80,000	4,227	8	7,15,000	7,20,000	6,777	8
3,80,000	3,85,000	4,265	0	7,20,000	7,25,000	6,815	0
3,85,000	3,90,000	4,302	8	7,25,000	7,30,000	6,852	8
3,90,000	3,95,000	4,340	0	7,30,000	7,35,000	6,890	0
3,95,000	4,00,000	4,377	8	7,35,000	7,40,000	6,927	8
4,00,000	4,05,000	4,415	0	7,40,000	7,45,000	6,965	0
4,05,000	4,10,000	4,452	8	7,45,000	7,50,000	7,002	8
4,10,000	4,15,000	4,490	0	7,50,000	7,55,000	7,040	0
4,15,000	4,20,000	4,527	8	7,55,000	7,60,000	7,077	8
4,20,000	4,25,000	4,565	0	7,60,000	7,65,000	7,115	0
4,25,000	4,30,000	4,602	8	7,65,000	7,70,000	7,152	8
4,30,000	4,35,000	4,640	0	7,70,000	7,75,000	7,190	0
4,35,000	4,40,000	4,677	8	7,75,000	7,80,000	7,227	8
4,40,000	4,45,000	4,715	0	7,80,000	7,85,000	7,265	0
4,45,000	4,50,000	4,752	8	7,85,000	7,90,000	7,302	8
4,50,000	4,55,000	4,790	0	7,90,000	7,95,000	7,340	0
4,55,000	4,60,000	4,827	8	7,95,000	8,00,000	7,377	8
4,60,000	4,65,000	4,865	0	8,00,000	8,05,000	7,415	0
4,65,000	4,70,000	4,902	8	8,05,000	8,10,000	7,452	8

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
But does not exceed—		Proper fee.		But does not exceed—		Proper fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
8,10,000	8,15,000	7,490	0	9,80,000	9,85,000	8,765	0
8,15,000	8,20,000	7,527	8	9,85,000	9,90,000	8,802	8
8,20,000	8,25,000	7,565	0	9,90,000	9,95,000	8,840	0
8,25,000	8,30,000	7,602	8	9,95,000	10,00,000	8,877	8
8,30,000	8,35,000	7,640	0	10,00,000	10,05,000	8,915	0
8,35,000	8,40,000	7,677	8	10,05,000	10,10,000	8,952	8
8,40,000	8,45,000	7,715	0	10,10,000	10,15,000	8,990	0
8,45,000	8,50,000	7,752	8	10,15,000	10,20,000	9,227	8
8,50,000	8,55,000	7,790	0	10,20,000	10,25,000	9,065	0
8,55,000	8,60,000	7,827	8	10,25,000	10,30,000	9,102	8
8,60,000	8,65,000	7,865	0	10,30,000	10,35,000	9,140	0
8,65,000	8,70,000	7,902	8	10,35,000	10,40,000	9,177	8
8,70,000	8,75,000	7,940	0	10,40,000	10,45,000	9,215	0
8,75,000	8,80,000	7,977	8	10,45,000	10,50,000	9,252	8
8,80,000	8,85,000	8,015	0	10,50,000	10,55,000	9,290	0
8,85,000	8,90,000	8,052	8	10,55,000	10,60,000	9,327	8
8,90,000	8,95,000	8,090	0	10,60,000	10,65,000	9,365	0
8,95,000	9,00,000	8,127	8	10,65,000	10,70,000	9,402	8
9,00,000	9,05,000	8,165	0	10,70,000	10,75,000	9,440	0
9,05,000	9,10,000	8,202	8	10,75,000	10,80,000	9,477	8
9,10,000	9,15,000	8,240	0	10,80,000	10,85,000	9,515	0
9,15,000	9,20,000	8,277	8	10,85,000	10,90,000	9,552	8
9,20,000	9,25,000	8,315	0	10,90,000	10,95,000	9,590	0
9,25,000	9,30,000	8,352	8	10,95,000	11,00,000	9,627	8
9,30,000	9,35,000	8,390	0	11,00,000	11,05,000	9,665	0
9,35,000	9,40,000	8,427	8	11,05,000	11,10,000	9,702	8
9,40,000	9,45,000	8,465	0	11,10,000	11,15,000	9,740	0
9,45,000	9,50,000	8,502	8	11,15,000	11,20,000	9,777	8
9,50,000	9,55,000	8,540	0	11,20,000	11,25,000	9,815	0
9,55,000	9,60,000	8,577	8	11,25,000	11,30,000	9,852	8
9,60,000	9,65,000	8,615	0	11,30,000	11,35,000	9,890	0
9,65,000	9,70,000	8,652	8	10,35,000	11,40,000	9,927	8
9,70,000	9,75,000	8,690	0	11,40,000	11,45,000	9,965	0
9,75,000	9,80,000	8,727	8	10,45,000		10,000	0

## COURT-FEES (UNITED PROVINCES AMENDMENT) ACT (III OF 1943).

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces for the purpose hereinafter appearing ;

Preamble.

AND WHEREAS by the Proclamation, dated the third day of November, 1939, promulgated under section 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act, in the Provincial Legislature ;

AND WHEREAS the said Proclamation is still in force ;

NOW THEREFORE the Governor in exercise of the power aforesaid is pleased to make the following

Act :

Short title and commencement.

1. (1) This Act may be called THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT, 1943.

(2) It shall come into force on such date as the Provincial Government may by notification direct.

2. Clause (d) of Article 11 of Schedule II of Court-Fees Act, 1870, as inserted by clause (b) of section 8 of the Court-Fees (United Provinces Amendment) Act, 1941, shall be repealed.

## THE COURT-FEES (UNITED PROVINCES SECOND AMENDMENT) ACT (VIII OF 1943).

*An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces.*

WHEREAS it is expedient, for purposes connected with the War and the period immediately after the War, to enhance the fees payable under the Court-Fees Act, 1870, as amended from time to time in its application to the United Provinces.

AND WHEREAS, by the Proclamation, dated the 3rd day of November, 1939, promulgated under section 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act in the Provincial Legislature ;

AND WHEREAS the said Proclamation is still in force ;

NOW THEREFORE, the Governor in exercise of the powers aforesaid is pleased to make the following Act :

Short title, extent, commencement and duration.

1. (1) This Act may be called THE COURT-FEES (UNITED PROVINCES SECOND AMENDMENT) ACT, 1943.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on 1st August, 1943, and shall cease to have effect on such date as the Provincial Government, may, by notification in the Provincial Gazette, appoint in this behalf.

2. Notwithstanding anything contained in the Court-Fees Act, 1870, as amended from time to time in its application to the United Provinces (hereinafter called the principal Act) all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the

Enhancement of court-fees.

schedule annexed hereto.

(3) The provisions of the principal Act, save in so far as they are inconsistent with anything herein contained, shall apply to this Act.

#### SCHEDULE.

Rate of surcharge on fees leviable under the Court-Fees Act, 1870, as amended from time to time, in its application to the United Provinces.

	Rate of surcharge.
1. On every whole rupee	4 annas per rupee.
2. (a) On a fraction of a rupee upto and including 4 annas	1 anna per rupee.
(b) on a fraction exceeding 4 annas but not exceeding 8 annas.	2 annas per rupee.
(c) On a fraction exceeding 8 annas but not exceeding 16 annas.	3 annas per rupee.

*Example.*—On a court-fee of Rs. 20-6-0 the surcharge will be (20 (x) 4) plus 2 annas, i.e., Rs. 5-2-0 and the total court-fee chargeable will be Rs. 25-8-0.

#### THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT (V OF 1944).

*An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces.*

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces for the purpose hereinafter appearing.

Preamble.

AND WHEREAS by the Proclamation dated the 3rd May of November, 1939, promulgated under section 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act in the Provincial Legislature.

AND WHEREAS the said Proclamation is still in force;

NOW THEREFORE, the Governor in exercise of the powers aforesaid is pleased to make the following Act;

Short title and commencement. 1. (1) This Act may be called THE COURT-FEES UNITED PROVINCES (AMENDMENT) ACT, 1944.

(2) For Article 18 of Schedule II of the Court-Fees Act, 1870, as substituted by Section 7 of the United Provinces Court-Fees (Amendment) Act, 1936, substitute the following:—

“Number.

Proper fee.

18. Application under the Arbitration Act, 1940.

Fifteen rupees.”

#### THE CROWN GRANTS ACT (XV OF 1895)).<sup>1</sup>

[S. 1, Rep. in pt., Act X of 1914.]

[10th October, 1895.

*An Act to explain the Transfer of Property Act, 1882,<sup>2</sup> so far as relates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.*

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882,<sup>2</sup> and as the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows:—

Title, extent and commencement. 1. (1) This Act may be called THE CROWN GRANTS ACT, 1895.

#### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1895, Pt. V, p. 169, and for Proceedings in Council, see *Ibid.*, Pt. VI, pp. 328 and 355.

<sup>2</sup> This Act was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), Bur. Code.

#### SEC. 1: CONSTRUCTION OF CROWN GRANTS.

—A Crown grant is to be construed by its own terms and not by reference to the previous or subsequent act of the parties. 86 Bom.L.R. 761=1934 B. 434. The Crown Grants Act applies to grants by Government of Sunderbans lands. The Crown has unfettered dis-

cretion to impose any condition, limitation, or restriction in its grants. I.L.R. (1938) 2 Cal. 1=42 C.W.N. 239. The grants or leases of Sunderbans lands, which are lands vested in the Crown by sec. 39 of 21 and 22 Vic., c. 106, executed by the Sunderbans Commissioner on behalf of the Secretary of State for India in Council are Crown grants and to these grants the Crown Grants Act applies. I.L.R. (1938) 1 Cal. 626=42 C.W.N. 81=1938 Cal. 211. Where certain waste lands were granted by the Governor of a province of His Majesty under sec. 1 of the Government of India Act, *held*, that Crown Grants Act applied to the grant. 7 O.W.N. 683=1930 O. 441. Where a Government grant recited that “all tenures now in

(2) It extends to the whole of British India ; [\*] <sup>1</sup>

(3) [ \* \* \* \* \* ] <sup>1</sup>

2. Nothing in the Transfer of Property Act, 1882,<sup>2</sup> contained shall apply

Transfer of Property  
Act, 1882, not to apply to  
Crown grants.

or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of <sup>3</sup>[the Crown] to or in favour of, any person

whomsoever ; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

#### LEG. REF.

<sup>1</sup> The words "and" at the end of Cl. (2) and "it shall come into force at once" in Cl. (3) were repealed by Act X of 1914, Sch. II.

<sup>2</sup> This Act was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), Bur. Code.

<sup>3</sup> Substituted for "Her Majesty the Queen-Empress, her heirs or successors, or by or on behalf of the Secretary of State for India in Council," by Government of India (Adaptation of Indian Laws) Order, 1937.

the possession of the family of *E* must be declared released in perpetuity to heirs general under Mahomedan Law of descent, with a distinct proviso that no tenure now declared released in perpetuity can be alienable by an incumbent for any period longer or beyond his individual life" it was held that the grant created a succession of independent life estates in the sense of an estate which is only enjoyed by the holder thereof during his life and which could not be transferred by him for any period beyond his life and that each successive life estate holder derived title, not from or through the previous holder, but directly from the grant. Where one of the incumbents alienated certain property and such alienation remained unquestioned during his lifetime as well as by the incumbents of the next generation and was questioned by the latter's heirs, on a question whether the claim was barred, it was held that it was not, and that if any such descendant does not within 12 years of his becoming entitled to possession on the death of the last preceding incumbent attack such a transfer his right to recover the property for himself would be barred, but that would not bar the right of any of those coming after him. 1942 A.W. R. (H.C.) 266=1942 A.L.J. 430=A.I.R. 1942 All. 402. A grant of a village to *S.S.* by the Governor-in-Council of Fort St. George on behalf of the East India Company, recited, *inter alia*: "(a) The Governor-in-Council confirms to you and your heirs the village of *E. C.* as shrotriem so long as you discharge the rent and are obedient to the laws and regulations established or to be established, under the authority of the Governor-in-Council for the time being. (b) In confirming to you and your heirs as shrotriem the village of *E.C.*, you are to understand that the said village is not assignable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Hon'ble Company". Some of the successors in interest of *S.S.* created a usufructuary mortgage over the village.

Held, on a construction of the grant, (1) that the grant was a Crown grant governed by the Crown Grants Act, and the condition in Cl. (b) was perfectly valid, though such a condition would be invalid if the grant were by a private individual; (2) that had the document ended with Cl. (a), the estate created would not be anything other than an absolute estate of fee simple, and the clause against alienation in Cl. (b) did not make the estate created one of a series of life-estates; (3) that reverter to the grantor or his heirs on failure of the heirs of the grantee did not prevent an alienation, and the alienee would be entitled to enjoy the property at any rate, as long as the line of the grantee continued; (4) that the effect of an alienation was not merely to enable the grantor to resume on failure of legal heirs but also to enable the successors of the alienee to avoid the alienation on his death. 1945 M.W.N. 614=58 L.W. 486=(1945) 2 M.L.J. 307. In Bengal, Crown has conferred no market franchise or right of holding markets. Therefore, a proprietor cannot acquire such a right by prescription, as the right is treated as an incident to the ownership of land; and he has no remedy at law if any competitor holds a market in his proximity. 24 C.W.N. 800=58 I.C. 879=47 C. 1079. A trader usually haunting one market for the sale of his goods, can take the same to another without committing any unlawful act. (*Ibid.*)

ESTOPPEL.—Acts of Government officers, as—A particular construction put upon a Crown grant by the officers will not work as an estoppel against the Government. 36 Bom.L.R. 761=1934 B. 434.

CROWN DEBTS.—The right of the Crown to enforce payment of Crown debts cannot be taken away by statute except by express enactment. There can be no bar by implication. 1934 A.L.J. 221=1934 A. 170. As to priority of Crown debts, see 11 B. 467; 1933 S. 568 (1931 S. 164; (1940) 1 M.L.J. 429; (1938) 1 M.L.J. 351; 5 Bom.H.C.R.O. C. 23, Ref.) It is the duty of the Crown and of every branch of executive to abide by and obey the law. If there is any difficulty in ascertaining it, it is the duty of the executive in cases of doubt to ask for directions from the Court to ascertain the law, in order to obey it, and not to disregard it. 16 P. 159=18 Pat.L.T. 95=1937 P. 65 (S.B.).

SEC. 2.—The Crown in British India has power to grant or transfer lands and limit its descent in any way it pleases; but a subject has no power to impose on lands or other property, any limitation of descent at vari-

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

Crown grants to take effect according to their tenor.

ance with the ordinary law applicable. 40 A. 470=23 C.W.N. 101=45 I.A. 134 (P.C.).

Scope and effect of—Mining licence—Registration—Necessity. See (1945) 2 M.L.J. 400.

SECS. 2 AND 3.—Transfer of Property Act has no application to grants of Crown lands. 10 P. 208=1931 P. 268=131 I.C. 811. It is not only the T.P. Act, that is affected by the Crown Grants Act. Sec. 3 of the Act declares the unfettered discretion of the Crown to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be, a restrictive clause in a Crown lease which compels the lessee to refer any boundary dispute with the adjoining lessee, only to revenue authorities, is not affected by sec. 28 of the Contract Act. But such a clause cannot be availed of by a lessee of an adjoining lot, to oust the jurisdiction of the Civil Court, for the reason that his predecessors in interest were not parties to the contract entered into between the Secretary of State in Council and the other lessees' predecessors in interest. I.L.R. (1938) 1 Cal. 626=42 C.W.N. 81=1938 Cal. 211. See also 1939 All. 263. The provisions of secs. 2 and 3 do not include all leases executed by or on behalf of Government from the operations either of sec. 107, T.P. Act or of the Registration Act which provides for the cases of documents exempt from registration when executed by or on behalf of Government. 36 A. 176=22 I.C. 932=12 A.L.J. 219. A provision in a lease granted by Government of land situate in Malabar that the lessee will not erect buildings, on the ground, is not consistent with sec. 19 of the Malabar Compensation for Tenants Improvements Act and is saved by sec. 3 of the Crown Grants Act. 43 M. 65=53 I.C. 345=37 M.L.J. 532. The expression "grant" in sec. 2 denotes not only the transfer of prerogative rights possessed by the Crown but also transfers of land of every description. (*Ibid.*) Where a Crown grant consists of a lease of land in the Malabar District containing a reservation of the right to terminate the tenancy on six months' notice and the lessee expressly covenanted to surrender, *held*, that under sec. 3, the lease must take effect according to its tenor and the Government is entitled to a decree for ejectment without paying for improvements. 41 M.L.J. 494=69 I.C. 475. The exemption of waste lands from payment of land revenue does not *ipso facto* exempt such land from Land Revenue Act and Tenancy Act. 28 N.L.R. 169=1932 N. 75 (F.B.). Where certain property which had been acquired by the Secretary of State under the Land Acquisition Act was sold in Court auction. *Held*, that the sale was immune from a claim for pre-emption in view

of the provisions of sec. 3 of the Crown Grants Act. 8 Luck. 322=10 C.W.N. 113=1933 O. 134 (F.B.).

SEC. 3.—An inam which is a Crown grant will be governed by sec. 3 of the C.G. Act which excludes the application of the personal law. If there is any ambiguity in the inam certificate, the question would have to be decided in accordance with the Inam Rules of 1859. I.L.R. (1940) Nag. 244=1940 N.L.J. 78=1940 Nag. 129. The effect of sec. 3 is that when a grant has been made by the Crown, the Crown is not with reference to that grant, bound by any of the sections of either the Tenancy Act or the Transfer of Property Act or the Contract Act. 181 I.C. 584=1939 A.L.J. 164=1939 All. 263. See also 1931 Pat. 258; 1938 Cal. 211; (1938) 1 M.L.J. 656. All that sec. 3 means is that the Crown is entitled to put such conditions in a grant which a private individual could not but the only advantage to the grantee is that the grant to him is not invalid if given by the Crown when it might be invalid if given by an individual. It cannot be said to confer the right to sue on the grant if he had no such right, had the grant in his favour been made by an individual. 1938 O.A. 358=1938 O.W.N. 462=1938 Oudh 175. It is competent to the Crown to make a heritable grant of a village, conferring on the grant not an absolute estate, but a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who will succeed him; it is open to the Crown to create successive life estates or limited interests, and prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant. Sec. 3 is clear and expressly mentions that all limitations contained in a Crown grant shall be valid and take effect according to their tenor notwithstanding any statute or enactment of the Legislature, which would take in sec. 60, C.P. Code. I.L.R. (1938) Mad. 767=1938 Mad. 623=(1938) 1 M.L.J. 686. See also 1937 A.L.J. 567=1937 All. 533. A tenure was created in 1842, by the proprietor of an estate, and granted in consideration of services to be rendered as *barkandaz*. The estate was subsequently forfeited to Government, and in 1881, there was a formal dispensation with the services which the *jagirdar* had to render as *barkandaz*, and a new grant was created of the tenure freed of those services at an annual rent. The new grant created a *jagir* for the descendants of an earlier *jagirdar* to enjoy so long as any of his descendants should survive. There was a stipulation that the *jagirdar* had no power to transfer by sale or by creation of *mokkarrari* tenures any part of the tenure with a liability to resumption if unauthorised trans-



**THE CURRENCY ACT (IV OF 1927).**

[Repealed by Reserve Bank Act (II of 1934), S. 60.]

**THE CUTCHI MEMONS ACT (X OF 1938).**

[8th April, 1938.]

*An Act to provide that all Cutchi Memons shall be governed in matters of succession and inheritance by the Muhammadam Law.*

WHEREAS it is expedient that all Cutchi Memons be governed in matters of succession and inheritance by the Muhammadam Law; It is hereby enacted as follows:—

Short title and commencement. 1. (1) This Act may be called **THE CUTCHI MEMONS ACT, 1938.**

(2) It shall come into force on the 1st day of November, 1938.

Cutchi Memons to be governed in certain matters by Muhammadan Law. 2. Subject to the provisions of section 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Muhammadan Law.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

Savings.

Repeal.

[4. The Cutchi Memons Act, 1920, is hereby repealed. (Repealed by Act XXV of 1942.)]

**THE DECREES AND ORDERS VALIDATING ACT (V OF 1936).**

[26th April, 1936.]

*An Act to remove certain doubts and to establish the validity of certain proceedings in High Courts of Judicature in British India.*

WHEREAS doubts have arisen as to the validity of certain proceedings in High Courts of Judicature in British India under the Letters Patent erecting and establishing those Courts;

AND WHEREAS it is expedient to terminate those doubts and to establish the validity of those proceedings;

It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called **THE DECREES AND ORDERS VALIDATING ACT, 1936.**

fer should be made. *Held*, (1) that the tenure was a Crown grant, a grant affected by the Crown Grants Act in such a manner that the provisions of the Transfer of Property Act would not apply to it, so that it took effect according to its tenor whatever might be the conditions laid down; (2) that the grant made a clear restriction against alienation and granted a limited interest which was not transferable either by operation of law or by voluntary alienation; and (3) the estate could not therefore be attached and sold in execution of a decree against the jagirdar. 1939 Pat. 598. Rowland, J.—When a Crown grant contains a prohibition against alienation of the estate, that prohibition must take effect in accordance with its terms. 18 Pat. 370=1939 Pat. 598.

CUTCHI MEMONS ACT, SEC. 3.—The Cutchi

Memons Act applies not only to wills made after the passing of the Act but also to wills made before it was passed. A will speaks only from the death of the testator and a will made in 1933 by a Cutchi Memon who died in 1941, is not saved. The right which is intended to be saved by sec. 3 is a right acquired before the passing of the Act. After the passing of the Act, the will of every Cutchi Memon has to be construed and looked at from the point of view of Mahomedan law. 44 Bom.L.R. 792=A.I.R. 1942 Bom. 328 (2). Will executed by codicil—Law applicable—A Cutchi Memon is governed by the Mahomedan Law so far as the execution of his will and a codicil is concerned. (43 Bom. 641, Rel. on.) 47 L.W. 719=1938 M.W.N. 699=1938 Mad. 616=(1938) 1 M.L.J. 444.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. No decree passed or order made by the High Court of Judicature at Fort William in Bengal, the High Court of Judicature at Madras or the High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction under clause 12 of its Letters Patent, or by the High Court of Judicature at Rangoon, in the exercise of its original civil jurisdiction under clause 10 of its Letters Patent, shall be called in question in any proceedings before any other Court on the ground that the High Court passing the decree or making the order had no jurisdiction to pass or make the decree or order.

3. Where in any proceedings concluded on or after the 26th day of August, 1935, any such decree or order has been found to be invalid on such ground by any Court, such finding shall be void and of no effect; and the Court shall, notwithstanding anything to the contrary in the Indian Limitation Act, 1908, or any other law for the time being in force, on application made within six months from the commencement of this Act by any person prejudicially affected by such finding, restore the proceedings at and continue the proceedings from the stage reached immediately before the order embodying or based on such finding was made.

## THE DELHI LAWS ACT (XIII OF 1912).

*Supplemented and Amended Act (VII of 1915).*

Year.	No.	Short title.	Amendment.
1912	XIII	The Delhi Laws Act, 1912.	Supplemented and amended, Act VII of 1915.

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### SECTIONS.

1. Short title and commencement.
2. Saving of territorial application of enactments.
3. Construction of certain enactments in force in the territories mentioned in Schedule A.
4. Powers of Courts and Local Government for purposes of facilitating application of enactments.

### SECTIONS.

5. Vesting of powers of separate Officers in single Officer.
6. Pending proceedings.
7. Power to extend enactments in force in other parts of British India with modifications and restrictions.

SCHEDULE A.

SCHEDULE B.

[18th September, 1912.]

*An Act to provide for the application of the law in force in the Province of Delhi and for the extension of other enactments thereto.*

WHEREAS by Proclamation published in Notification No. 911, dated the seventeenth day of September, 1912, the Central Government, with the sanction and approbation of the Secretary of State for India, has been pleased to

SEC. 2.—S. 2 makes provision not only for the sanctity of the decrees passed by the Presidency High Court but has declared that orders passed by those Courts will also be sacrosanct. Hence decrees passed by

the High Court of Bombay and orders in execution thereof cannot be declared by the High Court of Allahabad to be *ultra vires* or without jurisdiction. 1941 A.L.J. 511=1941 All. 358—I.L.R. (1941) All. 664.

take under its immediate authority and management the territory mentioned in Schedule A, which was formerly included within the Province of the Punjab, and to provide for the administration thereof by a Chief Commissioner as a separate Province to be known as the Province of Delhi;

AND WHEREAS it is expedient to provide for the application of the law in force in the said territory, and for the extension of other enactments thereto; It is hereby enacted as follows:—

Short title and commencement. 1. (1) This Act may be called THE DELHI LAWS ACT, 1912; and

(2) It shall come into force on the first day of October, 1912.

2. The Proclamation referred to in the preamble shall not be deemed to have effected any change in the territorial application of any enactment notwithstanding that such enactment may be expressed to apply or extend to the territories for the time being under any particular administration.

3. All enactments made by any authority in British India and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments which immediately before the commencement of this Act were in force in, or prescribed for, any of the territories mentioned in Schedule A, shall in their application to that territory, be construed as if references therein to the authorities, or gazette mentioned in column 1 of Schedule B were references to the authorities, or gazette respectively mentioned or referred to opposite thereto in column 2 of that Schedule:

1[\* \* \* \* \*]

4. For the purpose of facilitating the application to the territory mentioned in Schedule A or any part thereof of any enactment passed before the commencement of this Act or of any notification, order, scheme, rule, form or by-law issued, made or prescribed under any such enactment—

(1) Any Court may, subject to the other provisions of this Act, construe the enactment, notification, order, scheme, rule, form or by-law with such alterations not affecting the substance as may be necessary or proper to adapt it to the matter before the Court, and

(2) the Provincial Government may, subject to the other provisions of this Act by notification in the *Official Gazette*, direct by what Officer any power or duty shall be exercised or discharged, and any such notification shall have effect as if it enacted in this Act.

5. (1) A notification issued under S. 4, sub-section (2), may direct that any powers or duties vested in separate Officers may be consolidated and vested in, and discharged by, a single Officer.

(2) Where by such a notification appellate powers are consolidated and vested in a single Officer, the period of limitation for the consolidated appeal shall be the longest period provided in the case of an appeal to any of the Officers whose powers are so consolidated.

6. Nothing in this Act shall affect any proceeding which at the commencement thereof is pending in respect of any of the territory mentioned in Schedule A, and every such proceeding shall be continued as if this Act had not been passed:

Provided that all proceedings which at the commencement of this Act are pending before the Commissioner of the Division or any other authority within the territory mentioned in Schedule A shall be transferred to, and disposed of by, such authorities in the Province of Delhi as the Provincial Government may, by notification in the *Official Gazette*, direct.

Power to extend enactments in force in other parts of British India with modifications and restrictions.

7. The [Provincial Government] may, by notification in the *Official Gazette*, extend with such restrictions and modifications as <sup>1</sup>[it] think fit to <sup>2</sup>[the Province of Delhi] or any part thereof, any enactment which is in force in any part of British India at the date of such notification.

## SCHEDULE A.

(See section 3.)

## THE PROVINCE OF DELHI.

That portion of the District of Delhi comprising the Tahsil of Delhi and the police station of Mahrauli.

## SCHEDULE B.

(See section 3.)

1	2
Reference.	Construction.
1. <sup>3</sup> [ * * * ] ..	
2. The Provincial Government of the Punjab. ..	
3. <sup>3</sup> [ * * * ] ..	
4. <sup>3</sup> [ * * * ] ..	
5. The Chief Customs Authority ..	
6. The Financial Commissioner ..	
7. The Commissioner of Revenue ..	
8. The Commissioner of the Division ..	
9. The Commissioner ..	
10. The Chief Secretary to Government ..	
11. A Secretary to Government or to the Provincial Government ..	
12. All officers and official bodies not mentioned in the foregoing clauses except the Treasurer of Charitable Endowments whose authority extended immediately before the commencement of this Act over the territory mentioned in Schedule A. ..	The Provincial Government of Delhi.
13. <sup>4</sup> [ * * * ] ..	Such officials or official bodies respectively as the Provincial Government may, by notification in the <i>Official Gazette</i> , direct.

## NOTIFICATIONS UNDER DELHI LAWS ACT, 1912.

## HOME DEPARTMENT.

[30th May, 1939.

No. 189/38.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), and in supersession of all previous notifications under that section extending Punjab Acts to the Province of Delhi or any part thereof, except the notification of the Government of India, in the Department of Education, Health and Lands, No. F. 117/32-L. & O., dated the 26th January 1933, the Central Government is pleased to extend to the Province of Delhi or such part thereof as is specified in the second column of the Schedule annexed hereto, the enactments specified in the corresponding entry in the first column thereof, subject to the restrictions and modifications, if any, specified in the corresponding entry in the third column, and to the following provisions namely:—

(i) references in the first column of the said schedule to an Act shall be deemed to be references to that Act as in force in the Punjab on the date of this notification, and

(ii) references in the said enactments to the Provincial Government shall be construed as references to the Chief Commissioner of Delhi, and references to the Punjab shall be construed as references to the Province of Delhi.

## LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> The words "the Province of Delhi" were substituted for the words "the territory mentioned in Schedule A" by Act VII of

1915, S. 7.

<sup>3</sup> Items 1, 3 & 4 were repealed by A.O., 1937.

<sup>4</sup> Item 13 was repealed by *ibid*.

Provided that all notifications, orders, bye-laws, rules and regulations made or issued under any of the enactments extended to the Province of Delhi or any part thereof by the notifications hereby superseded, shall continue to be in force as if made or issued under the corresponding enactment extended by this notification ; and all proceedings taken under any of the enactments extended by the superseded notifications shall be continued as if taken under the corresponding enactment extended by this notification.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
1. The Punjab Pre-emption Act, 1913 (Punjab Act I of 1913).	That part of the province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
2. The Redemption of mortgages (Punjab) Act, 1913 (Punjab Act II of 1913).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
3. The Punjab Excise Act, 1914 (Punjab Act I of 1914).	The Province of Delhi.	<p>(1) Throughout the Act for the words "Financial Commissioner" wherever they occur, the words "Chief Commissioner" shall be substituted.</p> <p>(2) Clauses (4), (7) and (11) of section 3, sections 9, 13 and 33-A, sub-section (3) of section 35 and clause (b) of sub-section (2) of section 58 shall be omitted.</p> <p>(3) For section 8 the following section shall be substituted, namely :—"8. (a) The general superintendence and administration of all matters, relating to excise shall vest in the Chief Commissioner.</p> <p>(b) Subject to the control of the Chief Commissioner and unless the Chief Commissioner shall by notification otherwise direct, the Collector shall control all the excise officers in the Province of Delhi."</p> <p>(4) In clause (a) of section 10 the word "other" shall be omitted.</p> <p>(5) For section 12 the following section shall be substituted, namely :—</p> <p>"12. The Jurisdiction of the Collector and other excise officers shall, unless the Chief Commissioner otherwise directs, extend to the whole of the Province of Delhi."</p> <p>(6) In clause (b) of section 15 for the words "A Commissioner or Collector" the words "The Collector" shall be substituted.</p> <p>(7) In sections 21 and 22 for the words "as the Provincial Government may impose" the words "as he thinks fit" shall be substituted.</p>
4. The Punjab Military Transport Act 1916 (Punjab) Act I of 1916).	The Province of Delhi.	Throughout the Act for the words "Central Government" wherever they occur, the words "Chief Commissioner" shall be substituted.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
5. The Punjab Courts Act, 1918 (Punjab Act VI of 1918).	The Province of Delhi.	In section 20, for the words "Provincial Government" the words "Central Government" shall be substituted. <sup>1</sup>
6. The Punjab Village and Small Towns Patrol Act, 1918 (Punjab Act VIII of 1918).	The Province of Delhi.	..
7. The Punjab District Boards Amendment Act, 1919 (Punjab Act V of 1919).	The Province of Delhi.	..
8. The Punjab Primary Education Act, 1919 (Punjab Act VII of 1919).	The Province of Delhi.	(1) Sub-section (2) of section 1 shall be omitted. (2) In section 10— (i) in clause (a) after the word "education" the words "conducted in his vernacular" shall be inserted; and (ii) to clause (c) the following proviso shall be added, namely :— "Provided that in the case of boys over ten years of age attendance at a night school conducted on lines approved by the Superintendent of Education shall be deemed to satisfy this condition." (3) In section 11 for the words "Director of Public Instruction" the words "Superintendent of Education" shall be substituted. Sub-section (2) of section 1 shall be omitted.
9. The Punjab Limitation (Custom) Act, 1920 (Punjab Act I of 1920).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
10. The Punjab Custom (Power to Contest) Act, 1920 (Punjab Act II of 1920).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	Sub-section (2) of section 1 shall be omitted.
11. The Punjab Municipal Amendment Act, 1921 (Punjab Act I of 1922).	The Province of Delhi.	Sub-section (2) of section 1 and section 5 shall be omitted.
12. The Punjab Village Panchayat Act 1921 (Punjab Act III of 1922).	The Province of Delhi.	(1) In the Second proviso to section 4 for the words and figures "estate as defined by the Land Revenue Act, 1887," the words and figures "Estate as defined by the Punjab Land Revenue Act, 1887, or of a mahal as defined by the United Provinces Land Revenue Act, 1901" shall be substituted. (2) In the proviso to section 26, after the figures "1887" the words and figures "or the Agra Tenancy Act, 1901, as the case may be" shall be inserted. (3) In section 26-A, the words and figures "or the Punjab Loans Limitation Act, 1904" shall be omitted.
13. The Court-Fees (Punjab Amendment) Act, 1922 (Punjab Act VII of 1922).	The Province of Delhi.	Sub-section (3) of section 1 shall be omitted.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
14. The Indian Stamp (Punjab Amendment) Act, 1922 (Punjab Act VIII of 1922).	The Province of Delhi.	Sub-section (3) of section 1 shall be omitted.
15. The Punjab District Boards (Amendment) Act, 1922 (Punjab Act XI of 1922).	The Province of Delhi.	..
16. The Punjab Municipal (Amendment) Act, 1923 (Punjab Act II of 1923).	The Province of Delhi.	<p><sup>1</sup>[In section 16, in the substituted section 61, after the words "until provision to the contrary is made by the Central Legislature" the following shall be inserted namely :—</p> <p>"and, with the previous sanction of the Provincial Government, may, from time to time—</p> <p>(i) vary the limits fixed under clause (g) of section 188 for the collection of any terminal tax, and</p> <p>(ii) vary the schedule of animals or articles subject to such tax and enhance, reduce or modify the rates thereof".</p> <p>Sub-sections (2) and (3) of section 1 shall be omitted.</p>
17. The Punjab Opium Smoking Act 1923 (Punjab Act VI of 1923).	The Delhi Municipality.	(1) Sub-sections (2) and (3) of section 1 shall be omitted.
18. The Punjab Motor Vehicles Taxation Act, 1924 (Punjab Act IV of 1924).	The Province of Delhi.	<p>(2) In section 4, in sub-section (1) the words and figures "before the 30th day of April, 1925, or if such person commences to keep the motor vehicles for use after the 10th day of April, 1925, then," and the proviso to sub-section (2) shall be omitted.</p> <p>(3) In sections 11 and 12 for the word "Collector" wherever it occurs, the words "Additional District Magistrate" shall be substituted.</p> <p>(4) In section 12 for the word "Commissioner," wherever it occurs, the words "Deputy Commissioner" shall be substituted.</p>
19. The Punjab Municipal (Amendment) Act, 1925 (Punjab Act I of 1925).	The Province of Delhi.	..
20. The Opium (Punjab Amendment) Act, 1925 (Punjab Act III of 1925).	The Province of Delhi.	..
21. The Punjab District Boards (Amendment) Act, 1925 (Punjab Act VI of 1925).	The Province of Delhi.	Clause (i) of section 2 shall be omitted.
22. The Punjab Vaccination Law Amendment Act, 1925 (Punjab Act IX of 1925).	The Province of Delhi.	..
23. The Punjab Court-Fees (second Amendment) Act, 1926 (Punjab Act VI of 1926).	The Province of Delhi.	Sub-section (2) of section 1 shall be omitted.
24. The Prisons (Punjab Amendment Act), 1926 (Punjab Act IX of 1926).	The Province of Delhi.	..



Name of Act.	Area to which extended.	Restrictions and modifications.
1	2	3
25. The Good Conduct Prisoners' Probational Release Act, 1926 (Punjab Act X of 1926).	The Province of Delhi.	..
26. The Punjab Borstal Act, 1926 (Punjab Act XI of 1926).	The Province of Delhi.	(1) For section 3 the following section shall be substituted, namely :— "3. The Borstal Institution in which orders of detention passed under this Act are to be served shall be the Borstal Institution at Lahore." (2) Section 4, sections 15 to 34 and section 36 shall be omitted. Section 2, clause (i) of section 5 and sections 6 and 8 shall be omitted.
27. The Punjab Municipal (Amendment) Act, 1926 (Punjab Act XV of 1926).	The Province of Delhi.	..
28. The Punjab Tenancy (Amendment) Act, 1927 (Punjab Act II of 1927).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	(1) All references to the Financial Commissioner or the Commissioner shall be read as references to the Chief Commissioner of Delhi.
29. The Punjab Land Revenue (Amendment) Act, 1928 (Punjab Act III of 1928).	That part of the province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	(2) In section 4, in the proviso to the new section 4B-B for the words, brackets and figures "at the time of the commencement of the Punjab Land Revenue (Amendment) Act, 1928," the words and figures "on the 30th May, 1939" shall be substituted; (3) In clause (ii) of section 6, the words "through the Financial Commissioner" shall be omitted; (4) In clause (iii) of section 7, the words and figures "or of an area declared to be a small town under the provisions of the Punjab Small Towns Act, 1921" shall be omitted; (5) In section 13, for the words, figures and letter, "subject to the provisions of section 60-A" the words "subject to the condition of previous publication" shall be substituted; (6) In section 14, the new sections 60-A and 60-B, and in new section 60-C, the words "or the Financial Commissioner with the approval of the Provincial Government" shall be omitted.
30. The Public Gambling (Punjab Amendment) Act, 1929 (Punjab Act I of 1929).	The Province of Delhi.	Sub-sections (2) and (3) of section 1 shall be omitted.
31. The Punjab Vaccination Law Amendment Act, 1929 (Punjab Act II of 1929).	The Province of Delhi.	..
32. The Punjab Municipal and Small Towns Amending Act, 1929 (Punjab Act IV of 1929).	The Province of Delhi.	Clause (ii) of section 2 and section 3 shall be omitted.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
33. The Punjab Tenancy (Amendment) Act, 1929 (Punjab Act V of 1929).	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	..
34. The Punjab Pure Food Act, 1929 (Punjab Act VIII of 1929).	The Province of Delhi.	<p>(1) In section 6, the words "The Director of Public Health may and" in sub-section (1) and sub-sections (2) and (4) shall be omitted.</p> <p>(2) In section 19 the words "of the Director of Public Health or" and the words "as the case may be" shall be omitted.</p> <p>(3) Sub-section (5) of section 22 shall be omitted.</p> <p>(4) In the Schedule after the words and figures "Punjab Pure Food Act, 1929" wherever they occur, the words "as extended to the Province of Delhi" shall be inserted.</p>
"34-A. The Punjab Regulation of Accounts Act, 1930 (Punjab Act I of 1930).	The Province of Delhi.	<p>(1) In clause (ii.) of sub-section (7) of section 2, for the words "the Central or any Provincial Government" wherever they occur, the words "any Government in British India" shall be substituted.</p> <p>(2) In section 6 :—</p> <p>(a) in sub-section (1) after the word "may" the words "subject to the condition of previous publication" shall be inserted; and</p> <p>(b) the proviso to sub-section (2) shall be omitted."</p> <p>..</p>
35. The Punjab Alienation of Land (Amendment) Act, 1931 (Punjab Act I of 1931).	The Province of Delhi.	..
36. The Punjab Nurses Registration Act, 1932 (Punjab Act I of 1932).	The Province of Delhi.	<p>Only sections 2, 17, 19, 23 and 24 shall be in force subject to the following modifications, namely :</p> <p>(1) For section 2 the following section shall be substituted:—</p> <p>"2. In this Act,—</p> <p>(a) "registered person" means—</p> <p>(i) a person registered under a law which is in force in any part of British India and which has been recognised by a notification of the Chief Commissioner, or</p> <p>(ii) a person who is certified by the Chief Health Officer, Delhi, to have been employed, or to have been practising as a nurse, health-visitor, midwife, nurse-dai, trained-dai, or dai in the Delhi Province on the 10th July, 1935; Provided that no such certificate shall be granted to any person unless it is applied for on or before the 10th July, 1940; and</p>

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<sup>1</sup> Notification No. 194/1939, dated 11th September, 1940.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
37. The Punjab Wild Birds and Wild Animals Protection Act, 1933 (Punjab Act, II of 1933.) 38. The Punjab Municipal (Amendment) Act, 1933 (Punjab Act III of 1933.)	The Province of Delhi.  The Province of Delhi.	<p>(b) "unregistered person" means any person other than a registered person."</p> <p>2. In sub-section (2) of section 17 and section 19, for the words "Provincial Government," the words "Chief Commissioner" shall be substituted.</p> <p>3. In sub-section (1) of section 19, for the words and figures "sections 17 and 18" the word and figure "section 17" shall be substituted.</p> <p>4. In section 23, for the words "from the beginning to the end of clause (c)" the following words shall be substituted, namely :—</p> <p>"Any person who dishonestly makes use of any certificate of registration issued to him or to other any person under a law in force in any part of British India which has been recognised by the Chief Commissioner in pursuance of sub-clause (i), of clause (a) of section 2 of this Act, or of any certificate issued to him or to any other person by the Chief Health Officer, Delhi, in pursuance of sub-clause (ii) thereof."</p> <p>(1) Sub-section (2) of section 3 and section 2 shall be omitted.</p> <p>(2) In clause (v) of section 3 for the words "District Medical Officer of Health" the words "Chief Health Officer" shall be substituted.</p> <p>(3) In section 9 for the words "Secretary, Transferred Departments," the words "Deputy Commissioner" shall be substituted.</p> <p>(4) In section 15, in clause (b) of sub-section (1) of the substituted section 33, the figures "146," "155," "156," and "157" shall be omitted.</p> <p>(5) In section 30, sub-sections (4) and (5) of the substituted section 62, shall be omitted.</p> <p>(6) In section 31, in the substituted section 78-A,—</p> <p>(i) in sub-section (1) after the words "has agreed with" the words "a committee of another municipality or" shall be inserted ;</p> <p>(ii) In sub-section (2) after the words "joint area of the municipality and" the words</p>

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1 Notification No. 174/39, dated 9th November 1939.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
39. The Punjab Municipal (Amendment) Act, 1934 (Punjab Act I of 1934.)	The Province of Delhi.	<p>"the other municipality or the" and</p> <p>(b) after the words "subject to the control" of the words "the Committee of the other Municipality or" shall be inserted.</p> <p>(1) Sub-section (2) of section 1 shall be omitted.</p> <p>(2) For section 13 the following section shall be substituted, namely :—</p> <p>"13. In clause (c) of sub-section (1) of section 192 of the said Act, for the words "the Municipal area" the words such "unbuilt area" shall be substituted.</p>
40. The Punjab Land Revenue (Amendment) Act, 1934 (Punjab Act VI of 1934.)	That part of the Province of Delhi which is described in Schedule A to the Delhi Laws Act, 1912.	..
41. The Punjab Relief of Indebtedness Act, 1934 (Punjab Act VII of 1934.)	The Province of Delhi.	..
42. The Punjab Criminal Law (Amendment) Act, 1935 (Punjab Act II of 1935.)	The Province of Delhi.	..
43. The Punjab Municipal (Amendment) Act, 1935 (Punjab Act III of 1935.)	The Province of Delhi.	..
43-A. The Punjab Debtor's Protection Act, 1936 (Punjab Act II of 1936.)	The Province of Delhi.	<p>In section 6, for the word "Commissioner" the words "Chief Commissioner" shall be substituted.</p>
43-B. The Punjab Entertainments Duty Act, 1936 (Punjab Act III of 1936.)	The Province of Delhi.	<p>(1) In clause (b) of section 2, after the words and figures "Punjab Excise Act, 1914," the words "as extended to the Province of Delhi" shall be inserted.</p> <p>(2) In section 3—</p> <p>(i) in sub-section (1), for the words "Government of the Punjab" and "Provincial Government," the words "Central Government" shall be substituted;</p> <p>(ii) in sub-section (2) the words "it shall also be laid before the Punjab Legislative Assembly, and shall only take effect after it has been passed with such amendments, if any, as the assembly may make therein" shall be omitted;</p> <p>(iii) sub-section (3) shall be omitted.</p> <p>(3) In sub-section (1) of section 5, for the words "Provincial Government," the words "Central Government" shall be substituted.</p>

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<sup>1</sup> Notification No. 194/1939, dated 11th September, 1940.<sup>2</sup> Notification No. 173/1939, dated 9th November, 1939.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
		(4) . For the entries in the schedule, the following entries shall be substituted :— “(1) The Municipality of Delhi. (2) The Municipality of New Delhi. (3) The Notified area of the Civil Station, Delhi. (4) The Notified area of the Delhi Fort.”
44. The Punjab Copying Fees Act, 1936 (Punjab Act V of 1936.)	The Province of Delhi.	..
45. The Punjab Alienation of Land (Amendment) Act, 1936 (Punjab Act VII of 1936.)	The Province of Delhi.	..
46. The Suits Valuation (Punjab Amendment) Act, 1938 (Punjab Act I of 1938.)	The Province of Delhi.	..
47. The Court-Fees (Punjab Amendment) Act, 1939 (Punjab Act IV of 1939.)	The Province of Delhi.	..
47-A. The Punjab Alienation of Land (Amendment) Act, 1938 (Punjab Act II of 1938.)	The Province of Delhi.	..
48. The Punjab Registration of Money-lenders Act, 1938 (Punjab Act III of 1938.)	The Province of Delhi.	(1) In section 2,— (a) clause (3) shall be omitted. (b) in sub-clause (iv) of clause (8), for the words “the Central or any Provincial Government” wherever they occur, the words “any Government in British India” shall be substituted. (2) in sub-clause (iii) of clause (b) of section 3, for the words “a Commissioner,” the words “the Chief Commissioner” shall be substituted. (3) in sections 7 and 11, for the word “Commissioner” wherever it occurs, the words “Chief Commissioner” shall be substituted. In sub-clause (IV) of clause (4) of the Explanation below the section inserted by section 3, for the words “the Central or any Provincial Government” wherever they occur the words “any Government in British India,” shall be substituted.
49. The Punjab Alienation of Land (Third Amendment) Act, 1938 (Punjab Act V of 1938.)	The Province of Delhi.	
50. The Punjab Alienation of Land (Fourth Amendment) Act, 1938 (Punjab Act VIII of 1938.)	The Province of Delhi.	
51. The Provincial Insolvency (Punjab Amendment) Act, 1939 (Punjab Act III of 1939.)	The Province of Delhi.	

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1 Notification No. 132/39, dated 31st July, 1939.

2 Items 47-A to 55 added by Notification No. 194/39, dated 11th September, 1940.

Name of Act. 1	Area to which extended. 2	Restrictions and modifications. 3
<sup>1</sup> 53. The Punjab Excise (Amendment) Act, 1940 (Punjab Act I of 1940.)	The Province of Delhi.	..
<sup>2</sup> 54. The Punjab Motor Vehicles (Taxation (Amendment) Act 1940 (Punjab Act II of 1940.)	The Province of Delhi.	Sections 7, 8, 9 and 10 shall be omitted.
<sup>3</sup> 55. The Code of Criminal Procedure (Punjab Amendment) Act, 1940 (Punjab Act XI of 1940.)	The Province of Delhi.	..
<sup>4</sup> 56. The Punjab Criminal Law (Second Amendment) Act, 1940 (Punjab Act XIII of 1940.)	The Province of Delhi.	..
<sup>5</sup> 57. The Punjab Entertainments Duty (Amendment) Act, 1941 (Punjab Act III of 1941.)	The Province of Delhi.	
<sup>6</sup> 57-A. The Punjab Suppression of Indecent Advertisements Act, 1941 (Punjab Act VII of 1941.)	The Province of Delhi.	

No. 189/38-I.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to cancel the following notifications of the Government of India, extending certain enactments to the Province of Delhi, namely :—

(i) No. 460, dated the 13th March, 1914,

(ii) No. 5987-G., dated the 2nd June, 1917, and

(iii) No. F 844/36, dated the 15th January, 1937.

No. 189/38-II.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912, (XIII of 1912), the Central Government is pleased to direct that the following amendment shall be made in the notification of the Government of India in the Home Department, No. F. 32/3/37, dated the 10th November, 1937, namely :—

“In modification 1, for the words ‘local’ at both places where it occurs, the word ‘Provincial’ shall be substituted.”

No. 173/38 : dated 26th November, 1938.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to extend to the Province of Delhi the provisions of the Punjab Suppression of Immoral Traffic Act, 1935 (Punjab Act IV of 1935), with the following modifications, namely :—

(i) For the words “Provincial Government” wherever they occur the words “Chief Commissioner” shall be substituted.

(ii) In section 2 for the word “Punjab” the words “Delhi Province” shall be substituted.

(iii) In section 17 (1), for the words “may make rules” the words “may, subject to the condition of previous publication, make rules” shall be substituted; and (ii) the proviso shall be omitted.

No. F. 23-12/38-H : (Dated 15th February, 1939).—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912) and in supersession of the notifications of the Government of India, in the Department of Education, Health and Lands. No. F. 24-15/36-H., dated the 3rd June, 1936, and No. F. 24-15/36-H., dated the 26th January, 1937, the Central Government is pleased to extend to the Province of Delhi the enactments specified in the first column of the Schedule hereto annexed, with such restrictions and modifications, if any, as are specified in the corresponding entry in the second column of the said schedule.

#### SCHEDULE.

Name of Act. 1	Restrictions and modifications. 2
1. The Punjab Municipal (Amendment) Act, 1933 (Punjab Act III of 1933).	(1) Sub-section (2) of section 1, and section 2 shall be omitted.

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<sup>1</sup> Items 47-A to 55 inserted by Notification No. 194/39, dated 11th September, 1940.

<sup>2</sup> Notification No. 194/39, dated 30th November, 1940.

<sup>3</sup> Notification No. 104/41, dated 11th September, 1941.

<sup>4</sup> Notification No. 78/1941, dated 3rd May, 1941.

Name of Act. 1	Restrictions and modifications. 2
	( In clause (v) of section 3, for the words "District Medical Officer of Health" the words "Chief Health Officer" shall be substituted.
	(3) In section 9, for the words "Secretary, Transferred Departments," the words "Deputy Commissioner" shall be substituted.
	(4) In section 15, in clause (b) of sub-section (1) of substituted section 33, the figures "146" and "155, 156, 157" shall be omitted.
2. The Punjab Municipal (Amendment) Act, 1934 (Punjab Act I of 1934).	(1) Sub-section (2) of section 1 shall be omitted.
	(2) For section 13, the following section shall be substituted, namely :— "13. In clause (c) of sub-section (1) of section 192 of the said Act, for the words 'the Municipal area' the words 'such unbuilt area' shall be substituted.
3. The Punjab Municipal (Amendment) Act, 1935 (Punjab Act III of 1935).	

Notification No. 174/39 and 173/39 dated 9th November, 1939.—The following amendments shall be made in the Notification No. 189/38 dated 30th March, 1939, and the Schedule annexed thereto namely :—

1. For clause (i) in the said notification the following clause shall be substituted :—  
"(i) references in the first column of the said Schedule to an Act shall be deemed to be references—

(a) in the case of an amending Act, to that Act as modified by the inclusion therein of the adaptations and modifications, if any, made in the amendments effected thereby in the Act which it amended, by the Government of India (Adaptation of Indian Laws) Order, 1937 and

(b) in the case of an Act other than an amending Act, to that Act as in force in the Punjab on the date of this notification, and

No. A—801 dated 19th March, 1941.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to extend to the Province of Delhi the Bombay Lifts Act, 1939 (Bombay Act X of 1939), subject to the following modifications, namely :—

(i) References wherever they occur to the Provincial Government shall be construed as references to the Chief Commissioner.

(ii) In sub-section (1) of section 2, for the word "Bombay" the word "Delhi" shall be substituted; and to the said sub-section, the following proviso shall be added, namely :—

"Provided that except in so far as the Chief Commissioner may otherwise direct, nothing in this Act shall apply to any lift in any building maintained by the Public Works Department or the Military Engineer Services;"

(iii) In sub-section (1) of section 9, the words "in the City of Bombay to the Commissioner of Police and elsewhere" shall be omitted."

No. F. 28-13 (5)/41-F. & L. (C.)/19th May, 1941.—In exercise of the powers conferred by section 7 of the Delhi Laws Act, 1912 (XIII of 1912), the Central Government is pleased to extend to the province of Delhi the United Provinces Town Improvement (Appeals) Act, 1920 (III of 1920), with the following modification, namely :—

In section 2 of the said Act, for clause (1) the following clause shall be substituted, namely :—

"(1) 'High Court' means the High Court of Judicature at Lahore; and"

No. 189/38-III.—In exercise of the powers conferred by the fourth paragraph of section 1 of the Transfer of Property Act, 1882 (TV of 1882), the Central Government is pleased to extend sections 54, 107 and 123 of the said Act to the following areas in the Province of Delhi, namely :—

(a) Area within the jurisdiction of the Delhi Municipal Committee,

(b) Area within the jurisdiction of the New Delhi Municipal Committee,

(c) Area within the jurisdiction of the Notified Area Committee, Civil Lines, and

(d) Area within the jurisdiction of the Notified Area Committee, Fort.

## THE DELHI LAWS ACT (VII OF 1915).

Year.	No.	Short title	Amendment.
1915	VII	The Delhi Laws Act, 1915	Am. Act XVIII of 1919, Rep. in part, Act X of 1927.



PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill.—

"Owing to the issue of the proclamation cited in the preamble, adding certain territory, previously included in the United Provinces of Agra and Oudh, to the Province of Delhi, it has become necessary to take steps to declare the law in force in the territory so added.

Save in respect of a few enactments which are referred to below, the law in force in the Province of Delhi is declared to be in force in the territory now added to that province.

The enactments in force in the province of Delhi which are declared not to be in force in this territory are set forth in Schedule II.

In place of them the enactments specified in Schedule III, which are already in force in this area, are continued in force there. It is clearly undesirable to make any change in these laws, which mainly relate to land, if such a course can be avoided".—*Fort St. George Gazette*, Part III, 1st March, 1915.

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### SECTIONS.

- the added area.
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7. Amendment of section 7 of Act XIII of 1912. [*Repealed.*]
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- SCHEDULE III.

[22nd March, 1915.]

*An Act to declare the law in force in certain territory added to the Province of Delhi.*

WHEREAS by Proclamation published in Notification No. 984-C, dated 22nd day of February, 1915, the Governor-General in Council, with the sanction and approbation of the Secretary of State for India, has been pleased to take under his immediate authority and management the territory mentioned in Schedule I, which was formerly included within the United Provinces of Agra and Oudh, and to include the said territory in the Province of Delhi with effect from the 1st April, 1915;

And whereas it is expedient to declare the law in force in the said territory;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called **THE DELHI LAWS ACT, 1915.**

(2) It shall come into force on the first day of April, 1915.

Application to added area of law in force in existing Province of Delhi.

2. All enactments (except the enactments specified in Schedule II) for the time being in force in the territory specified in Schedule A to the Delhi Laws Act, 1912, and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments shall be deemed to be in force in the territory specified in Schedule I in the same manner and subject to the same modifications as they are for the time being in the territory specified in the said Schedule to the said Act.

Continuance in added area of certain laws now in force in the United Provinces.

3. The enactments specified in Schedule III, and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under those enactments shall continue to be in force in the territory specified in Schedule I:

Provided that in the enactments so continued and in all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed thereunder, reference to a Provincial Government, the Provincial Government of the

United Provinces of Agra and Oudh, or the Board of Revenue for the United Provinces shall be read as referring to the <sup>1</sup>[Provincial Government] of Delhi; references to a High Court or the High Court of Judicature of the North-Western Provinces as referring to the <sup>2</sup>[High Court of Judicature at Lahore,] and references to the Official Gazette for the United Provinces as referring to the Official Gazette.

Provision for facilitating application of certain enactments.

Exclusion of certain enactments from the added area.

4. For the purpose of facilitating the application to the territory mentioned in Schedule I of the enactments referred to in section 3, the powers conferred by sections 4 and 5 of the Delhi Laws Act, 1912, shall be exercisable in respect thereof.

5. Save as provided in sections 2 and 3 no enactment which is in force in the United Provinces of Agra and Oudh or any part thereof shall continue to be in force in the territory specified in Schedule I.

6. Nothing in this Act shall affect any proceedings which at the commencement thereof is pending in respect of any of the territory mentioned in Schedule I or of anything arising in such territory and every such proceeding shall be continued as if this Act had not been passed:

Pending proceedings.

Provided that the Provincial Government may, by notification in the Official Gazette, direct that any proceeding, criminal, civil or revenue, other than a proceeding pending before the High Court of Judicature for the North-Western Provinces, shall be transferred to, and disposed of, by the corresponding authority of the Delhi Province.

7. *Amendment of S. 7 of Act XIII of 1912. [Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Sch.]*

Construction.

8. This Act shall be construed with and deemed to be part of the Delhi Laws Act, 1912.

#### SCHEDULE I.

#### TERRITORY ADDED TO THE PROVINCE OF DELHI.

(See section 2.)

Revenue estates of—	
1. Subehpur.	25. Shamspur.
2. Jagatpur.	26. Gharaunda Nimkha Khadar.
3. Baqiabad.	27. Nagli Razapur.
4. Beharipur.	28. Chilla Sarauda Khadar.
5. Saadatpur Mahal Gujran.	29. Qarawalnagar wrf Dharauti Kalan.
6. Saadatpur Musalmanan.	30. Jivanpur Johripur.
7. Saadatpur Amad Delhi.	31. Mustafabad.
8. Wazirabad.	32. Mirpur Turk.
9. Khajuri Paramad.	33. Ziauddinpur.
10. Khajuri Khas.	34. Khanpur Dhani.
11. Garhi Mendu.	35. Maujpur.
12. Timarpur.	36. Ghonda patti Gujran Bangar.
13. Chandrawal.	37. Ghonda patti Chauhan Bangar.
14. Usmanpur.	38. Jafraabad.
15. Ghonda patti Gujran Khadar.	39. Uldanpur.
16. Ghonda patti Chauhan Khadar.	40. Babarpur.
17. Andhavli.	41. Siqdarpur.
18. Kaithwara.	42. Gokalpur.
19. Silampur Amad Delhi.	43. Sabauli.
20. Ghondi Khadar.	44. Mandauli.
21. Jatwara Khurd.	45. Taharpur.
22. Mubarakpur Reti.	46. Jhilmila.
23. Shakarpur Khadar.	47. Chandavli wrf Shadara.
24. Nagla Manchi.	48. Silampur Bangar.
	49. Silampur Khadar.

LEG. REF.

<sup>1</sup> Substituted by A.O., 1937, for "Chief Commissioner".

<sup>2</sup> The words "High Court of Judicature

at Lahore" were substituted for the words "Chief Court of the Punjab" by Act XVIII of 1919.

50. Ghondli Bangar.  
 51. Kakarduman.  
 52. Khureji Khas.  
 53. Khureji Baramad.  
 54. Shakarpur Khas Bangar.  
 55. Mandavli Fazilpur.  
 56. Hasampur Bhuapur.  
 57. Ghazipur.  
 58. Khichripur.

59. Gharaunda Nimka Bangar (Patpar-ganj).  
 60. Shakarpur Baramad.  
 61. Kotla.  
 62. Chilla Saraunda Bangar.  
 63. Dalupura.  
 64. Konāli.  
 65. Gharauli.

## SCHEDULE II.

ENACTMENTS IN FORCE IN THE DELHI PROVINCE WHICH WILL NOT BE IN FORCE IN THE TERRITORY ADDED TO THAT PROVINCE.

(See Section 2).

Year.	No.	Short title.	Remarks.
1	2	3	4
		<i>Acts of the Governor-General of India in Council.</i>	
1887	XVI	The Punjab Tenancy Act, 1887.	..
	XVII	The Punjab Land Revenue Act, 1887.	..
1[*	*	* * * * *]	
		<i>Punjab Acts.</i>	
1900	II	The Punjab Land Preservation (Chos) Act, 1900.	..
1912	V	The Colonization of Government Lands (Punjab) Act, 1912.	..
1913	I	The Punjab Pre-emption Act, 1913.	..
"	II	The Redemption of Mortgages (Punjab) Act, 1913.	..

## SCHEDULE III.

ENACTMENTS IN FORCE IN THE UNITED PROVINCE OF AGRA AND OUDH WHICH WILL CONTINUE TO BE IN FORCE IN THE TERRITORY ADDED TO THE DELHI PROVINCE.

(See Section 3.)

Year.	No.	Short title.	Remarks.
1	2	3	4
		<i>Act of the Governor-General of India in Council.</i>	
1882	IV	The Transfer of Property Act, 1882.	..
"	V	The Indian Easements Act, 1882.	..
1891	VIII	An Act to extend the Indian Easements Act, 1882, to certain areas, in which that Act is not in force.	..
		<i>United Provinces Acts.</i>	
1901	II	The Agra Tenancy Act, 1901.	..
"	III	The United Provinces Land Revenue Act, 1901.	..
1904	I	The United Provinces General Clauses Act, 1904.	In so far as it applies to the Agra Tenancy Act, 1901, and the United Provinces Land Revenue Act, 1901.

## THE DELHI RESTRICTION OF USES OF LAND ACT (XII OF 1941)

[8th April, 1941.

*An Act to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes.*

WHEREAS it is expedient to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes;

It is hereby enacted as follows:—

LEG. REF.

1 The entry relating to the Punjab Alienation of Land Act (XIII of 1900) was repealed by Act X of 1927.

**S. 3] THE DELHI RESTRICTION OF USES OF LAND ACT (XII OF 1941). 2113**

Short title, extent and commencement.

1. (1) This Act may be called **THE DELHI RESTRICTION OF USES OF LAND ACT, 1941.**

(2) It extends to the Province of Delhi.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “agriculture” includes horticulture and the planting and upkeep of orchards;

(2) “building” has the same meaning as in clause (2) of section 3 of the Punjab Municipal Act, 1911;

(3) “Chief Commissioner” means the Chief Commissioner of Delhi;

(4) “Deputy Commissioner” means the Deputy Commissioner of Delhi and includes any authority, not being an officer employed by the Delhi Improvement Trust, appointed by the Chief Commissioner, by notification in the Official Gazette, to perform all or any of the functions of the Deputy Commissioner under this Act;

(5) “place of worship” includes an *imambara*, *dargah*, *karbala* or *takya*;

(6) “prescribed” means prescribed by rules made under this Act;

(7) “road” means a metalled road maintained by the Central Government or by a local authority; and

(8) the expression “to erect or re-erect” in relation to any building has the same meaning as in clause (5) of section 3 of the Punjab Municipal Act, 1911.

3. (1) The Chief Commissioner may, with the previous sanction of the Central Government, by notification in the Official Gazette, declare any land adjacent to and within a distance of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act.

(2) Not less than three months before making a declaration under sub-section (1) the Chief Commissioner shall cause to be published in the Official Gazette and in at least two newspapers printed in a language other than English a notification stating that he proposes, with the previous sanction of the Central Government, to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made, and copies of every such notification or of the substance thereof shall be published by the Deputy Commissioner in such manner as he thinks fit at his office and in every revenue estate of which any part is included within the said boundaries.

(3) Any person interested in any land included within the said boundaries may, at any time before the expiration of thirty days from the last date on which a copy of such notification is published by the Deputy Commissioner, object to the making of the declaration or to the inclusion of his land or any part of it within the said boundaries.

(4) Every objection under sub-section (3) shall be made to the Deputy Commissioner in writing, and the Deputy Commissioner shall give to every person so objecting an opportunity of being heard either in person or by pleader, and shall after all such objections have been heard and after such further enquiry, if any, as he thinks necessary, forward to the Chief Commissioner the record of the proceedings held by him together with a report setting forth his recommendations on the objections.

(5) If before the expiration of the time allowed by sub-section (3) for the filing of objections no objection has been made, the Chief Commissioner may proceed at once to the making of a declaration under sub-section (1). If any

such objections have been made, the Chief Commissioner shall consider the record and the report referred to in sub-section (4) and shall hear any parties applying to be heard and may either—

(a) abandon the proposal to make a declaration under sub-section (1), or

(b) make such a declaration in respect of either the whole or a part or parts of the land included within the boundaries specified in the notification under sub-section (2).

(6) For the purposes of sub-section (3) a person shall be deemed to be interested in land if he is a "person interested" as defined in clause (b) of section 3 of the Land Acquisition Act, 1894, for the purposes of that Act or, where the land is land occupied by or for the purposes of a mosque, *imambara*, *dargah*, *karbala*, *takya* or Muslim graveyard, if he is a Muslim.

(7) A declaration made under sub-section (1), unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

4. (1) The Deputy Commissioner shall deposit at his office and at the office of the Municipal Committee, New Delhi, and at such other places as he considers necessary, plans showing all lands declared to be controlled areas for the purposes of this Act, and setting forth the nature of the restrictions applicable to the land in any such controlled area.

Plans of controlled areas to be deposited at certain offices.

(2) The plans so deposited shall be available for inspection by the public free of charge at all reasonable times.

5. No person shall erect or re-erect any building, or make or extend any excavation, or lay out any means of access to a road in a controlled area except with the previous permission of the Deputy Commissioner in writing.

Restrictions on building, etc., in a controlled area.

6. (1) Every person desiring to obtain the permission referred to in section 5 shall make an application in writing to the Deputy Commissioner in such form and containing such information in respect of the building, excavation or means of access to which the application relates as may be prescribed.

Application for permission to build, etc., and the grant or refusal of such permission.

(2) On receipt of such application the Deputy Commissioner, after making such enquiry as he considers necessary, shall, by order in writing, either—

(a) grant the permission, subject to such conditions, if any, as may be specified in the order; or

(b) refuse to grant such permission.

(3) When the Deputy Commissioner grants permission subject to conditions under clause (a) of sub-section (2) or refuses to grant permission under clause (b) of sub-section (2), the conditions imposed or the grounds of refusal shall be such as are reasonable having regard to the circumstances of each case.

(4) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building, not being a dwelling house, if such building is required for purposes subservient to agriculture, nor shall the permission to erect or re-erect any such building be made subject to any conditions other than those which may be necessary to ensure that the building will be used solely for the purposes specified in the application for permission.

(5) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building which was in existence on the date on which the declaration under sub-section (1) of section 3 was made, nor shall he impose any conditions in respect of such erection or re-erection unless it involves the addition of one or more storeys to the building or the extension of the plinth area of the building by more than one-eighth of the original plinth area, or there is a probability that the building will be used for a purpose other than that for which it was used on the date on which the said declaration was made.

(6) If at the expiration of a period of three months after an application under sub-section (1) has been made to the Deputy Commissioner no order in writing has been passed by the Deputy Commissioner permission shall be deemed to have been given without the imposition of any conditions.

(7) The Deputy Commissioner shall maintain a register with sufficient particulars of all permissions given by him under this section and the register shall be available for inspection without charge by all persons interested and such persons shall be entitled to take extracts therefrom.

7. (1) Any person aggrieved by an order of the Deputy Commissioner under sub-section (2) of section 6 granting permission subject to conditions or refusing permission may within thirty days from the date of such order prefer an appeal to the Chief Commissioner.

Right of appeal.

(2) The order of the Chief Commissioner on appeal shall be final.

8. (1) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by an order—

Compensation.

(a) refusing permission to make or extend an excavation, or granting such permission but imposing conditions on the grant, or

(b) refusing permission to lay out a means of access to a road, or granting such permission but imposing conditions on the grant, or

(c) granting permission to erect or re-erect a building but imposing conditions on the grant.

(2) When an order has been made refusing permission to erect or re-erect a building any person who has exercised the right of appeal given by sub-section (1) of section 7 may, within three months of the date of the order of the Chief Commissioner, make to the Chief Commissioner a claim for compensation on the ground that his interest in the land concerned is injuriously affected by the said order:

Provided that no claim for compensation may be made under this sub-section in respect of any land situated in a controlled area adjoining a road which has been constructed after the commencement of this Act or which was not at the commencement of this Act a road within the meaning of clause (4) of section 2.

(3) On receipt of a claim under sub-section (2) the Chief Commissioner shall either proceed to acquire the land concerned under the Land Acquisition Act, 1894, or transfer the claim for disposal to an officer exercising the powers of a Collector under the said Act:

Provided that in case the Chief Commissioner decides to acquire the land, the claimant shall be entitled to be repaid by the acquiring authority the amount of expense which he may have properly incurred in connection with the preparation and submission of his claim for compensation under this section, and in default of agreement such amount shall be determined by the authority deciding the value of the land in the proceedings under the Land Acquisition Act, 1894.

(4) Nothing in this section shall be deemed to preclude the settlement of a claim by mutual agreement.

9. If the Chief Commissioner decides to acquire the land under the Land Acquisition Act, 1894, then, notwithstanding anything contained in that Act,—

Compulsory acquisition.

(i) proceedings under section 5-A of that Act shall not be required;

(ii) the notification under section 6 of that Act shall be published within six months from the date of institution of the claim, failing which the claim shall be transferred for disposal to an officer exercising the powers of a Collector under that Act;

(iii) the market value of the land shall be assessed as though no declaration under section 3 (1) had been made in respect of the area in which it is situated and no restrictions upon its use and development had been imposed, any compensation already paid to the claimant or to any of his predecessors in interest for injurious affection being deducted from the market value as so assessed.

10. (1) When a claim is transferred for disposal under section 8 or section 9 to an officer exercising the powers of a Collector under the Land Acquisition Act, 1894, such officer shall make an award determining the amount of compensation, if any, payable to the claimant.

Amount of compensation  
how determined.

(2) The amount of compensation awarded under sub-section (1) shall in no case exceed—

(a) the amount that would have been payable if the land had been acquired under section 9 or

(b) the difference between the market value of the land in its existing condition having regard to the restrictions actually imposed upon its use and development by the order refusing permission to erect or re-erect a building thereon, and its market value immediately before the publication under sub-section (2) of section 3 of the notification in pursuance of which the area in which it is situated was declared to be a controlled area, and no compensation shall be awarded under sub-section (1)—

(i) unless the claimant satisfies the officer making the award that proposals for the development of the land which at the date of the application under sub-section (1) of section 6 are immediately practicable, or would have been so, if this Act had not been passed, are prevented or injuriously affected by the restrictions imposed under this Act, or

(ii) if and in so far as the land is subject to substantially similar restrictions in force under some other enactment which were so in force at the date when the restrictions were imposed under this Act; or

(iii) if compensation in respect of the same restrictions in force under this Act or of substantially similar restrictions in force under some other enactment has already been paid in respect of the land to the claimant or to any predecessor in interest of the claimant.

(3) The provisions of Parts III, IV, V and VIII of the Land Acquisition Act, 1894, shall so far as may be apply to an award made under sub-section (1) as though it were an award made under that Act.

11. Nothing in this Act shall affect the power of any authority to acquire land or to impose restrictions upon the use and development of land under any other enactment for the time being in force.

Saving for other enactments.

12. (1) No land within a controlled area shall be used for the purposes of a charcoal-kiln, pottery-kiln or lime-kiln and no land either within or outside a controlled area shall be used for the purposes of a brick-field or brick-kiln except under, and in accordance with the conditions of, a licence from the Chief Commissioner which shall be renewable annually.

Prohibition of use of any  
land as a brick-field, etc.,  
without a licence.

(2) The Chief Commissioner may charge such fees for the grant and renewal of such licences and may impose such conditions in respect thereof as may be prescribed.

(3) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by the refusal of a licence under sub-section (1).



Offences and penalties.

13. (1) Any person who—

(a) erects or re-erects any building or makes or extends any excavation or lays out any means of access to a road in contravention of the provisions of section 5 or in contravention of any conditions imposed by an order under section 6 or section 7, or

(b) uses any land in contravention of the provisions of sub-section (1) of section 12,

shall be punishable with fine which may extend to five hundred rupees and, in the case of a continuing contravention, with a further fine which may extend to fifty rupees for every day after the date of the first conviction during which he is proved to have persisted in the contravention.

(2) Without prejudice to the provisions of sub-section (1), the Deputy Commissioner may order any person who has committed a breach of the provisions of the said sub-section to restore to its original state or to bring into conformity with the conditions which have been violated, as the case may be, any building or land in respect of which a contravention such as is described in the said sub-section has been committed, and if such person fails to do so within three months of the order may himself take such measures as may appear to him to be necessary to give effect to the order, and the cost of such measures shall be recoverable from such person as an arrear of land-revenue.

Trial of offences.

14. No Court inferior to that of a Magistrate of the first class shall try any offence punishable under this Act.

Protection of persons acting under this Act.

15. No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Savings.

16. Nothing in this Act shall apply to—

(a) the erection or re-erection of buildings upon land included in the inhabited site of any village as defined in the revenue records;

(b) the erection or re-erection of a place of worship or a tomb or cenotaph or of a wall enclosing a graveyard, place of worship, cenotaph or *samadhi* on land which is at the time a notification under sub-section (2) of section 3 is published by the Chief Commissioner occupied by or for the purposes of such place of worship, tomb, *samadhi*, cenotaph or graveyard;

(c) excavations (including wells) made in the ordinary course of agricultural operations;

(d) the construction of an unmetalled road intended to give access to land solely for agricultural purposes.

Power to make rules.

17. (1) The Chief Commissioner may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(a) the form in which applications under sub-section (1) of section 6 shall be made and the information to be furnished in such applications;

(b) the regulation of the laying out of means of access to roads;

(c) the fees to be charged for the grant and renewal of licences under section 12 and the conditions governing such licences.

(3) All rules made under this section shall be subject to the condition of previous publication, which publication shall be made in the Official Gazette and in at least two newspapers printed in a language other than English; and the date to be specified under clause (3) of section 23 of the General Clauses Act, 1897, shall not be less than two months from the date on which the draft of the proposed rules was published.

## THE DESTRUCTION OF RECORDS ACT (V OF 1917).

Year.	No.	Short title.	Amendment.
1917	V	The Destruction of Records Act, 1917.	Repealed in part, XII of 1927.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill :—

“In present conditions documents are required to be placed in the custody of Government officers under a large number of enactments. In many of these Acts no provision exists for the destruction of such of them as have become valueless. For example there is no provision for the destruction of documents lodged with the Registrar of Joint Stock Companies under the Registration of Societies Act (XXI of 1860), the Provident Insurance Societies Act (V of 1912), the Indian Life Assurance Companies Act (VI of 1912), and the Indian Companies Act (VII of 1913); nor could such papers be dealt with under the Destruction of Records Act (III of 1879), as it stands. It is accordingly proposed to repeal and re-enact the Act of 1879 so as to make it conform to modern requirements. The principal feature of the draft Bill is that it empowers certain authorities to frame rules for the disposal by destruction or otherwise of documents which they may consider not of sufficient public value to justify preservation, and provides for the delegation to subordinate officers of the rule-making powers vested in the Local Government. The rule-making powers already vested in the High Courts and the Chief Controlling Revenue authorities by Act III of 1879 will not be affected by this Bill. To avoid overlapping, it is proposed to repeal the provisions of the enactments mentioned in this Schedule.”—(*Fort St. George Gazette*, Part III, 20th February, 1919, p. 2.)

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## SECTIONS.

1. Short title.
2. Definitions. [*Repealed.*]
3. Power to certain authorities to make rules for disposal of documents.
4. Validation of former rules for disposal of documents.

## SECTIONS.

1. Disposal of documents.
5. Saving of certain documents. [*Repealed.*]
6. [Repeals.]
- SCHEDULE. [*Repealed.*]

[28th February, 1917.]

*An Act to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers.*

WHEREAS it is expedient to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE DESTRUCTION OF RECORDS ACT, 1917.

2. 1[\* \* \* \*].

3. (1) The authorities hereinafter specified may, from time to time, make rules for the disposal, by destruction or otherwise, of such documents as are, in the opinion of the authority making the rules, not of sufficient public value to justify their preservation.

Power to certain authorities to make rules for disposal of documents.

(2) The authorities shall be—

(a) in the case of documents in the possession or custody of a High

Court or of the Courts of Civil or Criminal jurisdiction subordinate thereto,—the High Court;

(b) in the case of documents in the possession or custody of Revenue Courts and officers,—the Chief Controlling Revenue Authority; and

(c) in the case of documents in the possession or custody of any other public officer,—

<sup>1</sup>[(i) if the documents relate to purposes of a province, the Provincial Government or any officer specially authorised in that behalf by that Government;

(ii) in any other case, the Central Government or an officer specially authorised in that behalf by that Government].

(3) <sup>1</sup>[Rules made under this section by any High Court or by a Chief Controlling Revenue Authority or by an officer specially authorised in that behalf by any Provincial Government shall be subject to the previous approval of the Provincial Government; and rules made by an officer specially authorised in that behalf by the Central Government shall be subject to the previous approval of the Central Government.]

4. All rules and orders directing or authorising the destruction or other disposal of documents in the possession or custody of any public officer, heretofore made by a Provincial Government, or with the approval of the Provincial Government, by any authority not empowered to make such rules under the destruction of Records Act, 1879, shall be deemed to have had the force of law from the date on which they were made, and all such rules and orders now in force shall continue to have the force of law until they are superseded by rules made under this Act.

5. Nothing in this Act shall be deemed to authorise the destruction of any document which, under the provisions of any law for the time being in force is to be kept and maintained.

6. <sup>2</sup>[\* \* \* \* \*].

## THE SCHEDULE.

### REPEAL OF ENACTMENTS.<sup>2</sup>

## THE DISSOLUTION OF MUSLIM MARRIAGES ACT (VIII OF 1939).

[Rep. in part by Act XXV of 1942.]

[17th March, 1939.

*An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.*

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

(2) It extends to the whole of British India.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

SEC. 2: DISSOLUTION OF MARRIAGE—DECISION BY OATH OF WITNESS OR ARBITRATION—LEGALITY.—In a suit for dissolution of marriage under the Dissolution of Muslim Marriages Act, it is the Court which has to perform the function of a Qazi and it is the pronouncement of the Court made on a consideration of the evidence led in the case which dissolves the marriage, and that function cannot be delegated by the Court to anyone else either by arbitration or by accepting the statement of a witness on oath even with the consent of a party at least on an immaterial point in the case. 47 P.L.R. 119—A.I.R. 1945 Lah. 183.

Ground for divorce—Wife hating husband—Husband contracting debts. The fact that the wife has begun to hate the husband as he has been leading a shameful life is not a ground for divorce. Nor is the fact that the husband has been contracting debts or that he has taken any debts from the wife's mother deceitfully a ground. 46 P.L.R. 343.

SEC. 2 (ii): RETROSPECTIVE EFFECT.—When an Act is intended to provide a remedy for what is considered to be an existing unsatisfactory state of affairs, the intention is clearly that the remedy should be applied even though this may involve giving retrospective effect to some of its provisions. Consequently, S. (2) (ii) must be taken as intended to apply with retrospective effect. 194 I.C. 567—1941 Lah. 167. See also 1941 Lah. 292—43 P.L.R. 394—196 I.C. 139.

FAILURE TO MAINTAIN—IF MUST BE WILFUL.—There is nothing in the wording of S. 2 (ii) to suggest that the failure to maintain the wife must be wilful. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or to any other cause whatsoever. 194 I.C. 567—1941 Lah. 167. See also 1944 Lah. 336.

The maintenance contemplated is Cl. (11) of S. 2 is adequate maintenance—the provision of food, raiment and lodging, adequate for the wife; the statute could be defeated by half-hearted attempts at providing maintenance or providing maintenance which is not reasonably adequate. It is further absolutely immaterial whether the

failure to maintain is due to poverty, failing health, loss of work, imprisonment, or any other cause whatsoever. I.L.R. (1945) Kar. 327.

SEC. 2 (ii).—Husband's failure to maintain wife.—When entitles her to divorce. A Mahomedan husband is not legally bound to provide maintenance for his wife if the latter without reasonable cause refuses to live with her husband, disobeys his instructions and declines to co-habit with him and the husband's failure to maintain his wife in such circumstances cannot entitle the wife to a divorce under S. 2 (ii). A Mahomedan wife cannot compel her husband to divorce his other wife and if she refuses to live with her husband unless he divorced his other wife, there is no liability on the husband to maintain the wife and his failure to do so would not entitle the wife to a divorce under S. 2 (ii). A.I.R. 1944 Lah. 336—216 I.C. 194. If the wife is not ready and willing to perform her part of marital duties during the period in which she is living separately, the husband is under no obligation to maintain her, and his failure to maintain her in such circumstances does not bring the case within the ambit of S. 2 (ii). 46 P.L.R. 343—1945 Lah. 56. Where a Mahomedan husband refuses to pay the prompt dower due to his wife and the wife is forced to file a suit against him for it, she can refuse to stay with the husband and the latter is bound to maintain her even when she is staying apart from him for non-payment of her dower. No blame can attach to the wife as it is the failure of the husband to carry out his contract that gives her a right under the Mahomedan Law to refuse to go and live with him. Where the husband in such circumstances fails to maintain his wife, and never makes any attempt to induce his wife to go and live with him and does not send any one to fetch her to him in a proper and decent manner recording to the prevalent social custom of the parties, the husband must be held to have deliberately neglected to maintain his wife, and the latter is entitled to a dissolution of her marriage under S. 2 (ii) of the Act. 12 Cut.L.T. 5. See also 1941 Sind 23. The word 'neglect' implies wilful default or failure. Hence where a wife, through her own conduct in going away to her parent's house and not returning to the husband's

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years;

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

house, leads the husband to stop her maintenance, the Court will not allow dissolution of marriage for that would be giving her a benefit—if benefit it can be called—arising from her own wrongful acts. 1943 A.L.J. 540=1943 A.L.W. 582=1943 A.W.R. (H. C.) 264. Act VIII of 1939 does not lay down that its provisions shall be subject to the principles of Mahomedan law. The Act is complete in itself and crystallizes a portion of Mahomedan Law which before it came into force was not codified and consisted of principles only. All that has to be decided is whether the husband has maintained his wife for two years preceding the suit, irrespective of the fact whether the woman was entitled to maintenance or not under Muslim law. The Act does not make any difference between a rich wife and a poor wife. The responsibility of the husband to provide for his wife will continue even if she has her own personal property of great value. 209 I.C. 248=1943 Pesh. 73. Act is not subject to Mahomedan law.—The fact that the dissolution of Muslim Marriages Act, 8 of 1939, repealed S. 5 of N.W.F.P. Muslim Personal law ((Shariat) Application Act, 26 of 1937, clearly shows that the Legislature intended that the general provisions of Mahomedan law should not control the operation of Act 8 of 1939. The inference is clear that Act 8 of 1939 was expected to be complete by itself. The question whether a woman was entitled to maintenance under Mahomedan law would, therefore, be absolutely foreign to the inquiry under Act 8 of 1939, as to whether a marriage should be dissolved for failure on the part of the husband to pay maintenance. S. 2 (ii) has been deliberately couched in very wide terms so that a woman should be protected in any case, and there was no intention whatsoever that the Courts should find out whether the woman was entitled to maintenance or not under the Muslim law before they considered her claim to dissolution of marriage on the ground of failure to pay maintenance. A.I.R. 1945 Pesh. 51. See also 1943 Pesh. 73. "Period of two years"—Meaning and

computation of S. 2 (ii) contemplates an unbroken period of two years next before the suit and not periods aggregating to two years, and the period must be that immediately preceding the suit and not a period of at least two years which has been followed by a period during which the wife has been maintained. I.L.R. (1945) Kar. 327. A Muslim husband neglected and failed to provide maintenance for his wife for a period of ten years. In pursuance of a Magistrate's order, however, he had been paying maintenance allowance to his wife for some months during two years preceding the suit by the wife for the dissolution of the marriage. *Held*, that the payment of maintenance during two years preceding the suit did not debar the wife from relying on S. 2 (ii) in respect of the earlier period of ten years as a good ground for the dissolution of her marriage. I.L.R. (1941) Kar. 114=193 I.C. 347=13 R. S. 237=A.I.R. 1941 Sind 23.

SEC. 2 (vii).—S. 2 (vii) cannot be construed as allowing a woman who has been given in marriage by her father before she attained the age of puberty to repudiate the marriage in the same way as if she had been given in marriage by her uncle. All that S. 2 (vii) provides is that if a woman who has been given in marriage by her father before she has attained the age of 15 years repudiates the marriage before she has attained the age of 18 years, she is entitled to obtain a decree for dissolution of the marriage. Until she has obtained a decree that the marriage has been dissolved, the marriage must be regarded as subsisting. Where the woman concerned has not obtained a decree for the dissolution of marriage, she is not under the Mahomedan law as it stands, since she was given in marriage by her father, entitled to repudiate the marriage as if she had been given in marriage by her uncle. I.L.R. (1942) Kar. 3=15 R.S. 10=43 Cr.L.J. 647=A.I.R. 1942 Sind 92.

S53. 2 (viii) (a).—The wife was forced to live away from her husband for about 12

- (b) associates with women of evil repute or leads an infamous life, or
- (c) attempts to force her to lead an immoral life, or
- (d) disposes of her property or prevents her exercising her legal rights over it, or
- (e) obstructs her in the observance of her religious profession or practice, or
- ((f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;
- ((ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that—

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

years on account of his ill-treatment and her life was being made miserable by reasons of the fact that a return to her husband's house was out of the question as it meant submission to conditions impossible to a self-respecting woman. She was compelled to do without the society of her husband and could not marry any other person. She was forced to the degrading position of having to live with and be a burden upon her parents. *Held*, that it was reasonable in the circumstances to say that the husband was making her life miserable by cruelty of conduct within the meaning of S. 2 (viii) (a). I.L.R. (1941) Kar. 114=A.I.R. 1941 Sind 23.

SEC. 2 (viii) (d).—S. 2 (viii) (d) read as a whole seems to convey that the property must have been disposed of with the object or intention of preventing the wife from exercising her rights without her wishes or consent. The word "property" in the sub-clause should be interpreted in the sense of a substantial portion of a wife's property and its disposal in the sense of getting rid of that property not for the wife's benefit but for the selfish ends of the husband not with the object of meeting a pressing need but more in the sense of waste and this also done with the object of depriving the wife of her property and not with her consent or for things in and from which her consent might have been reasonably and legitimately presumed, implied or inferred. 46 P.L.R. 343=1945 Lah. 56. Where certain articles were left by the wife in her husband's house when she went to her parent's house with a view to their being used after her return, and she never came back to her husband's house where they remained, it cannot be said that the husband has prevented her from exercising her legal rights over such property within the meaning of S. 2 (viii) (d) of the Act. 1943 A.L.J. 540=1943 A.L.W. 582=1943 A.W.R. (H.C.) 264.

SEC. 2 (viii) (f).—A wife is entitled to a decree for dissolution of marriage, if her husband fails to provide for her maintenance for a period of two years, marries another wife and does not treat her equitably in accordance with the injunctions of the Quran. 45 P.L.R. 336=A.I.R. 1943 Lah. 310. Under the Act a Mahomedan husband has to treat all his wives equitably in accordance with the injunctions of Quran. Where a husband marries a second wife when his first wife either of her own accord or because of her parents' fault fails to live with her husband, she cannot claim dissolution of marriage on the ground that she has not been treated equitably. In fact the husband has had no chance of treating her at all equitably or otherwise. 1943 A.L.J. 540=1943 A.L.W. 582=1943 O.A. (H.C.) 264=1943 A.W.R. (H.C.) 264. It is only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution of the marriage. Where there has never, after the separation of the wife due to ill-treatment, been any real intention on the part of the husband or positive effort to treat the wife as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which, having regard to human imperfections and to the circumstances of the husband, could be considered as an honest effort in that direction, the case falls within the purview of S. 2 (viii) (f), I.L.R. (1941) Kar. 114=A.I.R. 1941 Sind 23.

SEC. 2 (ix).—The words 'Muslim Law' in S. 2 (ix) of the Act were employed by the Legislature to convey that divorce could be granted by the Courts for reasons for which it could have been granted under the shariat regardless of the fact whether that reason had been recognized by the British Indian Courts or not. A.I.R. 1945 Lah. 51.

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Notice to be served on heirs of the husband when the husband's whereabouts are not known.

3. In a suit to which clause (i) of section 2 applies—

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Effect of conversion to another faith.

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Rights to dower to be affected.

[6. Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937, is hereby repealed. —(Repealed by Act XXV of 1942).]

Repeal of section 5 of Act XXVI of 1937.

SECTION 4: SEC. NOT RETROSPECTIVE.—S. 4 is not retrospective in its operation, and it applies only to renunciations or conversions which take place after the Act came into force. If the renunciation took place before the Act came into force, the marriage would be dissolved automatically without any decree of Court. 43 P.L.R. 394—A.I.R. 1941 Lah. 292. See also 191 I.C. 420. The words “the renunciation. . . shall not by itself operate to dissolve the marriage,” are incapable of the interpretation “never has had the effect of dissolving the marriage.” In-

deed, the words of the statute are capable of only one meaning, namely, in future the renunciation will not dissolve a marriage. The enacting words being unambiguous, there is no occasion to resort to the preamble for aid in construing the statute, the Act is therefore not retrospective. Before the passing of the Act the law was that a marriage between Muslims became, under the texts, null and void, on either party apostatizing. 196 I.C. 127—A.I.R. 1941 Lah. 291.

Suit by wife before Act—Act coming into force during pendency of appeal. A wife



## THE DIVORCE ACT (IV OF 1869).

Year.	No.	Short title.	Amendment.
1869	IV	The Indian Divorce Act, 1869.	Repealed in part, VII of 1870; XII of 1873; IV of 1901, S. 8. Amended, VI of 1909; X of 1912, XVIII of 1919; XI of 1923; XXXII of 1925; XXV of 1926; XXXIV of 1926; XV of 1927; XXX of 1927; Act VIII of 1935; Supplem. Temporarily in Sind; Bom. Act VIII of 1930.

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not vested in her under any statute and consequently she could not insist that that right was indefeasible. The law applicable was as contained in S. 4 of Act by which no marriage was dissolved merely on account of change of faith. 198 I.C. 327=A. I. R. 1941 Lah. 22.

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THE DIVORCE ACT (IV OF 1869).<sup>1</sup>

[26th February, 1869.

*An Act to amend the law relating to Divorce and Matrimonial Causes in India.*

WHEREAS it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial ; It is hereby enacted as follows :—

Preamble.

LEG. REF.

1 For Statement of Object and Reasons, see Calcutta Gazette, 1863, p. 173; for Report of Select Committee, see Gazette of India, 1869, p. 192; for Proceedings in Council, see Calcutta Gazette, 1862, Supplement, p. 463; *ibid.*, 1863, Supplement, p. 48, and Gazette of India, 1869, Supplement, p. 291.

It has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act (XII of 1898), sec. 4 (1) and Sch. I; in the Arakan Hill District, see Schedule to the Arakan Hill District Laws Regulation (IX of 1874); in Angul and the Khondmals, Schedule to the Angul District Regulation (I of 1894); in the Sonthal Par-

gasas by sec. 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), *ibid.*; in British Baluchistan by the Baluchistan Regulation (I of 1890).

It has been declared by notification under sec. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

The District of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, see Gazette of India, 1881, Pt. I, p. 504.

The District of Lohardaga included that time the present district of Palamau which

## I.—PRELIMINARY.

Short title. Commencement of Act.

1. The Act may be called **THE INDIAN DIVORCE ACT**, and shall come into operation on the first day of April, 1869.

Extent of Act.

2. This Act shall extend to the whole of British India, and (so far only as regards British subjects within the <sup>1</sup>[territories] herein-after mentioned, to the <sup>2</sup>[Indian States].

## LEG. REF.

was separated in 1894. The District of Lohardaga is now called the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44.)

The Scheduled District in Ganjam and Vizagapatam, *see* Fort St. George Gazette, 1898, Pt. I, p. 666.

It has been extended by notification under sec. 5 of the same Act to the North-Western Provinces Tarai, *see* Gazette of India, 1876, Pt. I, p. 505.

The Limitation Act does not apply to suits under this Act, *see* the Indian Limitation Act (IX of 1908), sec. 29 (2).

<sup>1</sup> Substituted by Government of India (Adaptation of Indian Laws) Order, 1937.

<sup>2</sup> Substituted by *ibid.*

SEC. 1.—Jurisdiction in matrimonial causes was not based on a so-called matrimonial domicile when the Indian Councils Act was passed in 1861. 47 B. 843=25 Bom.L.R. 945=1923 B. 321. *See also* 143 I.C. 618=1933 Sind 70; 1933 A.L.J. 8=1933 A. 39. Act does not confer jurisdiction on the Court to dissolve the marriages of non-domiciled parties. 47 B. 843. Relief not involving the status of the parties may be granted under the Act if the conditions of residence are satisfied. 47 B. 843. Municipal Law of a country may lay down its own test for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. 47 B. 843. Whether Act applies to British subjects in Native States, *see* 10 B. 422. Relief under the Act cannot be granted to Jews. 34 C.W.N. 319=57 C. 1089=1930 C. 558. On this section, *see also* 38 B. 125; 8 Bom.L.R. 856; 17 M. 235. As to the jurisdiction of Indian Courts under the Indian and Colonial Divorce Jurisdiction Act, 16 & 17 Geo. V, ch. 40, sec. 3. *See* 10 L. 64=1928 L. 557. Courts in Native State (Mysore) have no jurisdiction to make decrees for judicial separation of Christian British subjects. 9 Mys.L.J. 269. (3 Mys.C.C.R. 78, Foll.). Divorce Act is and always has been within the legislative powers conferred upon the Indian legislature by the Indian Councils Act, 1861. 47 B. 843. There is a definite established practice in the Court for divorce and matrimonial causes in England that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances. This salutary rule will be followed. 1935 O.W.N. 103=1935 Oudh 133. Wild rumour and baseless suspicious cannot take the place of legal testimony which is required to substantiate an allegation of unchastity or immorality. Vague and indefinite evidence is insufficient for the

purpose. A.I.R. 1935 L. 112.

## DUTY OF COURT IN EX PARTE PROCEEDINGS.

—When in an application for divorce neither the respondent nor the co-respondent seek to resist the petition, the duty of special circum-spection is thrown upon the Court. The Court has discretion in certain specified events either to pronounce a decree for divorce or to dismiss the petition. The exercise of that discretion must be regular and systematic. For this purpose the Judge should make free use of his power to look into all the necessary circumstances even though his attention is not called to them by the party. The danger of collusion between the parties must always be borne in mind especially when there has been a long delay in applying to the Court for relief. 143 I.C. 618=1933 S. 70; 26 S.L.R. 423=1933 S. 27. Undefended divorce action—Trial of—Necessity for hearing in open Court—Trial held in breach of rule of publicity—Effect on decree—Principles—Setting aside—Time for. 40 C.W.N. 448=70 M.L.J. 385 (P.C.).

## SEC. 2: EFFECT OF AMENDING ACT OF 1926.

—By the Amending Act the jurisdiction of the Indian Courts under sec. 2 of the Act has been taken away only in respect of making decrees of dissolution of marriage between parties who are not domiciled in India. The other reliefs under the Act and the power to make decrees of nullity of marriage remain unaffected, the only requirements in the latter case being that the parties profess the Christian religion, the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition. 130 I.C. 524=1931 L. 245. As a result of the amendment in 1926 of sec. 2 of the Act, Courts in India are permitted to make decrees of nullity of marriage even though the parties presenting the petition are not domiciled in India. I.L.R. (1937) 1 Cal. 417=41 C.W.N. 268. The effect of sec. 2 of the Act is that so far as a suit for dissolution of marriage is concerned a domiciled British subject resident beyond British India, i.e., in Mysore can invoke the jurisdiction of the Madras High Court, but as regards a suit for nullity of marriage, any person resident in India who has been married in India can bring such a suit in the High Court. 59 M. 509 and 518=1936 M. 324=70 M.L.J. 321 (F.B.). Defect in the Act pointed out and amendment of the Act suggested. *See* 62 C. 82=39 C.W.N. 95.

JURISDICTION.—To grant relief under the Act, it must be proved that the conditions of sec. 2 are strictly complied with. *See* 29 C. W.N. 350=62 C. 379=1925 C. 585 (F.B.). *See also* 52 C. 566=89 I.C. 611=1925 C. 874.

Courts in India are not empowered to decree dissolution of the marriage between persons not domiciled within their jurisdiction. 1923 R. 223. The provisions of sec. 2 as to the residence apply to cases when the parties are domiciled in India but where the parties are domiciled in England, they cannot override the express provisions in sec. 7. (*Ibid.*). See also 143 I.C. 618=1933 Sind 70. Sec. 2 makes it clear that unless the parties to the marriage are domiciled in India at the time when the petition is presented, there is no jurisdiction in a District Court to dissolve the marriage and a decree, even if confirmed, would not be effective. If a decree for dissolution of marriage is granted by a Court having no jurisdiction, the marriage would subsist and either of the parties going through a subsequent form of marriage would be guilty of bigamy and any issue from such subsequent union would be illegitimate. I.L.R. (1943) Lah. 765=45 P.L.R. 313=A.I.R. 1943 Lah. 260 (S.B.). But as a result of the amendment of 1926, Courts in India are permitted to make decrees of nullity of marriage even though the parties preventing the petition are not domiciled in India. 169 I.C. 948=41 C.W.N. 268=I.L.R. (1937) 1 C. 417. The proper form of a decree to be passed in the first instance in a suit on the original side of the High Court for declaration of nullity of a marriage is that of a decree *nisi* and not a decree absolute. 59 M. 509 and 518=1936 M. 324=70 M.L.J. 321 (F.B.). Court should enquire and set out in the judgment facts relied on as conferring jurisdiction. 32 A. 293=5 I.C. 871=7 A.L.J. 193.

**DOMICILE.**—In a case of divorce, it is important to consider the question of domicile from the outset, because it goes to the very root of jurisdiction. 58 C. 1332=135 I.C. 455=1932 C. 161. See also 138 I.C. 611=1932 L. 468 (S.B.). It is necessary to see that there is proper proof of Indian domicile before giving a decree under the Act. The fact that the petitioner is shown to have been born in India and residing there is not sufficient to prove Indian domicile. 60 C. 601=144 I.C. 827=37 C.W.N. 255=1933 C. 524 (S.B.). Domicile in India at the time of the presentation of the petition for divorce is an absolute necessary condition of jurisdiction so far as regards divorce. The domicile of the parties means in practice the domicile of the husband. The burden of proving that a person has changed the domicile is on the person who alleges it. Where the petitioner was shown to have come to India to earn a living and intended to remain there so long as an opportunity to obtain a livelihood was open to him but he had formed no intention to settle in any one place. *Held*, that there being no intention to reside and establish himself in India for the rest of his days it could not be said that the petitioner was domiciled in India. 56 C. 530=1929 C. 599. The question of domicile should be treated with care, for unless the parties to the marriage are domiciled in India at the time when the peti-

tion is presented there is no jurisdiction in a District Court to dissolve the marriage. Residence alone, for however long a period, is by no means the test, and a safer guide is to enquire where the person, whose domicile is in question, intends to end his days. Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence but not otherwise. To these may be added the further propositions that the presumption of law is against a change of domicile, which must be proved by the person alleging it, and that a wife's domicile is the domicile of her husband. Where a European claims to be domiciled in India, it will be pertinent to enquire where his father lived and died or resides as the case may be, where he and his father were born, the circumstances in which he came to and resides in India, which will assist in ascertaining whether there exists an *animus revertendi* or an *animus manendi*, his object in residing in India, and generally as to the conditions under which he lives and his habits of life. 58 C. 259=1931 C. 383 (S.B.). See also 1943 Lah. 360. The presumption of law is that the domicile of origin continues and is against change of domicile. A change of domicile has to be strictly proved and evidence of a mere expression of intention to change is not sufficient. To prove a change of domicile it is necessary that the evidence should establish the intention of a person permanently to settle down in the country of his choice and to abandon forever the country of his origin as his residence. 223 I.C. 637=48 P.L.R. 72. A change of domicile from that of origin to one of choice—apart from any statutory declaration—has to be strictly proved and a very heavy onus lies on any person alleging such change. To establish such change the most cogent evidence is necessary and mere evidence of an expression of intention, supported by nothing else, is not sufficient. It is necessary that the evidence should establish the intention of a person permanently to settle down in the country of his choice and to abandon forever the country of his origin as his residence. I.L.R. (1943) Lah. 765=45 P.L.R. 313=A.I.R. 1943 Lah. 260 (S.B.). Sec. 11, Succession Act, merely provides a means for acquiring an Indian domicile for the purposes of succession under that Act. The making of a declaration under that section will not, therefore, affect the declarant's domicile for purposes of divorce. For the latter purposes the domicile of origin can only be changed when a person abandons the country of his origin and adopts the country of his choice as his permanent home. I.L.R. (1943) Lah. 765=45 P.L.R. 313=A.I.R. 1943 Lah. 260 (S.B.). See also 1945 Sind 152; 1945 Sind 171 (S.B.); I.L.R. (1943) Lah. 489=45 P.L.R. 186=1943 Lah. 62.

Domicile must be decided on the facts as they exist and not on future possibilities. Every person must have a domicile and until the petitioner abandons his present domicile

in India and becomes domiciled in some other country, he will remain within the jurisdiction of the Indian Courts. 1931 O. 126=8 O.W. N. 177. Where the petitioner alleged that he had been in India for 15 years and that the had no intention of returning to England and the respondent also stated that the intended to settle in India and it was proved that they had lived in India since the date of their marriage. *Held*, that their statements that they had made India their domicile could be accepted and the petition for divorce be entertained. 7 R. 313=119 I.C. 220=1939 R. 216 (S.R.). The mere statement of the petitioner, who is 42 years old and is in this country, because he is in the service of the Railway that he intends to continue to reside here is not proof of his domicile in India. 174 I.C. 992=1938 Lah. 292. Domicile is of two kinds: domicile of origin and domicile of choice. The domicile of origin is irrevocably ascertained at the parties' nativity. A domicile of choice, he can indeed acquire; but the domicile of origin remains in abeyance and is at any moment ready to revive. Every presumption is to be made in favour of the original domicile. It is for the party who relies on a change of domicile to prove a double intention: the intention of abandoning his domicile of origin and the intention of adopting the domicile of choice. A domicile of choice is not established by mere assertion. The petitioner left his native land under orders and not of his own free will. He came to India in obedience to other authority and not in the exercise of any choice of his own. Being thus transplanted he did not strike root. The petitioner, moreover was neither a householder, nor any member of any club in India, nor was he permanently employed. *Held*, that the petitioner was not domiciled in India. 1933 Sind 70=143 I.C. 618. If the domicile of the parties be English the Courts in India have no jurisdiction to dissolve their marriage notwithstanding that it was solemnized in India and that the adultery was committed in India. 1933 S. 70=143 I.C. 618.

**RESIDENCE.**—Residence in India is sufficient to give the Court jurisdiction under the Act, though the party retains a foreign domicile. 40 C. 215=17 C.W.N. 491; 53 C. 282=1926 C. 871. *See also* 5 L. 147 (161) (F.B.). Intention has nothing whatever to do with the question of residence. Whether or not a person resides in a particular district is a question of fact depending upon the evidence. Mere casual or temporary visits do not constitute "residence" within the meaning of the Act. *C*, a Railway employee, had official quarters provided for him by the Railway Company at Gondia, in the C.P. He had a bungalow there, and in the same compound an office. *C* had himself furnished the bungalow allotted to him. His position as Inspector entailed a good deal of travelling over the Railway line, and in every month he used to be for several days away from Gondia. But when in Gondia he lived at the quarters assigned to him. Shortly before the petition was filed, *C* came to Allahabad for two days and thereafter every month for the same

period, and on each occasion he saw his counsel in connection with his case. It was also alleged that he busied himself in trying to discover some portion of land which might be suitable for carrying on farming operations when he would retire from the Railway and set up business as a farmer and as a breeder of dogs. *Held*, that *C* had failed to establish that he was residing in Allahabad and his residence within the meaning of sec. 3 (1) was in Gondia. 1933 A. 385=1933 A. L.J. 579; 144 I.C. 136=1933 A.L.J. 8=1933 A. 39. *See also* 37 Bom.L.R. 55=1935 B. 121; 1942 Cal. 42. There will be a valid divorce in India though the marriage may be valid in the country of the domicile of origin. 40 C. 215=17 C.W.N. 491. Residence of the petitioner must be *bona fide* and not casual or as a traveller. 38 B. 125=15 Bom.L.R. 593. *See also* 32 A. 293. The High Court has no jurisdiction to grant a decree for restitution either against a Parsi respondent or a respondent not within Presidency. 38 B. 125=15 Bom.L.R. 593. In a divorce case before a final decree is passed the Court must definitely come to a finding on the question whether the marriage was solemnized in India and on what date. 57 I.C. 43=31 C.L.J. 340. Where in a petition for dissolution of marriage, the petitioner stated that her husband went to and fro from India and cohabited with her at various places and the last place of cohabitation was at some definite place in India. *Held*, that at the time of cohabitation both parties were domiciled in India and thus it conferred jurisdiction on Courts in India to hear the petition. 167 I.C. 743=1937 P. 82=18 Pat.L.J. 686.

**RESIDENCE IN INDIA AS MEMBER OF ARMY—WHETHER CONFERS INDIAN DOMICILE.**—An Englishman or Scotsman serving in His Majesty's Forces in India cannot acquire an Indian domicile by reason of his residence in India, as such residence is not voluntary but is due to the terms of his service. I.L.R. (1943) Lah. 765=45 P.L.R. 313=A.I.R. 1943 Lah. 260 (S.B.). While the chief or principal domicile of a party may remain unaltered, namely, the domicile which affects the status of marriage, there may be by a statutory enactment a qualified limited domicile added as it were to and qualifying the chief and principal domicile. Such a domicile is contemplated by the Indian Legislature in sec. 11, Succession Act, 1925. The domicile to be acquired under sec. 11 is to be acquired only for the purpose of the Act in which the section itself occurs and by the provisions of this Act, it is domicile only for succession to immoveable property for which sec. 11 provides. A member of the Armed Forces of the United States, having not the very least intention of residing permanently in India cannot by a year's enforced residence in India and by a mere declaration of a desire to acquire domicile, acquire such a domicile as would give jurisdiction to the Indian Court in the dissolution of his marriage. 1945 Sind 171.

*Per O'Sullivan, J.*—A domicile of choice is acquired by residence accompanied by the

Extent of power to grant relief generally. <sup>1</sup>[Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except where the petitioner (or respondent)<sup>2</sup> professes the Christian religion.]

and to make decrees of dissolution.

[or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

or of nullity.

[or to make decrees of nullity of marriage except where the marriage has been solemnized in India, and the petitioner is resident in India at the time of presenting the petition,

[or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.]

Interpretation clause.

3. In this Act, unless there be something repugnant in the subject or context,—

#### LEG. REF.

<sup>1</sup> This and the succeeding three paras. were substituted for the 2nd, 3rd and 4th paras. by Act XXV of 1926, sec. 2.

[See also under sec. 7.]

<sup>2</sup> Inserted by Act XXX of 1927.

<sup>3</sup> Sub-secs. (1) and (2) were substituted by Government of India (Adaptation of Indian Laws) Order, 1937.

*animus manendi* or intention to remain. A person may express, whether by a statutory declaration or otherwise, an intention which he does not in fact have. Expressions of intention whether written or oral may be given as evidence of the intention but they can never be conclusive evidence. They are to be weighed and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference. A.I.R. 1945 Sind 171 (S.B.).

**RIGHT TO INTERVENE.**—In a suit for divorce under this Act by a wife against her husband on the ground of adultery with a named woman, the latter has no right to intervene, whereas in a similar suit under the Indian and Colonial Divorce Jurisdiction Act she can so intervene. This defect in the Indian Act has to be removed by legislation. 62 C. 82=1935 C. 456.

**PROFESSION OF CHRISTIANITY.**—Relief under the Act can be granted only to Christians and not to non-Christians as Jews. 57 C. 1089=34 C.W.N. 319. Words 'or respondent'—Effect—One of the parties being Christian and other Parsi—Petition for restitution of conjugal rights—Maintainability. See 32 Bom.L.R. 1046=54 B. 877=1930 B. 385. A person does not cease to profess Christianity within the meaning of sec. 2 merely because she has been ex-communicated by the sect or the Church to which she belongs. 46 M. 839=45 M.L.J. 208=1924 M. 18. The question of profession of Christianity is a question of the party's own action and not of the action of the Church. (*Ibid.*) The conversion to Christianity of one of two married Hindus does not dissolve the marriage. (*Ibid.*)

**SECS. 2 AND 7: MARRIAGE ACCORDING TO ARYA SAMAJ RITES—ONE OF PARTIES CHRISTIAN AT TIME OF PETITION—APPLICABILITY OF**

C.C.M.—267

**ACT.**—By virtue of sec. 2 of the Divorce Act as amended by Act XXX of 1927, the Act is applicable to a case where the parties had been married according to the Arya Samaj rites, if one of them is a Christian at the time when the petition for dissolution of marriage is presented. There is nothing in sec. 7 of the Act to bar relief in such a case. The effect of this latter section is that the Indian Courts may be deprived of jurisdiction if and only if the principles on which the Divorce Court in England acts would exclude relief. I.L.R. (1943) 1 Cal. 340=47 C.W.N. 251=A.I.R. 1943 Cal. 146.

**SEC. 3 (1): JURISDICTION—RESIDENCE.**—As to jurisdiction of Chief Court (now High Court) Punjab, see 10 I.C. 487=47 P.R. 1911. As to residence conferring jurisdiction, see 36 C. 964=4 I.C. 419. See also 53 C. 282; 59 B. 570=37 Bom.L.R. 55=1935 Bom. 121; 59 Bom.L.R. 1182. To constitute residence it is not essential that the persons should have a house of their own. It is sufficient to find the place where both parties lived together. 44 Bom. 924; 29 Bom.L.R. 308=100 I.C. 388=1927 B. 230. Per *Marten, C.J.*—The word 'reside' in sec. 3 does not mean sexual intercourse; the word 'together' in that section does not govern the word 'reside' but only the words 'last resided'. (*Ibid.*) See also 10 I.C. 487. Intention has nothing whatever to do with the question of residence. Whether or not a person resides in a particular district is a question of fact and depends in each case upon the evidence. Mere casual or temporary visits do not constitute "residence" within the meaning of the Act. 1933 A.L.J. 8=1933 A. 39=144 I.C. 136. See also 154 I.C. 900=37 Bom.L.R. 55=1935 B. 121. See also 1942 Cal. 42=201 I.C. 470.

**ILLUSTRATIVE CASES.**—Where a husband and wife had no permanent residence but they last lived together in a Hotel in Bombay for the greater portion of the month the husband then being on leave from active service in Mesopotamia, it was held the Bombay Court had jurisdiction. 45 B. 547=22 Bom. L.R. 1077. See also 38 C.W.N. 347=1934 C. 570=152 I.C. 32. Though both parties to a petition for divorce are residing separately,



"High Court."

(1) ['High Court' means with reference to any area—  
 (a) in Bengal, Assam and the Andaman and Nicobar Islands, the High Court at Calcutta;  
 (b) in the Provinces of Madras and Coorg, the High Court at Madras;  
 (c) in the Province of Bombay and in Panth Piploda, the High Court at Bombay;  
 (d) in Agra and Ajmer-Merwara, the High Court at Allahabad;  
 (e) in Oudh, the Chief Court of Oudh;  
 (f) in the Punjab, the North-West Frontier Province, British Baluchistan and Delhi, the High Court at Lahore;  
 (g) in Bihar and Orissa, the High Court at Patna;  
 (h) in the Central Provinces and Berar, the High Court at Nagpur;  
 (i) in Sind, the Court of the Judicial Commissioner in Sind; and  
 (j) in any Indian State, the Court which is a High Court for the purposes of the Government of India Act, 1935, and exercises original criminal jurisdiction in respect of European British subjects in that area.

In the case of any petition under this Act, "High Court" means the High Court for the area where the husband and wife reside or last resided together.]

"District Judge."

(2) 'District Judge' means—

(a) in a Province, a Judge of a Principal Civil Court of original jurisdiction, however designated; and

(b) in any area in an Indian State, such officer as the Central Government shall from time to time appoint in his behalf by notification in the Official Gazette, and in the absence of such an officer the High Court for the area].

(3) "District Court" means, in the case of any petition under this Act, the Court of the District Judge within the local limits

of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together :

from each other, the Court has jurisdiction if they lived within the jurisdiction of the Court at the time of the presentation of the petition. 44 B. 924=59 I.C. 931=22 Bom. L.R. 361; but not otherwise; see 76 P.R. 1916=36 I.C. 367=139 P.L.R. 1916. Petition by the wife for judicial separation. The husband was a railway employee. He had no permanent place of residence. Shortly before the petition, he went to Calcutta and lived with his wife and her parents for five days and then separated. *Held*, that the High Court had jurisdiction to entertain the petition for judicial separation. 152 I.C. 32=38 C.W.N. 347=1934 C. 570. See also 3 O.W. N. 306=1926 O. 319. As to the necessity for residence of husband and wife in order to confer jurisdiction on District Court or Divisional Court, see 7 L.B.R. 5=20 I.C. 399. The resident at Aden is not a District Judge. 37 B. 57=17 I.C. 215=14 Bom.L. R. 872; 130 I.C. 240=1931 C. 121. Judges of Divisional Courts throughout Burma are District Judges under the Act. No appeal, however, lies to the Chief Court from their decision. 6 Bur.L.T. 10=19 I.C. 53 (F.B.).

SEC. 3 (2) (a) AND (1) (d).—Under Divorce Act, sec. 3 (2) (a), 'District Judge' means a Judge of a principal Civil Court of original jurisdiction. The Court of the Judicial Commissioner, Ajmer-Merwara, has no original civil jurisdiction and the principal Civil Court of original jurisdiction is therefore the Court of the District Judge. The High Court for Ajmer is the High Court of Allahabad according to sec. 3 (1) (d). Hence it follows that a petition under

sec. 3 of the Divorce Act cannot be entertained by the Court of the Judicial Commissioner, Ajmer, as it has no jurisdiction. 1940 A.M.L.J. 1.

SEC. 3 (2) (b), 3 (3) AND 10.—The Deputy Commissioner of the Khasi and Jaintia Hills who has been vested with the powers and duties of a District Judge under the Indian Divorce Act under sec. 6 (a) of the scheduled Districts Act, has jurisdiction and power as a District Judge only within the scheduled District of Khasi and Jaintia Hills which is within British territory. He is not a District Judge in any area in Myllyam State, which is an Indian State, not being an officer appointed by notification in the Official Gazette under s. 3 (2) (b) of the Divorce Act and his Court cannot be regarded as a District Court within the meaning of s. 3 (3) of that Act. Consequently he has no jurisdiction to entertain a petition under s. 10 of the Divorce Act when the parties do not reside within his jurisdiction and they last resided together in Myllyam State. 47 C.W.N. 707.

SEC. 3 (3).—The word "together" in the definition only qualifies the words "last resided" and not the word "reside". (44 B. 924, Foll.) 130 I.C. 240=1931 C. 121. See also 47 P.R. 1911=10 I.C. 487; 1926 O. 319=94 I.C. 952; 1941 A.L.J. 710. Where the husband and wife who lived in various places never had any permanent residence but changed their residence very frequently and last resided together at a certain place for a week, the last residence is sufficient to give the District Court of that place jurisdiction to entertain



"Court." (4) "Court" means the High Court or the District Court, as the case may be :

(5) "minor children" means, in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of native fathers, girls who have not completed the age of thirteen years ; in other cases, it means unmarried children who have not completed the age of eighteen years :

(6) "incestuous adultery" means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity :

(7) "bigamy with adultery" means adultery with the same woman with whom the bigamy was committed :

(8) "marriage with another woman" means marriage of any person, being married to any other person, during the life of the former wife whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere ;

(9) "desertion" implies an abandonment against the wish of the person charging it ; and

(10) "property" includes, in the case of a wife, any property to which she is entitled for an estate in remainder or reversion or as a trustee, executrix, or administratrix ; and, the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix.

## II.—JURISDICTION.

4. The jurisdiction now exercised by the High Court in respect of divorce

a petition for dissolution of marriage. 50 O.W. N. 442. A person who was a resident of Delhi for about six years and was a Government servant liable to transfer and who came only for the purposes of prosecuting a criminal proceeding in Calcutta and put up at his brothers who also was liable to transfer was held not to "reside" within the jurisdiction of the Calcutta High Court. 1931 C. 121=180 I. C. 240. A person cannot be said to reside at a place where he spends only a day or two when he has got a fixed place of residence elsewhere ; but where a person has no fixed place of residence the place where he actually lives must be taken to be the place where he resides. The parties, husband and wife, belonged to Mangalore in South Kanara, were married in Mangalore, and were living there on more than one occasion. They last resided together at Mangalore until the husband left for Raugoon where he was employed, but he had no fixed place of residence in Raugoon. *Held*, that the husband must be deemed to be residing in the place where he actually lived, *i.e.*, in Mangalore, and the District Court of South Kanara had therefore jurisdiction to entertain an application presented by the wife under secs. 7, 18 and 19 of the Divorce Act for a declaration that the marriage was null and void and for maintenance. 1940 Mad. 584=(1940) 1 M.L.J. 651.

Sec. 3 (5).—As to the necessity for amendment of this section so as to give greater power to Courts to provide for the maintenance and custody of minor children, see 58

M.L.J. 29=31 L.W. 97=1930 M. 154 cited under sec. 42.

SECS. 3, 22 AND 23.—The words "portions of the G state occupied by the G.I.P.Ry." in the notification issued under the Government of India Act, sec. 109 (1) can only refer to those portions of the soil of the G. state and of any buildings attached thereto which are in the possession or occupation of the G.I. P. Ry. for whatever purpose and upon whatever form of tenure. The word 'occupy' must be given its ordinary grammatical meaning. That cannot include a building in the compound of a mill in G. state which is merely 'served' by the G.I.P. Ry. in the sense that it has a siding running into and through the mill premises. Hence a petition for judicial separation under sec. 22 against a person living in such a place cannot be filed in the High Court of Allahabad. I.L.R. (1942) All. 98=(1942) F.L.J. (H.C.) 163=1941 A. L.J. 710=A.I.R. 1942 All. 129.

Sec. 4.—[See also under sec. 7.] The jurisdiction of the Patna High Court in matters matrimonial is only such jurisdiction as is comprised within the provision of the Divorce Act. 72 I.C. 657=1923 P. 301. A suit for a mere declaration that the plaintiff's marriage with her deceased husband's brother is valid and legal is not sustainable on the matrimonial side of the Patna High Court. (*Ibid.*) As to jurisdiction of High Court, prior to passing of this Act, see 38 B. 125=20 I.O. 492=15 Bom.L.R. 593. As to jurisdiction of Oudh Chief Courts, see 94 I.C. 952.

Matrimonial jurisdiction of High Court to be exercised subject to Act. Exception.

*a mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise; except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

5. Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

6. All suits and proceedings in causes and matters matrimonial, which, when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

7. Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:

=1926 O. 319. Sec. 4 does not preclude the Court from considering whether a marriage was duly solemnized and from declaring a marriage null and void on grounds other than those contained in sec. 18. 47 I.C. 544=11 Bur.L.T. 69.

Sec. 7.—[See also notes under secs. 4, 17, 18 and 19.]

SCOPE OF SECTION.—Sec. 7 is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majori cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. 47 B. 843=25 Bom. L.R. 945=77 I.C. 654. The expression “rules and principles” points rather to the rules and principles on which the Courts deal with matrimonial cases in requiring a certain degree of evidence and other cognate matters. (*Ibid.*) The words “rules and principles” in sec. 7 have reference to rules that are quasi-substantive rather than mere adjective law. 7 Bur.L.T. 121=23 I.C. 242. “Principles and rules” in sec. 7 of the Divorce Act do not include the law of procedure prevailing in England for the time being. I.L.R. (1944) 1 Cal. 258=219 I.C. 354=1945 Cal. 75; (1945) 2 M.L.J. 389. A marriage to be recognized as such by the Courts of a Christian country must be a voluntary union for life of one man with one woman to the exclusion of all others although it need not necessarily have been celebrated in accordance with Christian rites or ceremonies. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy

is not a marriage as understood in England and the Court for Divorce and Matrimonial Causes under sec. 7, will not recognize such a marriage as valid. Therefore a marriage contracted between parties according to Buddhist Law which recognizes polygamy, is not such a marriage as entitles the parties to relief under the Divorce Act, although they may have become Christians subsequently to the marriage. 1940 Rang.L.R. 417=1940 Rang. 67 (S.B.). See also I.L.R. (1939) 2 C. 60=1940 C. 75 (Marriage between Mahomedan husband and Roman Catholic wife—Consent of wife obtained by fraud).

CONSTRUCTION OF SECTION.—Though an Indian Act should not ordinarily be constructed in the light of statutes enacted by another legislature, yet sec. 7 of the Act makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Court in England then acted and gave relief. It is therefore not irrelevant to enquire into the English practice with a view to the resolution of any question arising under the Act. 54 M. 774=35 C.W.N. 1185=1931 P.C. 234=61 M.L.J. 367 (P.C.).

APPLICABILITY.—Sec. 7 applies not only to the grant of relief but also to questions of procedure. 55 I.C. 269=12 Bur.L.T. 199. See also 52 C. 566=1925 C. 874; 53 C. 282=1926 C. 871. The words “principles and rules” in sec. 7 of the Act mean principles and rules of the law of evidence, of interpretation, of practice and procedure but not statutory provisions or rules. The principles and rules to be ap-

<sup>1</sup>[Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.]

#### LEG. REF.

<sup>1</sup> Proviso was added to this section by Act X of 1912.

plied are subject to the provisions of the Act and they consequently cannot run counter to it. They can neither cut down the provision of the Act nor supply any form of relief not provided by it. It is impossible to hold that 'rules' in the section means the statutory rules in force for the time being in England. *See* on appeal. 31 L.W. 97=1930 M. 154=58 M.L.J. 29. *See also* 13 P. 129=1934 P. 475; 57 A. 884=1936 A. 488. Under sec. 7, the provisions of which must be strictly complied with, Courts in India are required to give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial cases in England for the time being, acts and gives relief. One of these principles is that a decree for dissolution cannot be made merely on admission and without recording evidence. Even if the Court is satisfied that the petitioner has established his case by evidence, it is necessary for it to go further and find whether there has been collusion; and whether the petitioner has been in any manner accessory to or conniving at the adultery or has condoned the same. Having found on these questions, in favour of the petitioner, the Court is not bound to give a decree if it finds that the petitioner has been guilty of adultery or has been guilty of unreasonable delay in presenting the petition or of having wilfully separated himself from the other party before the adultery complained of. 130 I.C. 401=31 P.L.R. 1008=1931 L. 2 (S.B.).

**AGE OF CONSENT.**—There is nothing either in the Divorce Act or in the Christian Marriage Act as regards the age of consent for a Christian marriage. Under sec. 7, the Indian High Courts have to act according to the principles and rules of English Courts. Therefore in India the age of consent for a Christian marriage will be determined according to the law in England at the time of the marriage. 55 A. 243=1933 A.L.J. 168=1933 A. 135.

**DOMICILE.**—*See* notes under secs. 1 and 3, *supra*.

**ENGLISH LAW.**—There is the possibility of reading into sec. 7 an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon the matter of divorce but that is a forced and unnatural construction. 47 B. 843=25 Bom.L.R. 945=1926 B. 321. *See also* 48 C. 636 under sec. 57; 42 M.L.J. 562=1922 M. 350 (F.B.); 3 B. 125=20 I.C. 492; 32 C.W.N. 179. The rule of law in England that the non-publication of the banns is only a ground of declaring the marriage void if the lack

of due publication is within the knowledge of both the parties to the marriage is no guide to an Indian Court. 55 A. 185=144 I.C. 906. In considering a divorce suit in India, the question whether a previous marriage of one of the parties is or is still subsisting, the Court must apply the law in India applicable to that marriage at the time. 36 Bom. L.R. 1021; 1933 A. 122.

**DISCRETION OF COURT, EXERCISE OF.**—In exercising the discretion with which Courts in India have been entrusted, they should be guided by the principles and rules upon which the Divorce Division of the High Court in England acts and gives relief. The discretion is unfettered; though it should be exercised not capriciously but cautiously and carefully not only in regard to the parties themselves but also with reference to the interest of public morality and of decent society. 10 B. 299=139 I.C. 479=1932 R. 172.

**PRACTICE AND PROCEDURE—EVIDENCE.**—In all divorce cases the petitioner must prove his case because among other things, the Judge has to satisfy himself whether there is any collusion between the parties and as to the complete truth and honesty of the petition. Where this procedure had not been followed, the High Court would set aside the decree *nisi*. 44 A. 728=1923 A. 43 (F.B.). Divorce suits when undefended are peculiarly difficult because the Court is under the obligation of detecting for itself deficiencies which there is no interested party to point out. That obligation is however inoperative. Decrees for dissolution of marriage are not made without strict proof, and the fact that both parties are equally anxious to be divorced is in itself a reason why the Judge should be strict as to proof. 1933 S. 70=143 I.C. 618. In *ex parte* cases, the Judge should ask sufficient questions to make it clear what the facts are. 29 Bom.L.R. 308=1927 B. 230. It is almost impossible to administer the law on principles and rules laid down by the Divorce Court in England if the parties do not conform to the rules of procedure both under the Civil Procedure Code which applies to cases under the Divorce Act and to the principles and rules upon which the Court in England acts. The rules must be complied with. A petition which does not comply with the rules and which does not contain all the particulars ought not to be admitted. In divorce cases the parties must first establish the fact of marriage. The Divorce Court in England does not act upon the evidence of the petitioner only to prove the factum of marriage, but it is necessary to produce a statutory certificate of marriage. But the practice, though universal, is not necessarily a rule of law, and if the circumstances warrant it, the Court may still hold the marriage proved even in the absence of a certificate. 13 P.

8. The High Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction

Extraordinary jurisdiction of High Court.

under this Act.

129=15 Pat.L.T. 353=1934 P. 475. A decree for dissolution cannot be made merely on admissions and without recording evidence. (17 B. 624, Ref.) 1930 L. 771=12 L. 22=126 I.C. 68 (S.B.). See also 13 P. 129=1934 P. 475; (1940) 1 M.L.J. 210. As to admission of additional evidence after decision, where advocate omits to call evidence, see 11 I.C. 779=4 Bur.L.T. 161. Admissions as to cruelty and adultery are not conclusive proofs. 38 C. 907=13 I.C. 491. In proceedings for divorce the evidence of the husband or wife alone ought never to be accepted without corroboration either by witness or at least by strong surrounding circumstances. 43 M.L.J. 441=45 M. 982=68 I.C. 931 (F.B.). See also 42 M.L.J. 562=1922 M. 350=70 I.C. 43. Procedure as to service of petition. See 55 I.C. 269=12 Bur.L.T. 199. Attachment before judgment not to be made in a divorce suit. 7 I. C. 792=37 C. 693.

CO-RESPONDENT.—Where charges of adultery are made against a person, he ought to be made a co-respondent unless the Judge should otherwise direct. 45 M. 982=43 M. L.J. 441=1923 M. 9 (F.B.). Claim for damages against co-respondent—Points to be considered in assessing damages. 3 O.W.N. 296. See also 38 M. 466=25 M.L.J. 594; 47 I.C. 510=45 C. 525. Proceedings by wife for divorce—Joinder of adultery as a party, not proper. 10 R. 115=137 I.C. 426=1932 R. 73.

COSTS.—Even although a wife's defence fails or her counter charges break down or she has been proved guilty of adultery the husband has to pay her costs. 1922 A. 243. On the question of costs, see also 57 C. 1350=130 I.C. 246=1931 C. 206. Petitioner's costs have to be given priority in respect of amounts deposited by the co-respondent into Court over the rights of an attaching creditor. 57 C. 1350=130 I.C. 246=1931 C. 206. An order of the trial Court against the husband for security for the wife's costs in prosecuting her suit for divorce does not bind the hands of the appellate Court when it comes to make an order as to whether the wife should be given her costs of the appeal. 130 I.C. 246=57 C. 1350=1931 C. 206. In the matter of ordering security for costs under sec. 7, the Courts in India act and give relief on principles and rules which as merely as may be conform to the principles and rules observed in England under the Matrimonial Causes Act and Rules. The discretion given to the Courts in India is completely unfettered, and the Courts should endeavour to exercise their discretion cautiously and carefully not only with regard to the parties themselves but to the interests of society and public morality in general. The Court will be justified in passing an order

for security for costs where there is a claim for damages and the petitioner is out of the jurisdiction of the Court and has no property within its jurisdiction. A.I.R. 1943 Mad. 510=(1948) 1 M.L.J. 360. There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife. 60 C. 318=37 O.W.N. 249=1933 C. 388. Secs. 7 and 19 (4)—Applicability and scope—Application for declaration of nullity of marriage on ground of first spouse being alive—Burden of proof—Evidence Act, sec. 107—Application of—If excluded. See (1945) 2 M.L.J. 389.

SECS. 7 AND 45: MATRIMONIAL JURISDICTION OF HIGH COURT—LAW AND PROCEDURE APPLICABLE.—The substantive law to be applied by the Calcutta High Court in the exercise of its matrimonial jurisdiction is (1) the provisions of Divorce Act; (2) the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts; (3) the principles and rules of Ecclesiastical Law as were used and exercised in the Diocese of London in 1774. The proceedings in matrimonial causes are to be regulated by the provisions of C.P. Code and the Rules made by the High Court in conformity therewith. I.L.R. (1944) 1 Cal. 258=1945 Cal. 75.

SEC. 8.—The husband filed a divorce petition in the District Court. The wife applied to the High Court for the transfer of the case to its own file as the parties were both serving in Calcutta and it was convenient for them both, if the case was tried at Calcutta, and stated that in case the divorce proceedings were tried in the District Court, she might lose her employment if often required to go there. It was found that on the transfer of the case to the High Court, the costs payable by the husband were very excessive so much so that he would have to go in insolvency for them. *Held*, that though there was convenience to both parties if the case was tried in the High Court, it was an expensive task for the husband which might make him apply in insolvency and the application for transfer should, therefore, be refused. 1937 C. 303=171 I.C. 930. The expression "High Court" as used in sec. 8 of the Divorce Act does not mean either the original or the appellate side of the High Court, but means the High Court as one whole. But the litigant, when he wants to have an order under that section, would have to approach that particular department of the High Court which is empowered to deal with this matter by its rules framed under s. 13 of Act. 24 and 25 Vict., Chap. 104, which is substantially repeated in sec. 108 of the Government of India Act, 1919 and sec. 223 of the Government of India Act, 1935. I. L. R. (1941) 2 Cal. 373=45 C. W. N. 910=1942 Cal. 32.

The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

Power to transfer suits.

9. When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon,

Reference to High Court.

the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference, and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

### III.—DISSOLUTION OF MARRIAGE.

10. Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When husband may petition for dissolution.

R. 44 of Chap. 35-A of the Original Side Rules, Calcutta, framed under sec. 62 of the Divorce Act applies to all applications for transfer made under sec. 8 of that Act, whether under the first or second part of that section. Consequently, a Judge sitting singly on the Original Side, duly empowered in this behalf by the Chief Justice, has jurisdiction to transfer a divorce suit from one District Court to another and an application need not be made to a Bench on the appellate side. S. 24, C.P. Code, has no application to the case. The same Judge has also jurisdiction to issue a writ of commission authorising the District Court before which the suit was pending to examine witnesses and his order would be governed by the rules relating to commissions contained in Chap. 22 of the Original Side Rules. 46 C.W.N. 790; A.I.R. 1942 Cal. 546—I.L.R. (1942) 2 Cal. 461.

SEC. 9.—*See* 1943 Lah. 62 (S.B.).

SEC. 10: SCOPE—GROUNDS OF DIVORCE.—Sec. 10 of the Divorce Act sets out the grounds on which marriage may be dissolved by the Court. If the Legislative had intended that other grounds and other methods should be available to the parties, one would expect a proviso saving the operation of the personal law. 36 Bom.L.R. 1021. That the marriage had been induced by some sort of fraud is no ground for divorce under the Indian Divorce Act. 152 I.O. 1007=1934 P. 670 (F.B.). Where a Hindu after marrying a Christian wife marries a Hindu wife in Hindu form, though the second marriage does not amount to bigamy it amounts to a second marriage and if that marriage is consummated the consummation *vis a vis* the first wife amounts to adultery and forms a ground for divorce on the petition of the first wife. I. L.R. (1941) Nag. 260=1940 N.L.J. 391=1940 Nag. 195 (S.B.).

JURISDICTION.—In a case under the Divorce Act it is the duty of a Court, apart from the objections taken by one or other of the par-

ties, to enquire into and set out in judgment facts, which show clearly that it possesses jurisdiction to pronounce a decree for dissolution of marriage. 12 L. 214=1930 L. 916. Under sec. 16, Bombay Civil Courts Act, the District Judge cannot transfer to the Assistant Judge a suit under the Divorce Act and the Assistant Judge cannot try the suit. 39 B. 136=26 I.O. 599=16 Bom.L.R. 754. Irish woman and Englishman married in Ireland living in India—Husband temporarily serving in British regiment—Court has got power to grant divorce. 106 I.O. 481=5 O. W.N. 163. Scope of the Indian and Colonial Divorce Act pointed out. (*Ibid.*) As to jurisdiction of Oudh Chief Court, *see* 1926 O. 319=94 I.O. 952=3 O.W.N. 406.

DOMICILE.—Before granting a decree for divorce under sec. 10, a clear finding as to domicile of parties should be arrived at, and where the petitioner has claimed divorce on the ground that her husband committed an unnatural offence upon her, there should be some evidence and a finding as to the unnatural offence alleged. 13 I.O. 611=1932 L. 468 (1) (S.B.).

“RESIDE”—MEANING.—A person who has an abode elsewhere, but who comes to a place for a short period and with a fixed purpose for being within the jurisdiction of a Court cannot be said to “reside” there. 12 L. 214=1930 L. 916. In this section the word “together” governs only the words “last resided” and not the word “reside.” The Act therefore gives the petitioning spouse the choice of selecting his forum either as (1) the district where the parties had last resided together or (2) the district within the local limits of which, both the husband and the wife, though living separately “reside” at the date of the presentation of the petition. 1930 L. 916=12 L. 214.

CHANGE OF RELIGION.—Under this section change of religion by the husband and his subsequent re-marriage entitle his first wife

to dissolution of the marriage. 14 I.C. 192.

**ADULTERY.**—In a suit for dissolution of marriage the Court may presume adultery if it is satisfied that guilty attachment subsisted between the parties and that they had opportunities to have guilty intercourse. 62 I.C. 782. *See also* 55 A. 597=1933 A. 427. The direct fact of adultery need not be proved. In a divorce case, the correspondence between the respondent and the co-respondent is very important evidence. 62 I.C. 782. *See also* 31 N.L.R. 184=156 I.C. 1008=1935 N. 49 (S.B.). It is a fundamental rule that it is not necessary to prove the direct fact of the adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were so held, no protection whatever could be given to material rights. But the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. 55 A. 597=1933 A.L.J. 1108=1933 A. 427; 8 O.W.N. 168=132 I.C. 773=1931 O. 259. *See also* 1935 N. 49 (S.B.). Admission in a letter from the husband of adultery is not a sufficient proof of adultery. 31 I.C. 264 (F.B.). *See also* 49 B. 368=27 Bom.L.R. 251; 51 B. 1026 (1030, 1032). Wife's admission of adultery—Caution to be exercised. If a husband or wife contracts a venereal disease during the marriage but fails to show that the origin of the disease was innocent, adultery is established if it is proved that the wife or husband was free from that disease and could not possibly have communicated the same to him or her. 12 L. 95=1930 L. 828. *See also* 1933 L. 507. In India, in proceedings for divorce instituted by a wife, a Court has no power to allow the alleged adulteress to be made a party. 10 R. 115=1932 R. 73. In a divorce suit filed by the husband on the ground of adultery the miscarriage took place long after the filing of the petition, and the evidence of non-access was offered by the husband. *Held*, that the evidence of the husband of non-access was admissible against his wife. 150 I.C. 445=1934 A. 618 (S.B.). A husband praying for the dissolution of his marriage on the ground that his wife had been guilty of adultery, is entitled to rely upon adultery committed by her outside India. 45 O.W.N. 249.

**DELAY IN APPLYING FOR DIVORCE.**—When a charge of adultery is proved the first thing to which a Court directs its attention is the delay which has occurred since the husband became aware of the fact. Delay is not by itself a bar to the suit but it is a most material matter which, unexplained, would lead the Court to conclusions fatal to the petitioner's relief. 26 S.L.R. 423=1933 S. 27.

**"BIGAMY WITH ADULTERY" AND "MARRIAGE WITH ANOTHER WOMAN WITH ADULTERY".**—Bigamy with adultery is specifically defined in the Act as meaning adultery with the same woman with whom the bigamy was committed, but marriage with another woman with adultery is not defined. The definition contained in s. 2 (2) merely deals with mar-

riage with another woman which is defined as meaning marriage of any person being married to any other person during the life of the former wife, whether the second marriage shall have taken place within the Dominion of His Majesty or elsewhere. Therefore, if a man after such second marriage cohabits with such woman, the first wife is entitled to apply for dissolution of marriage, just as she would have been entitled to apply if the husband would have been guilty of "bigamy" with adultery. 136 I.C. 262=1932 L. 116.

**CRUELTY.**—Though cruelty in its popular sense is undoubtedly a ground for divorce, yet that is not the only kind of cruelty which will be a ground for divorce. There may be a case of cruelty in which either bodily injury has occurred or there may be cases in which the evidence is such as to lead to an inference of reasonable apprehension that bodily injury would result; and in case of cruelty it is necessary that the evidence of the petitioner should be corroborated. 13 P. 129=15 Pat.L.T. 353=1934 P. 475. Repeated acts of cruelty by a husband taken together, entitle the wife to a decree for divorce, though each act by itself may not be sufficient ground, and no formal complaint or threat of divorce proceedings was made as regards each of them. 36 I.C. 982=10 Bur.L.T. 228. Cruelty is conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. In order to establish a case of cruelty against her husband, a wife must prove more than isolated acts of violence. No doubt the degree of violence varies in accordance with the status of the parties. 107 I.C. 184=1928 O. 114. *See also* 139 I.C. 618=1932 O. 231. The cruelty must be dangerous to life, limb or health (bodily or mental), or a reasonable apprehension of it. 36 I.C. 381=10 Bur.L.T. 182; 139 I.C. 618=1932 O. 231. Isolated assaults that arise on the spur of the moment on some real or fancied provocation do not constitute cruelty. 1928 O. 114=107 I.C. 184; 1933 L. 728. A single severe assault resulting from a dispute as to jewellery would not amount to such cruelty but adultery of the husband affords ground for judicial separation. 107 I.C. 184. Threat of physical force to a pregnant wife amounts to legal cruelty. 47 A. 50=83 I.C. 167=1925 A. 237. *See also* 1933 L. 728; 53 O. 436. Subsequent cruelty may operate to revive condoned adultery. *See* 39 C. 395=15 I.C. 886; 47 A. 50=83 I.C. 167; 53 O. 436 96 I.C. 932=1926 C. 864. As to the amount of cruelty to be proved, *see* 11 I.C. 784, *supra*. Where a husband who has a loathsome disease compels his wife to sexual intercourse with him against her will even though the forcible intercourse might not result in communicating the disease, cruelty must be held to be proved. 1930 L. 828=12 L. 95=126 I.C. 527. *See also* 1933 L. 507.

**DESERTION.**—To constitute desertion there must be a cessation of co-habitation and an intention on the part of the guilty party to



Any wife may present a petition to the District Court or to the High Court,

When wife may petition for dissolution.

praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman ;

or has been guilty of incestuous adultery,  
or of bigamy with adultery,  
or of marriage with another woman with adultery,  
or of rape, sodomy or bestiality,  
or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*,  
or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

Contents of petition.

desert the other. Where a husband brings a concubine into the house where his wife is living and the wife has to leave the house in consequence, the husband, under the circumstances, is guilty of deserting the wife, so as to constitute a good ground for divorce at her instance. 155 I.C. 553=41 L.W. 534=68 M.L.J. 606. Desertion implies an abandonment against the wish of the person charging it. 5 Bur.L.T. 85=15 I.C. 353. There is no abandonment against the wish of the wife where she herself left owing to intemperate habits of her husband. 31 I.C. 264=8 L.B. R. 106 (F.B.). A wife who seeks to prove desertion must give evidence of conduct on the part of the husband showing unmistakably that such desertion was against her wish actively expressed. The husband must be proved to have wilfully absented himself from her in spite of her wish. Subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. 31 I.C. 264. No decree can be passed on a petition for divorce made before the two years' period of desertion is over, as it is premature and without a cause of action. 6 Bur.L.T. 177=21 I.C. 250. The desertion required to be proved under sec. 10 of the Act must be desertion within the meaning of sec. 3 (9) of that Act, *viz.*, a wilful abstention by the husband against the wish of the wife. 165 I.C. 392=1936 O.W.N. 938. When there has been desertion by the husband of his wife for a long time, a subsequent association between the parties, during which the parties, though living under the same roof live as strangers, cannot amount to a break in the desertion. Desertion is not broken unless the husband offers to the wife a home on terms which a self-respecting wife can accept. 177 I.C. 940=40 Bom.L.R. 900=1938 Bom. 425.

**ADULTERY AND CRUELTY.**—In order that a wife can have a marriage dissolved, it is necessary that there should be proof of adultery and cruelty on the part of the husband. 1933 L. 728. In a suit for dissolution of marriage, it was proved that the husband had contracted gonorrhoea and had communicated it to the wife and that the husband was guilty of cruelty. *Held*, that the husband was

guilty of adultery and that with the charge of cruelty was sufficient for the wife to obtain a decree *nisi* for the dissolution of the marriage. 1933 L. 507. *See also* 12 L. 95. A wife who has obtained a judicial separation on the ground of her husband's adultery is entitled to a dissolution of the marriage on proof that her husband has been guilty of adultery after the separation and that he has been guilty of cruelty to her after separation. 45 I.C. 914=11 Bur.L.T. 227. *See also* 1927 O. 34=98 I.C. 1019. The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery. It also amounts to legal cruelty. 1933 A.L.J. 14=1933 A. 56=55 A. 134.

**ADULTERY AND DESERTION.**—For a decree for divorce, adultery of the husband together with desertion without reasonable cause for two years or upwards or with such cruelty as without adultery would entitle the wife to divorce, must be proved. 36 I.C. 381=10 Bur.L.T. 182. As to condonation of adultery, *see* 1928 O. 114=107 I.C. 194. Marriage with another woman and adultery. *See* 33 P.L.R. 339=1932 Lah. 116.

**DISCRETION OF COURT.**—Court has a discretion to grant dissolution on a petition by the wife even though the petitioner had been, subsequent to desertion by the husband, leading a life of prostitution for some time, if the Court comes to the conclusion that such prostitution was necessitated by destitution and that her conduct was otherwise free from blame. 57 C. 891=1930 C. 729. Condonation in art. of matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse. If thereafter the offences are repeated the right to make the condoned offences a ground for divorce revives. To constitute such revival the same offence need not be repeated, and misconduct is sufficient. Where the husband condoned the wife's adultery and subsequently the latter was guilty of desertion, *held*, that the husband's right to claim divorce revived. 7 R. 313=1929 R. 216 (S.B.). *See also* 60 C. 318=37 C.W.N. 249=1933 C. 388. Release



by wife in favour of husband—Effect of. *See* (1945) 2 M.L.J. 80.

**JOINDER OF PARTIES.**—In proceedings by wife for divorce, the alleged adultery is not a proper party. 10 R. 115=1932 R. 73.

**PLEADINGS AND PROOF.**—Evidence in divorce proceedings to prove the case of the petitioner must be confined to the pleas set out in the petition. Consequently it is essential, as laid in sec. 10 to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded. 193 I.C. 301=1941 Bang. 110. Before the Court can grant a decree for dissolution of marriage it must be satisfied that the marriage did take place and the marriage is a valid one. A bare statement of the petitioner that he was married is not sufficient evidence of marriage and he must produce the marriage certificate. (1938 R. 93, Rel. om.) 164 I.C. 712=1936 R. 398; I.L.R. (1940) All. 99=1940 A.L.J. 228=1940 All. 308 (F.B.). As divorce affects the status of the parties it is of importance that the necessary conditions to justify a decree for dissolution of marriage should be complied with. It is specifically laid down that certain facts must be averred and proved before a Court has jurisdiction to pass a decree for dissolution of marriage. Where there was no averment or direct evidence that the parties to the marriage was domiciled in India at the time when the petition was presented. *Held*, that the omission would justify the Court in returning the petition. 11 R. 68=1934 R. 93. It is no doubt extremely difficult, if not impossible, to prove the actual fact of adultery, but no sensible man familiar with the common course of human conduct would ever persuade himself that when a man turns away his wife and lives with another woman in the same room for days and months that their relations could be altogether innocent. Where therefore, a woman shares a room with a stranger and her undue familiarity with him leads to the latter's wife being turned out of doors and the woman behave indifferently towards her own husband, the circumstances throw a sinister light on her relations with the stranger, and any man of common sense would irresistibly come to the conclusion that she was living in adultery with him. 1935 N. 49 (S.B.). *See also* 26 S.L.R. 423. Adultery requires direct proof either by that of eye-witnesses or irresistible inference and direct proof is required of the identity of persons charged with adultery. Where it is proposed to prove the alleged adultery by calling evidence as to the birth of a child since the separation of the husband and the wife, the evidence should be directed to the maternity of the mother in relation to the child and the mere statement that a child has been found or seen living in the same house with the wife is not ordinarily sufficient to establish that that child is her child. 11 P. 627=1932 P. 345 (S.B.). Where in a petition for dissolution by a wife, the petitioner stated that the person with whom her husband committed adultery was unknown to her, but in evi-

dence she and her witnesses identified a particular woman with whom her husband committed adultery: *Held*, even though no amendment in the petition was made as to the name, the identification by the petitioner and her witness was sufficient to grant a decree *nisi* for dissolution. 167 I.C. 743=1937 P. 82=13 Pat.L.T. 686. A woman named in the petition for divorce as an adultery has no right to intervene in the proceedings and need not, therefore, be served with notice of such proceedings. 46 C.W.N. 842.

**SECS. 10, 11 AND 12: PETITION FOR DISSOLUTION—FACTS TO BE PROVED.**—In a petition for dissolution petitioner has to allege and prove that he professes Christian religion, that marriage was solemnised in India, that the parties to marriage were domiciled in India when the petition was presented, and that husband and wife reside or last resided together within local limits of ordinary jurisdiction of Court of the District Judge to whom the petition was presented. Those must be proved by evidence, and petitioner is not excused from proving them merely because respondent admits them. A divorce Court has always to bear in mind the possibility of collusion and must insist on strict proof of all the facts alleged. The Judge should come to a distinct finding as to whether the marriage has been solemnised in India and upon what date. A certificate of marriage is not the only way of proving marriage but it is usually the best way. 31 N.L.R. (Supp.) 174=1936 N. 26 (S.B.).

**SECS. 10 AND 14.**—Where the petitioner the husband had also been guilty of adultery, it is for the Court to consider whether it should refuse to give him a decree or should exercise its discretion in his favour. The discretion should no doubt be exercised with due care and strictness. Where there was nothing to suggest that the petitioner was a man of loose and profligate character and where the parties were living apart and the respondent had given birth to an illegitimate child and there was no collusion or connivance between them, *held*, that a decree for dissolution of marriage should not be refused upon the ground of the petitioners' misconduct. I.L.R. (1939) All. 573=1939 A.L.J. 478=1939 All. 522.

**SECS. 10 AND 22.**—If on a petition by the wife for dissolution of her marriage, a case for judicial separation alone is made out and not for dissolution, the Court can grant a decree for judicial separation. If it dismisses the petition without considering the question of judicial separation a review application is competent. 41 P.L.R. 337=1939 Lah. 404. Petition for dissolution by wife—Charge of adultery not proved—Crucly proved—Right to decree for judicial separation. 165 I.C. 12=1936 O.W.N. 918.

**SECS. 10 AND 34.**—Where on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery had been condoned, the petitioner is not entitled to a judgment against

11. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court :—

(1) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed ;

(2) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it ;

(3) that the alleged adulterer is dead.

12. Upon any such petition for the dissolution of a marriage the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

the co-respondent and the claim for damages which is ancillary to or dependent on the petition for divorce must be dismissed. 222 I.C. 396=1946 N.L.J. 104=A.I.R. 1946 Nag. 69 (S.B.).

SEC. 11.—Court should not lightly excuse a party from making any enquiry which he can reasonably be expected to make as to the adulterer. See 49 B. 368=27 Bom.L.R. 251=1925 B. 231. Sec. 11 of the Act makes it obligatory on a husband when he petitions for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent, unless he is excused from doing so on one of three grounds. The section excuses him from doing this when his wife is leading the life of a prostitute and also when the alleged adulterer is dead. The third case in which he can be excused is 'when the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it. A suit without the co-respondent cannot proceed until leave to dispense with his presence he has actually been obtained. It is not sufficient merely to apply for leave at the trial. A formal application has to be made before the trial and it has to be supported by proper evidence that the conditions of sec. 11 of the Act have been complied with. I.L.R. (1942) All. 395=1942 A.L.J. 355=A.I.R. 1942 A. 223. Indian Courts do not have the same discretion to dispense with the name of a co-respondent as English Courts have. The three grounds stated in sec. 11 are the only ones on which leave can be so granted to proceed with the petition for dissolution. The fact that the petitioner had well grounded suspicions against two men is no sufficient reason. 107 I.C. 667=1928 N. 117. Where the husband did not name the co-respondent living in a distant place and it appeared that he did not know the name and that he could not find it out. Held, that the Court could excuse him under sec. 11. 7 R. 313=1929 R. 216 (S. B.). In a petition for divorce by the husband the petitioner has to make the alleged adulterer or adulterers a co-respondent or co-respondents to the petition unless he is excused from doing so by the Court on certain

grounds. The father and mother of the wife cannot be made parties to such a petition. 1930 L. 771=12 L. 22=126 I.C. 68 (S.B.).

SECS. 12 TO 14: CONNIVANCE.—It is obligatory on a Court entertaining a petition under the Divorce Act to consider all the aspects of the case which are mentioned in secs. 12 and 14 and that obligation is not extinguished by the mere fact that the case is an undefended one. 195 I.C. 325=1941 Rang. 193 (S.B.). The proceedings under the Act are not a civil suit which can be compromised and under sec. 12 it is for the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not petitioner has been in any manner accessory to or conniving at adultery or has condoned same and Court has to enquire into any counter-charge which may be made against petitioner. 1930 L. 771=12 L. 22=126 I.C. 68 (S.B.). A mere refusal by husband without reasonable cause of matrimonial bed, does not constitute desertion or such wilful neglect or misconduct as conduces to wife's adultery, and is not a sufficient ground for dissolution. 44 C. 1001=41 I.C. 447=21 O.W.N. 717. A decree for dissolution cannot be legally granted merely on the ground that respondent does not oppose petition. Court must satisfy itself that there was good reason for delay in suing, and that connivance or condonation is absent. 25 P.R. 1919=51 I.C. 235 (F.B.). Husband's conduct, partly cause of wife's adultery, can be considered against husband. 54 C. 80=30 O.W.N. 820=1926 O. 1014. A wife petitioning for dissolution of marriage is not in the absence of a fresh matrimonial offence, entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained a judicial separation previously. The Courts cannot possibly countenance a petitioner who had material for dissolution, refraining from claiming it in his or her petition and obtaining only a decree for judicial separation, and then later on when he or she thought it convenient to come to the Court to repeat the same evidence all over again and asking for a decree for dissolution. But where in a case there is, be-

13. In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been

Dismissal of petition.  
committed,

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is persented or prosecuted in collusion with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition.

When a petition is dismissed by a District Court under this section, the petitioner, may nevertheless, present a similar petition to the High Court.

sides the decree for judicial separation, entirely fresh evidence of adultery, the wife would be entitled to a decree *nisi* for dissolution on such evidence without adducing fresh evidence of cruelty which had already been proved in the previous case. I.L.R. (1940) Mad. 319=1940 Mad. 510=(1940) 1 M.L.J. 210.

**COLLUSION.**—Collusion is an illicit secret understanding by which parties who are jointly furthering a common purpose assume semblance of hostility. 1933 S. 70=143 I.C. 618. Collusion under sec. 13 exists where initiation of proceedings for dissolution is procured or its conduct provided for by agreement between spouses or their agents. 44 C. 1091=41 I.C. 447=21 C. W. N. 717. If Court is satisfied that there is no collusion between parties, it may act on an uncorroborated confession of adultery by a party to the proceedings. 49 I.C. 305=11 Bur.L.T. 197. See also 9 L. 116.

**ADMISSION OF ADULTERY — CORROBORATION — NECESSITY.**—Confession or admission by one of the parties in a matrimonial suit has to be taken with great caution. It may be accepted as evidence of adultery without corroboration only in most exceptional cases; usually the Court must demand corroboration of such admission or confession. But if Court is satisfied that there is no collusion, there is nothing in law to prevent Court from acting on what in substance is a confession by one of the parties. 13 P. 129=15 Pat. L.T. 353=1934 P. 475.

**CONDONATION.**—Resumption or continuance of co-habitation with complete knowledge of wife's adultery amounts to condonation. 57 I.C. 216=31 C.L.J. 435. Condonation is a question of fact and not of law. See 41 B. 36=36 I.C. 800=18 Bom.L.R. 818. Condonation is forgiveness of a conjugal offence with full knowledge of all circumstances and is purely a question of fact. It is a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before commission of offence. 44 C. 1091=21 C.W.N. 717. See also 60 C. 318=37 C.W.N. 249=1933 C. 388; 7 R. 813=1929 R. 216. (S.B.). Mere forgiveness is not condonation; condonation means completely restoring offending party and must be followed by co-habitation. 57 I.C. 216=31 C.L.J. 435=47 C. 1068; 44 C. 1091. Condonation of past matrimonial offen-

ces is however impliedly conditioned upon future good behaviour of offending spouse, and it follows that, if after condonation, offences are repeated, right to make condoned offences a ground for divorce revives. 57 I.C. 216=31 C.L.J. 435=47 C. 1068. If adultery is condoned, but subsequently wife commits an offence less than adultery with another person, it does not revive offence of adultery which has already been condoned; but if subsequent offence committed is adultery itself, forgiveness is cancelled and old cause of complaint is revived even if offence be *ejusdem generis* with original offence. 1928 O. 114=107 I.C. 184; 51 B. 1026=29 Bom.L.R. 1336=105 I.C. 871.

**DELAY.**—Unreasonable delay in instituting proceedings will generally be excused if it is really due to poverty. 57 I.C. 216=31 C.L.J. 435. But delay may also be a ground for dismissal of petition for dissolution. 1921 L. 320=107 I.C. 273 (2). Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife and for delaying the presenting of a petition. 31 I.C. 264=8 L.B.R. 106 (F.B.). See also 31 N.L.R. 184=1935 N. 849 (S.B.).

**PRACTICE AND PROCEDURE.**—High Court should not make a decree *nisi* absolute without a motion made to that effect. 31 A. 511=3 I.C. 969=6 A.L.J. 793, following 10 A. 559. A decree for divorce may be obtained even if the petitioner be guilty of adultery during marriage. Under very peculiar circumstances, adultery by the petitioner is no bar to a decree. But the Court is bound by the rules binding English Courts under the English Divorce Act. 70 P.R. 1911=12 I.C. 960. Misconduct of wife before confirmation of decree *nisi* on her application—Court's discretion. See 88 I.C. 1009=1925 R. 257. Wife's adultery—Husband's adultery proved—Application may be dismissed. 41 B. 36=36 I.C. 800=18 Bom.L.R. 818. Points to be considered in assessing damages against co-respondent. See 1927 O. 34.

**SEC. 13.**—If a petition for divorce by a wife is unopposed, the evidence that the husband committed adultery and had been cruel to his wife, is by itself not sufficient basis for a decree *nisi*. It is essential to prove want of connivance on part of the wife at the alleged adultery and if there is delay in fil-

Power to Court to pronounce decree for dissolving marriage.

14. In case the Court is satisfied on the evidence that the case of the petitioner has been proved,

ing petition, delay must be explained. It is also essential that necessary facts should be stated and recorded with precision. 1930 A. 322=124 I.C. 465 (S.B.).

SEC. 14.—In a suit under the Act provisions of Act must be strictly complied with and particularly a decree for dissolution cannot be made on admissions alone, without recording evidence. 1931 L. 1=12 L. 266 (S.B.).

**ADULTERY OF WIFE—HUSBAND'S CONDUCT REPREHENSIBLE.**—Husband of the petitioner had ill-treated her and subsequently deserted her with no means to provide for herself and her child. For providing for the education of the child, she was obliged to resort to a life of prostitution for some time and subsequently she gave up that life. It was found the husband was leading a life of adultery. The wife applied for dissolution. *Held*, that having regard to the fact that the petitioner did not make any attempt to keep material facts from the Court and that she has been maintaining her child in a very satisfactory manner, the discretion under sec. 14 ought to be exercised in favour of the petitioner and decree *nisi* for dissolution made. 57 C. 891=1930 C. 729. In dealing with divorce cases it should be remembered that the woman is the weaker vessel, that her habits of thought and feminine weakness are different from those of the man and that what may perhaps be excusable in the case of woman would not be excusable in the case of man. Where it is found that the woman has been guilty of adultery and that her adultery has resulted from the husband's conduct towards her, the Court should make allowance in treating her case with leniency. Where there is sufficient evidence to prove cruelty and adultery on the part of the husband who deserts his wife without making any provision for maintenance of his wife and the wife who was living in her father's house after her desertion by the husband, cohabits with a person living as a guest in the father's house, the conduct of the husband in deserting his wife and making no provision for her conduces greatly to wife's adultery and it is a fit case in which Court should exercise its discretion by granting to the wife a decree *nisi*. 1936 I.C. 764=1932 S. 18. *See also* 1939 A. L.J. 478=1939 All. 522=I.L.R. (1939) All. 573. Where proceedings for the dissolution of marriage on the ground of adultery are instituted promptly on the discovery and there is no collusion or connivance between the parties, a decree for dissolution of the marriage should be pronounced. 34 P.L.R. 893=145 I. 974=1933 L. 255. Where it is proved that the wife's adultery with the respondent was with the connivance of the husband, her adultery with him does not revive her previous adultery with another person. 165 I.C. 392=1936 O. W. N. 938. In a divorce case four points require consideration. They

are: (1) Is the petitioner resident in India within the meaning of the Act? (2) Has the petition been presented or prosecuted in collusion with either of the respondent? (3) Has the petitioner been guilty of any such wilful neglect towards his wife as has conduced to the adultery? and (4) Has there been adultery between respondent and co-respondent? 1933 S. 70=143 I.C. 618. *See also* I.L.R. (1939) All. 573=1939 A.L.J. 478=1939 All. 522; 143 I.C. 122=1933 L. 356. Where a woman who has been treated with gross cruelty and has been deserted by a husband guilty of habitual adultery, and who, after her husband had left the place married a Mahomedan husband according to Islamic law believing that by so doing and by herself becoming a Mahomedan, her marriage with her Christian husband would *ipso facto* be dissolved, it cannot be said, merely because, she was wrongly advised as to the law, that exercising discretion in her favour and granting her decree *nisi* would encourage immorality. Hence, discretion under sec. 14 should be exercised in her favour. 177 I.C. 167=A.I. R. 1938 Sind 162.

**CONDONATION.**—Condonation means forgiveness of a conjugal offence with full knowledge of all the circumstances. The best evidence of condonation is the continuance or resumption of sexual intercourse by the husband after he has discovered the misconduct of his wife. For the revival of the offence committed before the condonation, there must be clear evidence of a fresh matrimonial offence of a grave character such as adultery. 1946 N.L.J. 104=A.I.R. 1946 Nag. 69 (S. B.). Condonation of matrimonial offences means the complete forgiveness of all such offences as are known to, or believed by, the offended spouse so as to restore between the spouses the *status quo ante*. Mere forgiveness is not condonation. Forgiveness is condonation when it results in completely restoring the offending party and is accompanied by cohabitation. 1935 N. 49 (S.B.). Condonation is not absolute, but is only conditional and if there is a subsequent matrimonial offence, then the condonation goes and the original offence is revived. 1935 N. 49 (S. B.); 156 I.C. 247=29 S.L.R. 83. A deed of separation between a husband and wife contained the following clause: "No proceedings shall be taken by or on behalf of . . . in respect of any misconduct or alleged misconduct previous to the date of these presents and any offence which may have been committed or permitted by either of them against the other is hereby condoned". The wife having filed a petition for dissolution of marriage grounded on allegation of adultery by the husband subsequent to the separation deed coupled with allegation of cruelty charged to have taken place prior to the execution of that deed, *held*, that the clause in the deed operated as an absolute release and not by

and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections 16 and 17 made and declared :

Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued.

Condonation.

way of conditional condonation and that cruelty antecedent to the deed could not be relied on. 60 C. 318=37 C.W.N. 249=1933 C. 388. Upon the commission of a subsequent matrimonial offence the forgiveness of the prior offence is cancelled and the old cause of complaint is revived; furthermore, the subsequent offence need not be necessarily *ejusdem generis* as the original offence. Subsequent cruelty would, therefore, revive previously condoned adultery. 1939 Rang.L.R. 267=1939 Rang. 352.

**DELAY IN PRESENTING PETITION—DUTY OF COURT.**—Although the provisions of the Limitation Act do not apply to suits or proceedings under the Divorce Act one of the first things which Court should look to when a charge of adultery is preferred is whether there has been such delay as to lead to the conclusion that petitioner has either connived at the adultery or was wholly indifferent to it. Poverty is almost always a sufficient excuse for delay, subject of course to delay not being inordinate. 1935 Sind 112 (F.B.); 156 I. C. 247=29 S.L.R. 88. Where delay is accounted for by the honest efforts made by petitioner to prevail on his spouse to abandon her evil ways, it would not be an unreasonable delay so as to deprive the petitioner of his legal right to secure a divorce. 1935 N. 49 (S.B.); 31 N.L.R. (Supp.) 174=161 I. C. 409=1936 N. 26 (S.B.). Under sec. 14, delay in presenting a petition for dissolution of marriage is not an absolute bar to relief; the Court has a discretion either to grant or refuse a decree. Having regard to the conditions of Indian society, the statement of the husband that for the sake of the children and the honour of the family he wished to avoid publicity and therefore put off seeking redress, is a sufficient explanation of any delay there has been on his part. I.L.R. (1943) 1 Cal. 340=47 C.W.N. 251=A.I.R. 1943 Cal. 146. A petitioner for dissolution of marriage who has relied on several acts of

adultery with regard to some of which there has been delay, is not disentitled to relief merely on that ground, when he has proved the latest adultery of all regarding which there has been no question of delay. I.L.R. (1943) 1 Cal. 340=47 C.W.N. 251=A.I.R. 1943 Cal. 146. Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. 193 I.C. 301=1941 Rang. 110 (F.B.). In a petition for divorce by the wife on the ground of her husband's adultery and cruelty, when she makes out her case of adultery, the respondent should not be allowed to avoid the consequences of proved misconduct by putting forward acts of misconduct on the part of the petitioner for which the respondent was himself responsible, and when it is found that it was the conduct of the husband (respondent) in forcing the wife to leave the home that has conduced to the adultery which she confesses, the respondent should not be allowed to take advantage of that; *held, further*, on the facts that a delay of three years was not, under the circumstances, unreasonable and should be condoned by the Court; and that discretion should be exercised in the wife's favour by granting the divorce, notwithstanding the delay and her admitted adultery. 13 P. 129=15 Pat.L.J. 353=1934 P. 474. Courts in Burma, like the High Court in England, are entitled to pronounce a decree based on adultery committed by the respondent after the presentation of a petition for dissolution of marriage. But the petitioner desiring the Court to do so should, with the leave of the Court, file a duly verified supplemental petition supported by an affidavit setting out the facts, testifying to non-collusion and non-connivance, and should also serve such petition on the respondent and on all persons affected by it. This is the English practice which applies equally in Burma. 1938 Rang.L.R. 267=1939 Rang. 352.

15. In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground in case of such a suit instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion.

16. Every decree for a dissolution of marriage made by a High Court, not being a confirmation of a decree of a District Court, shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

PRACTICE.—There are no rigid rules as to the exercise of the discretion of Court to grant a petition for divorce. All relevant facts are to be considered as well as the welfare of the parties themselves and the principles of morality. If the wife's adultery has been condoned by the conduct of her husband, she is entitled to ask the Court to exercise its discretion in her favour and to grant her a divorce; in the event of deliberate suppression by a petitioner the Court will be disinclined to give him or her the assistance that it might have given, had full disclosure been made at the outset. Subject to these guiding principles, the Court will naturally take a large and merciful view, considering the interests of possible children who might otherwise be born out of lawful wedlock, and the probability of one party to the proceedings marrying the third party involved if enabled to do so by being accorded freedom from the marriage tie. 165 I.C. 392=12 Luck. 697=1937, O. 116. Before passing a decree *nisi* what the Court has to see is not that the petitioner has given *prima facie* proof of his case but that the justice of the case demands that the decree should be pronounced. The facts on which the exercise of the discretionary power is sought should be set out in the petition. The Court should also consider that delay in filing petition is a point against him. 1934 P. 38=146 I.O. 798 (F.B.). In petitions for dissolution there is nothing in the Act as regards the exercise of the discretion of Court, and in this matter the practice in English Courts must be followed. There is no doubt that discretion of Court in these matters ought to be used with care. The main consideration is interest of the community at large. There is one ground however on which the discretion of the Court is invariably exercised and that is where the wilful neglect or misconduct of the respondent husband caused or conduced to his wife's adultery. Further there must be complete candour and disclosure on the part of the petitioner who wishes the Court to exercise its discretion in his or her favour. 151 I.O. 827=1934 A. 782.

Sec. 15.—Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain

relief by way of divorce. 47 B. 657=25 Bom. L.R. 289=1923 B. 284. Desertion to justify judicial separation must be a wilful abstention by the husband against the wish of the wife. 47 B. 657. Where a wife sues her husband for divorce on the ground of his adultery it is open to the husband in his written statement to counter-petition for a divorce on the ground of wife's adultery. It is not necessary that the husband should take an independent proceeding. 47 B. 657. Where a husband alleges adultery on the part of the wife with a foreigner the Court has jurisdiction to add such foreigner as a co-respondent to the proceeding. (*Ibid.*) See also 46 M. 133 under S. 37.

Sec. 16.—A High Court alone is competent to pronounce a decree *nisi* under sec. 16. 45 I.C. 519. A decree for dissolution of marriage, made by the High Court under the Divorce Act whether in its appellate or in its original jurisdiction, should be a decree *nisi* and not a decree subject to the confirmation by the High Court under sec. 17. 175 I.C. 408=1938 Rang. 204 (F.B.). If in a matrimonial suit the petitioner husband being ordered to give security for the wife's costs, fails to do so, his petition should be stayed and not dismissed. 47 B. 664=25 Bom. L.R. 339. Where wife is petitioner, husband's defence should not be struck out, but he should be proceeded against for contempt if he is proved to be able to pay, but contumaciously refuses to do so. 47 B. 664. Where, in a divorce case, the decree is referred to the High Court for confirmation, it is not necessary that petitioner himself should be present personally before the High Court. 29 M. L.J. 269=29 I.C. 178 (F.B.). A witness in a divorce case is not precluded from showing cause why decree *nisi* should not be made absolute. 103 I.C. 512=1927 O. 310. As to effect of resumption of marital relations after decree *nisi* and before decree absolute, see 34 M. 339=21 M.L.J. 528. On this section, see also 84 I.C. 71=1924 B. 132.

"During that period" means period from the date of decree *nisi* to the date of decree absolute. 108 I.C. 512=1927 O. 310. Where a decree for dissolution of marriage has been made absolute, it is not open to a third party



During that period any person shall be at liberty in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court,

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi* or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of counsel and witnesses, and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever, a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

Confirmation of decree for dissolution by District Judge.

17. Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

to seek the aid of the Court under sec. 151, C.P. Code, to set it aside on the ground that one of the parties to the divorce proceedings was a minor and has not been represented by a guardian *ad litem*. Nor is there any provision in the Divorce Act to set aside a decree absolute in the manner in which a decree *nisi* could be attacked. 15 Luck. 350=1939 O.W.N. 139=1940 O. 279.

INTERVENOR.—In India, any person, with the exception of the respondent and the co-respondent and any person acting at the instance of either of these persons, may proceed by way of intervention proceedings. The mere fact of relationship of intervenor to respondent is not sufficient to disentitle intervention. 10 R. 115=137 I.C. 426=1932 R. 73; 103 I.C. 512=1927 O. 310. The words “not being brought before the Court” in sec. 16 means, “not being brought before the Court at any time up to the date of intervention.” 103 I.C. 512=1927 O. 310. It is the duty of every petitioner to place the facts of his or her case before the Court, and on intervention a decree *nisi* may be rescinded if there is failure to deal with the Court, with the utmost good faith. 10 R. 115=137 I.C. 426=1932 R. 73. There can be no collusion in mere prosecution as distinct from initiation of a true case. But it is very necessary to be careful before imputing collusion between parties from ordinary acts which a solicitor would naturally regard as inoffensive and unobjectionable. The mere fact that the wife’s attorney had furnished certain documents to the petitioner’s attorneys or that they had subpoenaed co-respondent is a very narrow ground for supposing that any collusion had taken place. 56 O. 530=1929 C. 599. Where after the passing of a decree *nisi*, a third party intervened alleging collusion and though notices and warrants were issued to the parties service was deliberately avoided. *Held*, the Court should dismiss the application for dissolution, set aside the decree *nisi*, and direct that a complaint be instituted against the husband under sec. 193, Penal Code. 145 I.C. 253=1933 L. 98. That the motive of the intervenor was not

to expose the conduct of the petitioner but only to obtain custody of the child is immaterial; if the charges or guilty conduct on the part of the petitioner are made out, the Court can refuse to make the decree absolute, irrespective of the motive prompting the intervention. 10 R. 115=137 I.C. 426=1932 R. 73. Petition for making decree *nisi* absolute—Court-fee payable. *See* 1945 O.A. (C.C.). 91 (1).

SECS. 16 AND 17.—Owing to the adultery, cruelty and desertion on the part of the husband, the wife was compelled to leave his house. Subsequently she committed adultery with another man whom she wanted to marry and files a petition for divorce. The Judge viewed the case leniently and even though she was guilty of adultery granted a decree *nisi*. *Held*, that the discretion exercised was proper and that the decree should be made absolute. 27 S.L.R. 322=1933 S. 38.

SECS. 16 AND 17-A.—Decree *nisi*—Right of respondent to intervene—Duties of Government Advocate as King’s Proctor. Sec. 16 does not give the right to the respondent to object to a decree *nisi* being made absolute. The words “any person” do not apply to parties to the proceedings, and, therefore, cannot include the respondent. The right of the petitioner to have the decree *nisi* made absolute can only be challenged by a third party, or by the Government Advocate who is placed in the position of King’s Proctor by a notification of the Governor-General in Council under sec. 17-A. The Government Advocate cannot leave the matter in the hands of the respondent, and the correct course is for him to consider the respondent’s allegations and what may be placed before him in connection therewith and then decide whether he should intervene. 14 R. 322=1936 R. 499.

SEC. 17: GENERAL.—The obvious intention of the Legislature as expressed in sec. 17 is that the High Court, upon a reference for confirmation, should review the entire evidence and come to its own conclusion whether facts sufficient to justify a decree for dissolution are or are not established by that evidence. 1922 A. 504=44 A. 745=79 I.C. 133.



Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference, the opinion of the senior Judge shall prevail.

Case where dissolution was refused for want of evidence of misconduct. *See* 1930 L. 360 (S.B.). *See also* 40 B. 109=17 Bom.L.R. 948 under S. 37; 91 I.C. 99=1926 S. 58 (F.B.). Only the innocent party can move the High Court for a decree absolute under sec. 17. The Court will not entertain application to that effect from guilty party. 150 I.C. 543 (1)=1934 A. 634 (1) (S.B.). Where husband himself had been living for a number of years in a state of adultery with another woman that fact in itself is sufficient justification for High Court not to exercise its discretion in the matter of confirmation of the decree *nisi* passed for dissolution specially when circumstances on which he relies in proof of his wife's misconduct, are highly improbable and fall considerably short of the high standard of proof required under the law. 149 I.C. 1009=36 P.L.R. 66=1934 L. 334 (S.B.). The High Court has power to act on a reference under sec. 17 by the District Judge without any further application by and in the absence of the parties. The High Court therefore can proceed under sec. 17 with the confirmation of the decree for dissolution of marriage passed by the District Judge even when the petitioner under sec. 17 is absent and has not obtained a motion for the confirmation of the decree and the co-respondent who was the only person present at the hearing does not wish to contest the proceedings. 213 I.C. 173=A.I.R. 1944 Lah. 162 (S.B.). Notice of confirmation proceedings to the respondent and co-respondent may be dispensed with in an appropriate case, *e.g.*, a case in which they did not before the decree *nisi* was passed deny the petitioner's allegation regarding adultery and were quite willing for the dissolution of the marriage and there is nothing that they can contest in the High Court. I.L.R. 1945 Lah. 332=47 P.L.R. 1=A.I.R. 1945 Lah. 67 (F.B.).

**JURISDICTION.**—In order that the Court may have jurisdiction to grant a decree for dissolution, the parties must profess the Christian religion, and they must also be domiciled in India at the date of the presentation of the petition. The domicile of the wife is the same as that of the husband, and it is his domicile which has to be considered. The domicile of origin remains until it is changed and a domicile of choice is acquired, and the burden of proving a change of domicile is upon the person who asserts it. Where the domicile of origin of the husband is Indian, the only question is whether there is any evidence that domicile has been changed. But where the domicile of origin is not Indian, then it is necessary to ascertain whether there is any evidence that that domicile had been

changed in favour of an Indian domicile at the date of the presentation of the petition. Domicile depends on two things, the fact of residence and the intention to reside permanently. 36 Bom.L.R. 492=58 B. 502=1934 B. 230 (S.B.). Sec. 20 does not make the proviso to sec. 17 applicable to the confirmation by the High Court of a decree of nullity made by a District Judge. Such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. Apart from this the scheme of the Act generally shows that it makes a distinction between decrees for dissolution and decrees annulling marriage. 151 I.C. 471=36 P.L.R. 137=1934 L. 636 (S.B.).

No notice to the respondent is necessary in proceedings for confirmation of a decree for dissolution of marriage. 10 P.L.R. 1921=59 I.C. 89. The High Court will not confirm a decree for the dissolution if it is not satisfied that the respondent was in fact served with a petition for divorce. 42 M.L.J. 562=1922 M. 350 (F.B.). Whether relationship of husband and wife subsists after decree *nisi*, and before it is confirmed. *See* 41 C. 714=18 C.W.N. 484.

**PRACTICE AND PROCEDURE.**—Where in divorce proceedings the petitioner charged his wife with adultery but did not mention the adulterer's name and the Judge added his name as co-respondent on his initiative, the Judge was in error in adding his name without amending the petition accordingly. 38 M. 466=25 M.L.J. 594. *See also* 29 I.C. 178=29 M.L.J. 269 (F.B.). The decree of the District Court cannot be confirmed by the High Court unless the co-respondent who had been impleaded in the District Court is also impleaded in the High Court. 12 L. 266=1931 L. 1 (S.B.). In a suit for dissolution brought by the husband on the ground of adultery by his wife an *ex parte* decree was granted, but the High Court returned the case for enquiry to the District Judge. He found that the act of adultery, though first condoned, was revived by subsequent matrimonial offence. The wife raised the counter-allegation of petitioner's alleged adultery with another woman subsequent to the decree. *Held*, that it was a matter which the wife could not raise; it could only be examined upon the intervention of a third party or of a King's Proctor. (14 R. 322; 1936 Rang. 499. Rel. on.) 167 I.C. 735=1937 R. 79 (S.B.). Where a divorce decree obtained by the wife comes before the High Court for its confirmation, the husband cannot object to the confirmation of the decree on the ground that the wife has married since the passing of the decree by the District Judge. 170 I.C. 200=1937 Rang. 333 (F.B.). A petition was made for

The High Court, if it thinks further enquiry or additional evidence to be necessary, may direct such enquiry to be made or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit :

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

During the progress of the suit in the Court of the District Judge, any person, suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the High Court, shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section 16 shall apply to every suit so removed ; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

judicial separation. But the petitioner in her evidence asked for a decree for dissolution of marriage. There was no evidence on record disclosing whether the petitioner was a Christian at the time of marriage, nor was there any evidence as to the religion of the respondent. There was no proof that the pastor who purported to solemnize the marriage was a person authorised under sec. 5, Christian Marriage Act, to do so and no marriage certificate was filed. But a decree for dissolution was granted. *Held*, that the decree granting the dissolution of marriage could not be confirmed and the record should be returned to the District Court for the amendment of the petition and for proof that a valid marriage had taken place. 164 I.C. 974=1936 R. 429 (S.B.).

**REOPENING OF CLOSED PROCEEDINGS NOT ALLOWED.**—Under sec. 17, the High Court has full power to confirm or not to confirm the decree *nisi* and an order not confirming it would amount to an order dismissing the suit. The petitioner sued in the District Court for dissolution of his marriage with his wife. He was granted a decree and he then applied to the High Court for confirmation of the decree. Later on he applied to the effect that his wife had agreed to come back to him and he accordingly prayed that the case should be consigned to the record room. The order passed was that the parties had settled their differences and the application for confirmation was withdrawn. On a later date the petitioner applied once again for confirmation of the decree *nisi*. *Held*, that though the order on the prior occasion merely stayed further proceedings, the parties meant thereby to have the matter finally disposed of and that the proceedings could not be reopened at petitioner's instance. 13 L. 47=1932 L. 279.

**EVIDENCE.**—It is contrary to the principles and rules on which the Divorce Court acts and gives relief, to act on the uncorroborated testimony of a petitioner either to establish adultery or cruelty. 42 M.L.J. 562=1922 M. 350 (F.B.). Under sec. 7, the

Courts in this country should follow the same rule. (*Ibid.*) Where the wife has made allegations before the District Judge that her husband was committing adultery by keeping a mistress, the decree against her ought not to be made absolute without further enquiry. And where the allegations made by the wife are denied by the husband, and the wife though given an opportunity to prove the truth of her allegations, declines to cite witnesses and there is in fact no evidence to support her allegations the decree may be made absolute. 196 I.C. 412=1941 Kang. 249 (S.B.); 175 I.C. 21=1938 L. 301. Admission of an adultery by a husband may form the ground for granting a divorce even though it is not corroborated by other evidence. 1927 L. 491=9 L. 116. Condoned adultery may be revived by a subsequent matrimonial offence. 53 C. 436=96 I.C. 932=1926 C. 864. In proceedings for divorce taken out by the husband the onus of proof of the marriage is on the husband and unless such proof of the marriage is forthcoming in strict form the Court has no jurisdiction to enter into the matter. 146 I.C. 798 (F.B.).

**DEATH OF HUSBAND DURING PENDENCY OF INTERVENER'S APPEAL—EFFECT.**—The fact that at the date of the death of the husband the intervenor's appeal was pending does not prevent the decree absolute operating so as to deprive the widow of her status as the wife of the deceased. The decree absolute dissolves the marriage from the moment it was pronounced. The fact that neither spouse could re-marry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment *in rem* and unless and until a Court of Appeal reversed it, the marriage was for all purposes at an end. A.I.R. 1945 P.C. 188.

**DECREE NISI—INTERVENTION—TIME LIMIT.**—That the intervention had not taken place within six months of the decree *nisi* is immaterial. Intervention can always take place at any time before the decree is made absolute. However, it is within the discretionary

<sup>1</sup>[17-A. The Provincial Government of any Province within which any High Court established by Letters Patent exercises jurisdiction, may appoint an officer who shall within the jurisdiction of the High Court in that Province have the like right of showing cause why a decree for the dissolution of a marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor; and the said Government may make rules regulating the manner in which the right shall be exercised and all matters incidental to or consequential on any exercise of the right.

In relation to the jurisdiction of any such High Court as aforesaid in an Indian State this section shall have effect as if the reference to the Provincial Government was a reference to the Central Government.]

#### IV.—NULLITY OF MARRIAGE.

18. Any husband or wife may present a petition to the District or to the High Court, praying that his or her marriage may be declared null and void.

19. Such decree may be made on any of the following grounds :

Grounds of decrees.

#### LEG. REF.

<sup>1</sup>Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the old sec. 17-A which had been inserted by Act XV of 1927.

power of the Court to refuse the extension. A.I.R. 1945 P.C. 188.

INTERVENTION—AFFIDAVIT — NATURE OF.—The affidavit under r. 36 of the Rules framed under the Divorce Act must be of some one prepared to swear of his own knowledge to some relevant fact, or at least one which sets out the sources of information and swears to a belief therein. A.I.R. 1945 P.C. 188.

SECS. 17 AND 55.—A decree for dissolution of a marriage was passed and the co-respondent was ordered to pay damages to the petitioner and respondent. The co-respondent did not appeal from the order regarding damages but when the petition for confirmation of the decree was filed in the High Court, he sought to attack the order regarding damages. *Held*, that he was entitled to do so even though he had not appealed against the order. [20 Bom. 362 (F.B.) (Foll.)] 39 P.L.R. 666=1937 Lah. 417 (S.B.).

Sec. 17-A.—See 14 R. 322=1936 R. 499.

SECS. 18 AND 19.—The word "solemnized" in sec. 5 of the Christian Marriage Act means "celebrated" and deals with the ceremony only; and the words "rules, rites, ceremonies and customs of the church" mean only the rules, etc., as to the capacity of the parties. 47 I.C. 544=11 Bur.L.T. 69. Suit for declaration of nullity of marriage—Questions to be considered by Court. (*Ibid.*) "Fraud" means fraud practised upon the other party to the marriage and does not include fraud upon a third party. (*Ibid.*) See also I.L.R. (1939) 2 C. 60=1940 C. 65. A ceremony of marriage constituting a binding marriage between the parties subsists until set aside on one or other of the grounds which justify annulling or setting aside a marriage. Before a valid marriage can be celebrated both parties must be either single or divorced or a widow or a widower. If at the time of the marriage ceremony one or other of the

parties had a spouse living, the earlier marriage not having been set aside, the later marriage is void *ab initio*; in other words it is no marriage at all. The law in England that a party to a marriage of which the other party is incompetent to join in the celebration because of the existence of a previous husband or wife, is entitled without any recourse to any Court to marry any one else applies equally well to marriages between Christians in India inasmuch as no Christian can marry another person in the life-time of an earlier spouse unless the previous marriage has been set aside. This position cannot be interfered with in regard to a marriage celebrated in India as provided by sec. 88, Christian Marriage Act. Unless therefore the marriage is a valid marriage it cannot be a marriage which is in force within the meaning of sec. 19. 46 L.W. 602=1937 M. 565. A decree of nullity must be passed when the marriage is effected within six months of the confirmation of a decree of dissolution of a former marriage of either party where the former husband or wife is living at the time of the latter. 29 P.R. 1913=19 I.C. 778. See also 38 I.C. 413=38 M. 452. Hereditary syphilis—Impotency—Consent obtained by fraud—*Held*, marriage should be annulled. 67 I.C. 949=25 C.W.N. 706. In the absence of an express allegation and strict proof that the party was impotent, *i.e.*, physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, a suit for declaration of nullity on the ground of impotency is not maintainable. 30 I.C. 565=29 M.L.J. 183. In a petition under sec. 18 a prayer for custody of children may also be inserted. 27 A. L.J. 65=1928 A. 677.

SECS. 18 TO 20 AND 45: DECREE FOR NULLITY OF MARRIAGE—FORM OF.—The decree to be passed by the Calcutta High Court in exercise of its matrimonial jurisdiction in a suit for nullity of marriage must be one plain, simple, absolute decree, and it should not be in the form of a decree *nisi* to be followed by a decree absolute. I.L.R. (1944) 1 Cal. 258.

Sec. 19.—Where there is a wilful refu-

(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit ;

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity ;

(3) that either party was a lunatic or idiot at the time of the marriage ;

(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

sal of sexual intercourse due to incapacity arising from nervousness or hysteria or from an inherent repugnance to act of consummation thus making consummation practically impossible, Court can declare marriage null and void on the ground of impotence. 1931 A.L.J. 267=1931 A. 207. If every attempt on the part of the husband to consummate the marriage immediately reduces his wife to a state of hysteria and the conduct of his wife is such that it is impossible to obtain consummation short of using force and being brutal and virtually raping her, the law regards this as impotency on the part of the woman within the meaning of sec. 19. It does not enjoin cruelty and brutality on the part of the man. It does not direct him to force the woman to his will. It respects her body and, provided her conduct is not just wilfulness or spite and if due to true incapacity, it grants release from an impossible situation which should never have arisen. Incapacity in the woman is possible *vis a vis* a particular man even when the woman is shown to have had previous sexual experience. That the incapacity need not be physical is now well established. It can be due as well to mental as to physical causes. All that is required is an invincible repugnance to the act of intercourse either generally or with the particular man. The rules of evidence are not different in these cases and there is no minimum standard of proof necessary. The uncorroborated testimony of the petitioner is sufficient, if it can be believed. His testimony cannot be discarded solely because the case is an unusual one. The mere fact that the wife also wants the marriage to be annulled does not necessarily import collusion. I. L.R. (1943) Nag. 474=1943 N.L.J. 296=A.I.R. 1943 Nag. 185. Incapacity in wife of consummating marriage; consisting of a nervous and psychic disorder and of invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner husband is concerned, which renders her incapable of submitting to sexual intercourse with him, is sufficient to satisfy the requirements of sec. 19, as it constitutes a permanent physical disability. The burden of proving his allegation is on the petitioner and he must remove all reasonable doubts. If there be a direct conflict of testimony between the two parties who alone know the truth, the difficulties are much increased. The delay on the part of the petitioner increases the burden of proof and is an important factor

in deciding whether his story is true. The law requires sincerity in the complainant, *i.e.*, real sense of grievance complained of, unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, requires all reasonable promptitude to be exhibited by complainant in seeking legal redress. Delay in itself is not an absolute bar to success in a suit of such nature unless the respondent has suffered in any way by reason of it; but it has an important bearing on the evidence by which the charge of impotency is sought to be established and upon the measure of proof required. 1938 C. 684. Where the wife was suffering from some curable form of venereal disease and it appeared that the only mistake was that the husband was under the impression that girl was not diseased at the time of marriage, *held*, that the lady was not impotent, that there was no fraud and that it was not a proper case to pass a decree of nullity. *Per Curiam*.—It would be proper to hold that incurable syphilis is equivalent to impotence. 6 O.W.N. 244=117 I.C. 450=1929 O. 238. The existence of venereal disease in a woman does not constitute impotence within the meaning of sec. 19 of the Act. *Per Hasan, J.*—Whether, when a wife suffers from a disease which might or might not be venereal and the husband has reasonable and well-founded apprehension of infection in case he has sexual intercourse with such a wife, in such circumstances the Court would be justified to record a finding that the wife was impotent. 5 Luck. 484=7 O.W.N. 17=1930 O. 83.

**Idioty.**—The term "idiot" in sec. 19 must be read as a word used in its ordinary significance and means a person deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct. The petitioner who has a licence to hold a gun for shooting, who goes about shooting, who rides a horse, who sometimes goes about fishing, who can compose a letter for himself and write it in a tolerably good hand, who reads books to pass time, who is invited to tea parties, who knows the nature of the transaction of marriage in which he entered with the opposite party and indeed who arranged for it with the Bishop cannot be called an idiot in the ordinary acceptance of the word. 56 A. 428. *Per Sulaiman, C.J.*—In order to find that a person is an idiot, it is not sufficient to find that he is a mere imbecile. One cannot be an idiot unless his faculties have not at all been deve-

20. Every decree of nullity of marriage made by a District Judge shall be

Confirmation of District Judge's decree.

subject to confirmation by the High Court, and the provisions of section 17, clauses 1, 2, 3 and 4, shall *mutatis mutandis* apply to such decrees.

loped and he has not acquired any appreciable intelligence. 56 A. 428. Any state of mind which falls short of lunacy or idiocy cannot be allowed to be a ground for annulment. Persons differ from one another in the degree of intelligence possessed by them. It would be a dire calamity if it could be said as a matter of law that a marriage, entered into by a person who is neither a lunatic nor an idiot, is void, simply because one of the parties lacks in intelligence, although he is able to understand the nature of the bonds of matrimony into which he is entering. Want of consent as such does not find a place in sec. 19 as one of the grounds for declaring a marriage null and void. 1934 A.L.J. 1127=56 A. 428=1934 A. 273. The Judge has to satisfy himself regarding the idiocy of a person. Doctor's opinion in such matters is not conclusive. It is at the most a guide. The mere fact that the person is feeble-minded and that he has the intelligence of a child of about eight or nine years of age is not sufficient to declare that person an idiot within the meaning of sec. 19 (3) which classes lunatics and idiots together. 1933 A. 122=55 A. 185.

The various grounds on which the Court can give a decree of nullity under the Divorce Act refer to cases where there has been a marriage validly performed. Questions arise under secs. 4 and 5, Christian Marriage Act, when the marriage has not been validly performed. There is a clear distinction between a decree of nullity of a valid marriage and a declaration that the marriage itself is illegal and void. There can therefore be no doubt there is jurisdiction in the High Court to hear and decide questions under the Christian Marriage Act. 55 A. 185.

**CONSENT TO MARRIAGE—QUESTION OF FACT.**—In a suit for declaring marriage null and void on ground of want of free consent, the question of consent is one of fact and not of law. Hence an issue and evidence for it is necessary for decision. 56 A. 428. Inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. Such consent cannot be given by a child of nine years of age and consequently a person who though 54 years old, is found by the Court to be very feeble minded and to have the mentality of a child of nine years of age is incapable of giving his consent. 1933 A. 122=55 A. 185.

**BURDEN OF PROOF.**—Where a petition to declare a marriage null and void is made under sec. 19 (4), the burden of proof lies upon the petitioner that the previous marriage of the opposite party was in full force and effect and was not set aside at the time when his marriage took place with the oppo-

site party. 169 I.C. 516=1937 Mad. 565. *A*, a Hindu, who was already married according to Hindu rites to a Hindu woman, *B*, falsely represented to *C*, a Christian woman, that he was a Christian and a bachelor and married her. On the petition for dissolution of the marriage by *C*, held, that the onus was on *A* to prove that he was converted to Christianity and that he was a Christian on the date of his marriage to *B* and therefore his marriage to *B* not being legal, marriage with *C* was legal. *A* having failed to discharge that onus, *C* was entitled to a decree of nullity under sec. 19 (4). Held, further, that *C* would be entitled to a divorce on the ground of fraud even if a decree of nullity was denied to her. 205 I.C. 290=A.I.R. 1943 Lah. 51 (S.B.).

**DISCRETION OF COURT—ADMISSIONS OF PARTIES—VALUE OF.**—Divorce proceedings and proceedings for nullity are not like ordinary civil suits in which the parties are litigating their own rights and seeking decrees to which they are indisputably entitled if the facts they allege are proved. There is no right of divorce. No one is indisputably entitled to a decree of nullity. The Courts have a discretion in every case even when all the necessary facts are clearly proved. The slightest bad faith, any suspicion of collusion, the least want of candour, entitles the Court to stay its hand. The State is vitally concerned in the institution of marriage and insists on strict proof and a close investigation before it will permit the tie to be dissolved. Provision is made for a loosening up of the normal procedure to prevent injustice in extreme cases but such cases must be extreme and should be very rare, and always, adequate reasons for any departure from the normal should be given by the Court. The mere fact that the other side admits the facts, or does not contest, is not in itself enough though that may be taken into consideration along with other matters. I.L.R. (1943) Nag. 474=1943 N.L.J. 296=A.I.R. 1943 Nag. 185.

**SECS. 19 AND 20.**—The policy of the Divorce Act does not contemplate a valid marriage between a Christian and a person professing a religion which is not monogamous. Where prior to and also at the time of their marriage, the husband who was a Mahomedan represented to the wife that he was a Roman Catholic, and the wife, who was a Roman Catholic would not have married him if she had known that he was a Mahomedan, the marriage is void, the wife's consent to it having been obtained by fraud. The High Court has accordingly power to annul that marriage on the ground of fraud under S. 19 of the Act. I.L.R. (1939) 2 Cal. 60=1940 Cal. 75.

**SEC. 20.**—S. 20 does not make the proviso

21. Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent

Children of annulled marriage.

marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.

V.—JUDICIAL SEPARATION.

22. No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial

Bar to decree for divorce *a mensa et toro*; but judicial separation obtainable by husband or wife.

separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

to S. 17 applicable to the confirmation by the High Court of a decree of a nullity of marriage made by a District Judge. Such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. Apart from this the scheme of the Act generally shows that it makes a distinction between decrees for dissolution of marriage and decrees annulling a marriage. 36 P.L.R. 137=1934 L. 636 (S. B.). As to form of decree in suit for nullity of marriage. See I.L.R. (1944) 1 Cal. 258.

SEC. 22.—The mere fact that the husband and wife cannot agree is not a sufficient ground for judicial separation. 1932 O. 231=9 O.W.N. 447. Desertion under the Divorce Act implies an abandonment against the wish of the person charging it, but it is not a universal rule that the abandonment must be against expressed wish of that person. 8 Bur.L.T. 32=27 I.C. 604. As to what constitutes "cruelty" "adultery", "desertion", see note under S. 10, *supra*. To constitute 'cruelty' there must be danger to life, limb and health, bodily or mental, or a reasonable apprehension of it. 1932 O. 231=9 O.W.N. 447. A decree for judicial separation and payment of alimony to the wife is annulled by subsequent resumption of co-habitation by the parties and the wife cannot claim any rights under the decree even if the husband had executed an agreement that the decree ordering payment should remain in force and that she should have the right to live separate if she had any fresh grievance against him. 137 I.C. 737=1932 O. 142 (8 Q.B.D. 778 and 2 R. 163 Foll.).

**CRUELTY—IMPUTATION OF MISCONDUCT TO WIFE—IF AMOUNTS TO.**—A false imputation of misconduct made by the husband in the course of an acrimonious correspondence between himself and his wife is not sufficient to make out a case of cruelty justifying a decree for judicial separation, especially when there is no evidence that he made any such

imputation against his wife to any third person and it is not even suggested that the wife has suffered any mental injury or injury to health by reason of such imputation. 1935 O.W.N. 103=1935 O. 133. Where the husband has been guilty of beating his wife on several occasions and on one of them her hands were tied with a chain and her feet with a rope and she was kept hanging in a door way until another person came to her rescue, the acts of the husband amount to legal cruelty sufficient to justify the Court to pass a decree for judicial separation under S. 22 of the Act. 165 I.C. 12=12 Luck. 526=1937 O. 52. As to jurisdiction, see 1941 A.L.J. 710.

**DESERTION.**—A false imputation of misconduct made by the husband in a letter written by him to his wife during the period of desertion by her when his feelings were greatly exasperated on account of the attitude adopted by his wife, does not constitute "reasonable cause" for her deserting him, especially when, during that period, the husband wrote to her several times asking her to return to him and offering to take her back without any conditions on either side but the wife persisted in her desertion. The husband, in such circumstances, is entitled to a decree for judicial separation on the ground of desertion by his wife without reasonable cause. 1935 O.W.N. 103=1935 O. 133. Where in a petition by the wife praying for the dissolution of her marriage with her husband on the ground of her husband's adultery, the wife fails to prove the charge of adultery but succeeds in proving cruelty by the husband towards her, the Court can pass a decree for judicial separation under S. 22 although she has not specifically prayed for such a decree either in her original petition or in her memorandum of appeal. 165 I.C. 12=12 Luck. 526=1937 O. 52. In an application for judicial separation under S. 22, where adultery is alleged, it is difficult to produce evidence of witnesses who may have seen the guilty party *in flagrante delicto*



23. Application for judicial separation on any one of the grounds aforesaid

Application for separation made by petition.

may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

24. In every case of a judicial separation under this Act, the wife shall,

Separated wife deemed spinster with respect to after-acquired property.

from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead :

Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

25. In every case of a judicial separation under this Act, the wife shall

Separated wife deemed spinster for purposes of contract and suing.

whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect

of any contract, act or costs entered into, done, omitted or incurred by her during the separation :

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessities supplied for her use :

Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

#### REVERSAL OF DECREE OF SEPARATION.

26. Any husband or wife, upon the application of whose wife or husband,

Decree of separation obtained during absence of husband or wife may be reversed.

as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree; on the ground that it was obtained in his or her absence,

and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts or acts of the wife incurred, entered into or done between the times of the sentence of separation and of the reversal thereof.

and at most circumstantial evidence can be led from which a reasonable inference may be drawn of the guilty party having committed adultery. 39 P.L.R. 556=1937 Lah. 395.

Sec. 23.—Adultery on the part of the applicant is sufficient legal ground for rejecting an application for judicial separation, though otherwise it is a fit case. 33 A. 500=9 I. C. 796=8 A.L.J. 318. Petition by wife—Marriage and residence in Bombay—Subse-

quent residence outside—Last residence in Bombay—Petitioner also residing in Bombay at the time of presentation of petition—Jurisdiction of High Court. 37 Bom.L.R. 55=1935 B. 121. See also 1941 A.L.J. 710=1941 A.W.R. (H.C.) 387 (Residence in a portion of G. State occupied by G.I.P. Ry. as conferring jurisdiction on All. High Court).

Sec. 24.—On this section, see 4 C. 140 and 1 C. 412.



## VI.—PROTECTION ORDERS.

27. Any wife to whom section 4 of the Indian Succession Act, 1865<sup>1</sup> does not apply, may, when desired by her husband, present a petition to the District Court or the High Court, at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

28. The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself, by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

29. The husband or any creditor of, or person claiming under him, may apply to the Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it think fit so to do, may discharge or vary the order accordingly.

30. If the husband, or any creditor of, or person claiming under, the husband seizes or continues to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

31. So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

## VII.—RESTITUTION OF CONJUGAL RIGHTS.

32. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

## LEG. REF.

<sup>1</sup> See now the Indian Succession Act (XXXIX of 1925).

SEC. 31.—Delay to be culpable must be somewhat in the nature of connivance or acquiescence. "Delay" must be the sort of delay that would show the petitioner to have been insensible to the loss of the husband or wife as the case may be. 27 I.C. 604=8 L. B.R. 256; see also 107 I.C. 273.

SEC. 32.—In a suit by a Christian brought in an ordinary way on the original side of the High Court, and not under the Matrimonial jurisdiction, praying for a declaration that the marriage between the

parties to the suit was valid and for restitution of conjugal rights, the judge has jurisdiction while making the declaration to pass an order for restitution of conjugal rights. 32 Bom.L.R. 17=1930 B. 105. In a petition for restitution of conjugal rights it is sufficient if one of the parties professes the Christian religion. *Held*, that the Bombay High Court has jurisdiction to entertain a petition instituted by a Russian lady who is a Russian and a Christian against her husband who is a Parsi, the marriage itself having been celebrated under the French Law. Effect of words "or respondent" inserted in S. 2 of the Act by Act XXX of 1927 considered. 32 Bom.L.R. 1046=1930 B. 385 (F.B.).

33. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

Answer to petition.

#### VIII.—DAMAGES AND COSTS.

34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

35. Whenever in any petition presented by a husband, the alleged adulterer has been a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the cost of the proceedings :

Power to order adulterer to pay costs.

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

SEC. 33.—*See* 38 B. 125=20 I.C. 492=15 Bom.L.R. 593.

SEC. 34.—Principle in awarding damages against a co-respondent in divorce proceedings is to ascertain what loss the husband has suffered; the object is not to punish. The means of the co-respondent are not a relevant factor. 52 C. 379=29 C.W.N. 350=1925 C. 585 (F.B.); 9 O.W.N. 362=7 Luck. 683; 98 I.C. 1019=1937 O. 34. *See also* 39 P.L.R. 666=1937 Lah. 417 (F.B.). Damages in divorce proceedings are compensatory and not punitive. I.L.R. (1943) 1 Cal. 340=47 C.W.N. 251=1943 Cal. 146. Damages are awarded for the injury done to the husband in alienating his wife's affections. A husband who is himself responsible for his wife's misconduct or who condones his wife's adultery with the co-respondent cannot claim damages from the latter. 165 I.C. 392=1937 Oudh 116=1936 O.W.N. 938. Amount spent over marriage is the tangible source for determining damages. A successful petitioner is entitled to much more irrespective of the capacity of co-respondent to pay. 1935 N. 49 (S.B.); 31 N.L.R. 184=156 I.C. 1008. The object of passing a decree for damages is to give the husband compensation for the loss which he has sustained. In order to determine what loss the petitioner has sustained by his wife's adultery it is necessary to consider the circumstances of their married life from the beginning. When it appeared that from the very beginning of their life in India the petitioner had thought time and again of means by which he might rid himself of his wife and it was further found that he had himself committed adultery with the woman and engineered her divorce from her first husband. *Held*, C.C.M.—270

that this was not a case in which damages could be awarded to the petitioner against the co-respondent, but that the co-respondent might be directed to pay the costs of the petitioner. 1931 O. 259=8 O.W.N. 168. *Per Marten, C.J.*—"In every divorce case one principal element is that the marriage should be proved strictly and in general a certificate of marriage should be produced . . . Indian Courts have no jurisdiction to dissolve the marriage of persons who are not domiciled in India or persons who are not Christians. . . . In such cases it is desirable that independent corroborative evidence should be obtained to show that the respondent was living in adultery with the co-respondent. 51 B. 1026=105 I.C. 871=1927 B. 594. The causes of action against the co-respondent for damages and against the wife for divorce are different and distinct although upon the true construction of the Divorce Act, the same defences are open to these claims. It is not right to say that because the Court has no jurisdiction to grant a decree for divorce, it cannot treat a petition as one for damages and give relief. It is clear, however, that the damages suffered by the petitioner will be different according as he is getting a decree for divorce or is not to get a decree for divorce. 56 C. 530=1929 C. 599. Where the District Judge has found that the petitioner was only entitled to a certain sum as damages his order directing the payment of an additional amount into Court in the event of the co-respondent not marrying the respondent within a certain time is bad in law. 11 L. 303=1930 L. 321 (S.B.). Where a decree was passed for the dissolution of marriage and the Court found that a sum of Rs. 1,500 directed to be paid by the co-respondent would be suffi-

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28. The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself, by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

29. The husband or any creditor of, or person claiming under him, may apply to the Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it think fit so to do, may discharge or vary the order accordingly.

30. If the husband, or any creditor of, or person claiming under, the husband seizes or continues to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

31. So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

## VII.—RESTITUTION OF CONJUGAL RIGHTS.

32. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

## LEG. REF.

<sup>1</sup> See now the Indian Succession Act (XXXIX of 1925).

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parties to the suit was valid and for restitution of conjugal rights, the judge has jurisdiction while making the declaration to pass an order for restitution of conjugal rights. 32 Bom.L.R. 17=1930 B. 105. In a petition for restitution of conjugal rights it is sufficient if one of the parties professes the Christian religion. *Held*, that the Bombay High Court has jurisdiction to entertain a petition instituted by a Russian lady who is a Russian and a Christian against her husband who is a Parsi, the marriage itself having been celebrated under the French Law. Effect of words "or respondent" inserted in S. 2 of the Act by Act XXX of 1927 considered. 32 Bom.L.R. 1046=1930 B. 385 (F.B.).

33. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

Answer to petition.

#### VIII.—DAMAGES AND COSTS.

34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Husband may claim damages from adulterer.

Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

35. Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the cost of the proceedings :

Power to order adulterer to pay costs.

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

Sec. 33.—See 38 B. 125=20 I.C. 492=15 Bom.L.R. 593.

Sec. 34.—Principle in awarding damages against a co-respondent in divorce proceedings is to ascertain what loss the husband has suffered; the object is not to punish. The means of the co-respondent are not a relevant factor. 52 C. 379=29 C.W.N. 350=1925 C. 585 (F.B.); 9 O.W.N. 362=7 Luck. 683; 98 I.C. 1019=1937 O. 34. See also 39 P.L.R. 666=1937 Lah. 417 (F.B.). Damages in divorce proceedings are compensatory and not punitive. I.L.R. (1943) 1 Cal. 340=47 C.W.N. 251=1943 Cal. 146. Damages are awarded for the injury done to the husband in alienating his wife's affections. A husband who is himself responsible for his wife's misconduct or who condones his wife's adultery with the co-respondent cannot claim damages from the latter. 165 I.C. 392=1937 Oudh 116=1936 O.W.N. 938. Amount spent over marriage is the tangible source for determining damages. A successful petitioner is entitled to much more irrespective of the capacity of co-respondent to pay. 1935 N. 49 (S.B.); 31 N.L.R. 184=156 I.C. 1008. The object of passing a decree for damages is to give the husband compensation for the loss which he has sustained. In order to determine what loss the petitioner has sustained by his wife's adultery it is necessary to consider the circumstances of their married life from the beginning. When it appeared that from the very beginning of their life in India the petitioner had thought time and again of means by which he might rid himself of his wife and it was further found that he had himself committed adultery with the woman and engineered her divorce from her first husband. *Held*,

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that this was not a case in which damages could be awarded to the petitioner against the co-respondent, but that the co-respondent might be directed to pay the costs of the petitioner. 1931 O. 259=8 O.W.N. 168. *Per Marten, C.J.*—"In every divorce case one principal element is that the marriage should be proved strictly and in general a certificate of marriage should be produced . . . Indian Courts have no jurisdiction to dissolve the marriage of persons who are not domiciled in India or persons who are not Christians. . . . In such cases it is desirable that independent corroborative evidence should be obtained to show that the respondent was living in adultery with the co-respondent. 51 B. 1026=105 I.C. 871=1927 B. 594. The causes of action against the co-respondent for damages and against the wife for divorce are different and distinct although upon the true construction of the Divorce Act, the same defences are open to these claims. It is not right to say that because the Court has no jurisdiction to grant a decree for divorce, it cannot treat a petition as one for damages and give relief. It is clear, however, that the damages suffered by the petitioner will be different according as he is getting a decree for divorce or is not to get a decree for divorce. 56 C. 530=1929 C. 599. Where the District Judge has found that the petitioner was only entitled to a certain sum as damages his order directing the payment of an additional amount into Court in the event of the co-respondent not marrying the respondent within a certain time is bad in law. 11 L. 303=1930 L. 321 (S.B.). Where a decree was passed for the dissolution of marriage and the Court found that a sum of Rs. 1,500 directed to be paid by the co-respondent would be suffi-

(1) if the respondent was, at the time of the adultery, living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.

Whenever any application is made under section 17, the Court, if it thinks

that the applicant had no grounds or no sufficient ground for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

Power to order litigious intervenor to pay costs.

#### IX.—ALIMONY.

36. In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony

*Alimony pendente lite.*

pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just.

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

37. The High Court may, if it thinks fit, on any decree absolute declaring

a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

Power to order permanent alimony.

cient compensation to the plaintiff and it was decreed further that a sum of Rs. 12,000 should be paid into Court in the event of the co-respondent failing to marry the respondent within six months of the confirmation of the decree: *held*, that the further direction regarding Rs. 12,000 was in contravention of S. 34 of the Divorce Act and that the same should be disallowed. 11 L. 303.

Sec. 36.—A Court has discretion to give alimony *pendente lite* if it thinks it reasonable and just, especially where the wife avers that she had been forced to prostitution by her husband. 49 I.C. 203=12 S.L.R. 89. As to quantum of alimony, *see* 132 I.C. 771=1931 O. 365. Where a petition by the wife for the dissolution of her marriage has been dismissed, Appellate Court has power to continue the order of alimony on the presentation of an appeal by her till the disposal of the appeal and till such time as the Court directs, unless the appellate Court considers that the conduct of the wife has been such as to disentitle her to an order of maintenance. 40 I.C. 503=1933 L. 5. On this section, *see also* 36 C. 1018=4 I.C. 699. Where a petition for the dissolution of marriage on the ground of adultery is made and is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel, as is reasonable under the circum-

stances. 44 A. 745=1922 A. 504 (F.B.). A husband may, in a proper case on the wife's application, be ordered by the appellate Court to provide for the costs of the wife's appeal against a decree *nisi* for divorce, but such a procedure should be adopted only after careful scrutiny and should be refused when facts do not justify it. 44 C. 35=37 I.C. 216=21 C.W.N. 711. Where a husband seeks dissolution of the marriage on the ground of the wife's adultery the latter should ordinarily be allowed costs from her husband to enable her to defend herself upon the charge, unless there are special reasons to the contrary. When an order for such payment is made, but the amount is not paid, the petition should be made to stand out till such costs are paid. 1940 All. 93=1940 A. L.J. 737=1940 O.A. 1058=I.L.R. (1940) All. 802=1940 A.W.R. (H.C.) 568. Net income merely means income after allowing for the cost of collection, income-tax and similar deductions. Net income does not mean any sum which is left over after the husband has spent all that he considers necessary for his maintenance. 1939 Cal. 753.

Sec. 37.—S. 37 gives the Court discretion to give an order for permanent alimony on any decree of judicial separation obtained by the wife, but it does not strictly negative the power of the Court to make similar provision for a wife against whom a decree of judicial separation has been passed at the instance of the husband. A decree of judicial separation does not dissolve the tie of marriage, and while

and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable :

Power to order monthly or weekly payments.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

the parties remain husband and wife, it is only fair and equitable that the husband should ordinarily contribute to the support of the wife. 1935 O.W.N. 103=1935 O. 133. It is the District Court whose order for dissolution of marriage was confirmed by the High Court, that has got jurisdiction in a petition for alimony. 40 B. 100=31 I.C. 331=17 Bom.L.R. 948. As to the quantum of alimony to be awarded, see 132 I.C. 771=1931 O. 365. A decree nisi for divorce for adultery having been obtained against a wife, it is left to the discretion of the Court to grant alimony to her under the particular circumstances of the case. 38 A. 688=37 I.C. 143=14 A.L.J. 786. A wife who was held to be innocent at the time of divorce is not disentitled to alimony by her alleged misconduct after the divorce. There is no rule that in granting maintenance to a wife who has obtained a divorce the "*dum sola et casta*" clause should invariably be inserted. 25 S.L.R. 458=1931 S. 112. The *dum sola et casta* clause must be inserted in an order granting alimony; it will never be inferred. If there is no such clause in the order granting alimony to the wife, the order could not be varied or discharged on the ground of subsequent unchastity. 1939 A.L.J. 572=I.L.R. (1939) All. 819=1939 All. 696. Under S. 37 the Court has power to make an order for payment of a lump sum for maintenance. 39 B. 182=27 I.C. 494=17 Bom.L.R. 56. The words "for any time not exceeding her own life" qualify "annual sum" and not "gross sum." The word "secure" would ordinarily include "pay". (*Ibid.*) Under S. 37 the power to make any order on the husband to secure a gross sum or annual income for the wife can only be exercised on the passing of the decree. An order directing the husband to furnish security made four years after the decree for judicial separation is, therefore, without jurisdiction. If such an order is not drawn up and filed, the Court has power to vacate it without an application for

review being made to it. I.L.R. (1938) 2 Cal. 22=42 C.W.N. 317=1938 Cal. 321. Under S. 37 the Court has power to make an order on the husband to secure a gross sum or annual income for the wife. In addition it has also the power to order him to pay to the wife such monthly or weekly sums for her maintenance and support as it may think reasonable. There is however no power given by the section which enables the Court to compel the husband to secure such monthly or weekly payments. I.L.R. (1938) 2 Cal. 22=42 C.W.N. 317=1938 Cal. 321. See also 1938 Oudh 171=1938 O.W.N. 513. Decree absolute dissolving marriage—Petition for alimony 15 years after decree—Power of Court to grant after such delay. 44 M. 987=41 M. L.J. 269. The words "on any decree" in S. 37 should be construed as meaning "at the same time as or after reasonable time after the passing of the decree". Circumstances of each case will determine what is reasonable time. (*Ibid.*) See also 1941 Bom. 372=43 Bom.L.R. 830; 1941 Bom. 17=42 Bom. L.R. 945. If a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged was not proved, the Court cannot, as part of the decree in the suit, grant permanent alimony to the wife. 46 M. 133=43 M.L.J. 763=1923 M. 211. Where the husband is gaining his income by his own personal exertions, the Court as a general rule will not give the wife more than one-third of his income as alimony, no matter how gross the misconduct of the husband has been. As a general rule half of the husband's income is only allotted in those cases where a wife has on marriage brought the husband a considerable sum of money or other property. 1931 O. 365=8 O.W.N. 851. Where the income of the husband was proved to be something over Rs. 1,000 a month, held, that it was reasonable to fix the alimony of the separated wife at Rs. 260 a month. 58 M. L.J. 29=1930 M. 154. Where a decree of

38. In all cases in which the Court makes any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

Court may direct payment of alimony to wife or to her trustee.

#### X.—SETTLEMENTS.

39. Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property, the Court may, if it think fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Power to order settlement of wife's property for benefit of husband and children.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

The Court may direct that the whole or any part of the damages recovered under section 34 shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.

Settlement of damages.

judicial separation has been obtained by the wife, and the District Judge has made an order on the husband for payment to the wife of a monthly or weekly sum by way of permanent alimony, the Court has power to make a subsequent order increasing the amount of such alimony if the circumstances are such as to justify an increase. 54 M. 774=35 C. W.N. 1185=1931 P.C. 234=61 M.L.J. 367 (P.C.). It is difficult to apply any definite principle for the purpose of fixing the gross amount payable to a wife. Considerations as to the existence of debts and increase of illegitimate family are quite irrelevant for such a purpose. 174 I.C. 901=1938 O.W.N. 513=1938 O. 171.

**ARREARS OF ALIMONY AND COSTS—ORDER FOR PAYMENT IN INSTALMENTS—PROPRIETY.**—Although the arrears of alimony and costs are ordinarily payable at once, the Court may, having regard to the poverty of the parties, make them payable in monthly instalments. 41 P. L.R. 337=1939 Lah. 404.

**SEC. 37, PARAS. 3 AND 4: SCOPE OF—POWER TO SUBSTITUTE ORDER UNDER PARA. 3 FOR PRIOR ORDER UNDER PARA. 4.**—The provisions of paras. 3 and 4 of S. 37 are alternatives at the discretion of the Court. They are merely alternative methods of protecting the successful petitioner, the wife. The proviso to the section in terms relates only to the provisions in para. 4 for monthly and weekly payments, and it does not in terms provide for any increase in the amount of the payments. Though a prior order has been made under para. 4, a Court has power on a fresh application to pass an order under para. 3. The correct interpretation of the third para. of S. 37 is that the husband is to secure to the wife a gross sum of money which is to be at her

disposal in the same way as the annual sum of money. The section does give power to direct a money payment. 1938 O.W.N. 513=1938 Oudh 171. See also 1938 Cal. 321=42 C.W.N. 317=I.L.R. (1938) 2 Cal. 321. (Jurisdiction of Court to order husband to furnish security some years after decree for judicial separation).

**SEC. 37, PROVISIO: DISCRETION—EXERCISE OF—DELAY.**—The power given to the Court under the proviso to S. 37 to discharge, modify or suspend an order for alimony is discretionary, and should not be exercised by the Court in favour of applicant who has unreasonably delayed his application. I.L.R. (1938) All. 213=1937 A.L.J. 1363=1938 All. 121. Under the proviso to S. 37 the Court has jurisdiction only to discharge, modify or suspend an order for alimony in so far as it concerns future payments, that is, as to payments which are to become due in future. The Court has no power to remit arrears and has no jurisdiction to declare that the husband should not be liable to make good sums of alimony which have already accrued due under the decree in execution proceedings or otherwise. I.L.R. (1938) All. 213=1937 A.L.J. 1363=1938 All. 121.

**SEC. 38.**—Alimony should usually be allowed from the date of service of summons upon the respondent; but where no summons has been served it should be from the time the latter entered appearance. Income-tax and insurance premia can be deducted, but not the expenses of a son's education in calculating the net income of a person for granting alimony to his wife. 11 I.C. 813=4 Bur.L. T. 176. See also 14 M. 89.

**SEC. 39.**—There is no power under the Divorce Act to make any provision for the



Inquiry into existence of ante-nuptial or post-nuptial settlements. 40. The High Court, after a decree absolute for dissolution of marriage, or decree of nullity of marriage,

and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit :

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

#### XI.—CUSTODY OF CHILDREN.

41. In any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim

Power to make orders as to custody of children in suit for separation.

orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if think fit, direct proceedings to be taken for placing such children under the protection of the said Court.

42. The Court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to

Power to make such orders after decree.

time, all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

maintenance of children who are no longer minors under the Act. 58 M.L.J. 29=1930 M. 154.

SEC. 40.—The power given to the Court under S. 40 is a discretionary one; the discretion must be exercised judicially. It is of course open to a guilty party to make an application under S. 40, but such an application should not be readily acceded to; unless special circumstances exist which make it just and proper to make an order upon the application of a guilty party varying a settlement, the *status quo* should remain undisturbed. The Court should not ordinarily deprive an innocent party of any interest which he or she takes under a settlement, even though it be for the benefit of the children of the marriage. I.L.R. (1938) All. 95=1937 A.L.J. 1368=1938 All. 126.

SEC. 41.—Appeal lies from order of Court fixing amount of maintenance under S. 41. 1937 Lah. 862.

SECS. 41 AND 43.—The order passed by the District Judge about maintenance under S. 41 terminates when a final order is passed under S. 43, and S. 41 gives the Court a very wide discretion to fix such maintenance as it thinks fit. High Court will not therefore ordinarily interfere with an order fixing the amount of maintenance unless it appears to have been passed in disregard of the evidence and is clearly unreasonable. 1937 Lah.

862.

SEC. 42: DECREE OF JUDICIAL SEPARATION—CUSTODY OF CHILDREN—CONSIDERATION.—It cannot be contended that in cases of judicial separation, the custody of daughters as a rule should be given to the mother in preference to the father. No hard and fast rule can be laid down in this matter. The paramount consideration must always be the welfare of the children. Where the father is held entitled to a decree of judicial separation and he has not been found guilty of any conduct which could disentitle him from the custody of his children and he holds a respectable position in life and is in a better position to give them a decent education and to provide and look to their upbringing and the mother's past conduct shows that if the children are left with her, she is sure to alienate their affections from the father, the Court would exercise a wise discretion in allowing the father who is in law the natural guardian of his minor children to have their custody. 1935 O.W.N. 103=1935 O. 133. Per *Phillips, J.*—It seems to me most improper that a Court of Matrimonial jurisdiction should not have power to pass orders as to the custody and maintenance of unmarried girls above the age of 13 or of boys over 16. Since 1869 great strides have been made on education and it cannot now be said that education always ceases in the case of girls at 13 and in the case of boys at 16,

43. In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in, or removed to a High Court,

Power to make orders as to custody of children in suits for dissolution or nullity.

the Court may from time to time before making its decree absolute or its decree (as the case may be) make such interim orders, and may make such provision in the decree absolute or decree,

and in any such suit instituted in a District Court, the Court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation,

as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit ;

and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the Court.

nor are they usually in a position to find for themselves at that age. In my opinion the definition of minor children in S. 3 (5) requires amendment. 58 M.L.J. 29=1930 M. 154.

SEC. 43.—It is no doubt true that *prima facie* the innocent party is entitled to the custody of the children of the marriage. But there is no hard and fast rule on the subject. The matrimonial offence which justified the divorce is not always sufficient to disentitle the mother to the custody of her daughter. The paramount consideration is the interest of the children. Where a child of tender years had been living with her mother all along, the mother was extremely devoted to her, it would be a great shock for the child to be separated from the mother, as the father was practically a stranger to the child, and the child could be better maintained by the mother than by father. *Held*, that the mother was entitled to custody of her daughter in preference to the father, though the former was the 'guilty' party. 9 O.W.N. 362=1932 O. 182. In cases coming under the Indian and Colonial Divorce Jurisdiction Act when an order is made for the custody of a minor child, the order is not to be expressly limited in point of time to any particular period. 1940 Rang.L.R. 674=1940 Rang. 303. Provision for children who are not minors cannot be ordered under the Act. English law cannot be invoked to widen the discretion of the Courts in India. A.I.R. 1943 All. 25=(1942) A.L.J. 688=1943 All. 8. The power of Court to make any order for the custody of a minor child, the marriage of whose parents is the subject of a suit for obtaining a dissolution of that marriage, is limited to making an order in respect of such child only so long as that child remains a minor child within the meaning of the Divorce Act. The proper practice to be followed in Burma is to limit the order for custody to the age which is fixed by S. 3 (5) of the Act and also to direct that the person to whom is given the custody should not remove the child outside the jurisdiction of the Court without its sanction. 1939 Rang.L.R. 267=1939 Rang. 352. An order under S. 43 regarding the custody and maintenance

of children is an *ad interim* order liable to terminate upon the confirmation of decree by the High Court, and hence such an order should not form part of the decree *nisi* by a District Judge for dissolution of marriage. 54 I.C. 943=142 P.R. 1919 (S.B.) As to the circumstances to be considered, see 27 A.L.J. 65=111 I.C. 627=1928 A. 677. See also 1937 Lah. 862.

SECS. 43 AND 44.—Where a person had obtained a decree *nisi* for dissolution of marriage and custody of the children and dies before its confirmation by the High Court, the Court has no jurisdiction to confirm the decree for dissolution of the marriage or to make any order as regards the custody of the children. 50 C. 153=1923 C. 426.

The C. P. Code, by S. 45, Divorce Act, applies to petitions under the Divorce Act and under the C. P. Code, a next friend is not required over the age of 18. Therefore a girl over 19 is not a minor within the meaning of S. 49 and can file a petition under S. 49, Divorce Act. 55 A. 243=1933 A.L.J. 168=1933 A. 135 (2). The Divorce Act provides that the question of damages shall be ascertained by the Court and under S. 45 the procedure subject to the provisions of the Divorce Act is to be regulated by the C.P. Code. It is therefore incumbent on the Court in a suit for dissolution of marriage to frame issues and among those issues there should be an issue for damages. The Court should also state its grounds for assessing the damages at a particular figure. 1933 S. 134 (1)=143 I.C. 829. A party should not be lightly excused from effecting personal service of the petition. See 49 B. 368=27 Bom.L.R. 251=1925 B. 231. See same case as to when service by registered post is proper. In India, in divorce proceedings instituted by a wife, the Court has no power to allow the alleged adulteress to be made a party, and so to cross-examine the witnesses for petitioner, give evidence and call witnesses herself. But in intervention proceedings the person with whom the petitioner is said to have committed adultery may be called as a witness. 10 R. 115=1932 R. 73. Petition for divorce—Co-res-

Power to make such orders after decree or confirmation. 44. The High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage,

and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed,

may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

## XII.—PROCEDURE.

Code of Civil Procedure to apply.

45. Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.<sup>1</sup>

46. The forms set forth in the Schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such schedule.

47. Every petition<sup>2</sup> under this Act for a decree of dissolution of marriage or of nullity of marriage, or of judicial separation [\* \* \* \*]<sup>3</sup> shall [\* \* \*]<sup>3</sup> state that there is not any collusion or connivance between the petitioner and the other party to the marriage ;

the statements contained in every petition under this Act shall be verified

Statements to be verified. by the petitioner or some other competent person in manner required by law for the verification of complaints, and may at the hearing be referred to as evidence.

## LEG. REF.

<sup>1</sup> See now the Code of Civil Procedure (Act V of 1908).

<sup>2</sup> For Court-fee, see Court-Fees Act (VII of 1870), Sch. II, No. 20.

<sup>3</sup> The words "or of reversal of judicial separation, or for restitution of conjugal rights, for damages, shall bear a stamp of five rupees, and", and the words "in the first, second, and third cases mentioned in this section," were repealed by the Court-Fees Act (VII of 1870). For Court-fee, see Art. 7 of Sch. II to that Act.

pendent as a necessary party—Notice, service of—Beat of drum and affixture in Court-house—Notice when can be dispensed with. See 56 C. 276=1929 C. 276.

WIFE'S COSTS.—See I.L.R. (1940) All. 802=1940 A.L.J. 737=1940 All. 93.

COSTS OF UNSUCCESSFUL APPEAL BY WIFE.—There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife. 60 C. 318=37 C.W.N. 249=1933 C. 388.

Sec. 44.—Where a decree for dissolution of marriage granted by a District Judge is confirmed by the High Court, the jurisdiction to entertain an application for the custody of the child or for arrears of maintenance lies with the District Judge. The High Court has in such a case no jurisdiction to hear the application. 187 I.C. 272=1940 Lah. 82 (S.B.).

SEC. 45.—It is clearly in the interests of justice that a party who is named in a divorce plaint as being one of the persons with whom the respondent is alleged to have committed adultery should be allowed to intervene and defend his or her character against the aspersions which have been levelled against her. There is very grave doubt as to whether the person so named has the right under the law as it stands at present, to claim to be added as a party to the divorce proceedings. Hence amendment of Divorce Act suggested. 57 A. 884=163 I.C. 802=1936 A. 488. See also 1935 C. 456. O. 7, R. 10, C.P.C. applies to Divorce proceedings under S. 45 of this Act. 47 C.W.N. 707. As to when security for costs may be ordered in matrimonial proceedings, see 1943 Mad. 510=(1943) 1 M.L.J. 360=56 L.W. 330.

SECS. 45 AND 51: EVIDENCE BY AFFIDAVIT—COURTS—POWER TO ALLOW.—In proceedings for divorce, the Court has power to allow evidence to be given by the petitioner and her witness by affidavit, by virtue of S. 45 of the Divorce Act which makes the provisions of the Code of Civil Procedure applicable, and also by virtue of S. 51 of the Act. 38 C. W.N. 969. See also 1940 Oudh 279=15 Luck. 350=1940 O.W.N. 139.

Sec. 47.—As to when affidavit evidence may be allowed in Divorce proceedings, see I.L.R. (1943) Nag. 474=1943 N.L.J. 296=1943 Nag. 185; 1945 P.C. 188.

48. When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

Suits on behalf of lunatics.

49. Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Suits by minors.

Such undertaking [\* \* \*]<sup>1</sup> shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

50. Every petition under this Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court by general or special order from time to time directs :

Service of petition.

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

51. The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness :

Mode of taking evidence.

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

52. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Competence of husband and wife to give evidence as to cruelty or desertion.

#### LEG. REF.

<sup>1</sup> The words "shall bear, a stamp of eight annas and" were repealed by *ibid*.

SEC. 49.—A girl over 19 is not a minor within the meaning of S. 49 and can file a petition for divorce under this section. 55 A. 243=1933 A.L.J. 168=1933 A. 135.

SEC. 50.—Held, that in a petition for divorce the co-respondent is a necessary party, that sufficient steps should be taken to serve notice on the respondent and co-respondent before an *ex parte* decree is passed and that an order should be announced in the village by beat of drum and that the proper notice should be put up at the Court-house. The Commissioner, has a discretion under S. 50, Divorce Act, to dispense with notice but it ought not to be exercised when a proper case has not been made out by the petitioner. 56 C. 29=1929 C. 276.

SECS. 50 AND 51.—Under S. 50 the manner in which service of petition is to be effected is to be regulated not by the C. P. Code,

but by general or special orders of the High Court. 55 I.C. 269=12 Bur.L.T. 199. In the absence of general orders on the subject the proper course when service cannot be effected on the respondent is to apply to the Court for a special order as to how it is to be effected. The Court will act on the principles laid down by the English decisions. 55 I.C. 269. As to the practice of use of evidence by affidavit in Divorce proceedings, see 1943 N.L.J. 296=1943 Nag. 185.

SEC. 51.—See 38 C.W.N. 969, cited under S. 45, *supra*. On a petition by a wife for dissolution of marriage filed in India, evidence of all the witnesses including the petitioner was taken on commission in England, though, in fact, she ought to have given evidence in the Court itself. *Held*, that, as the petitioner was the wife and completely at the mercy of her husband so far as her means were concerned and necessarily with regard to her opportunity of travel to India, the evidence though taken on commission could be accepted in view of the the law as to

53. The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

54. The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

55. All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed<sup>1</sup> from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force :

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage : nor from the order of the High Court confirming or refusing to confirm such decree :

No appeals as to costs. Provided also that there shall be no appeal on the subject of costs only.

56. Any person may appeal to Her Majesty in Council from any decree Appeal to Queen in (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise, Council.

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

### XIII.—RE-MARRIAGE.

57. When six months after the date of an order Liberty to parties to marry of a High Court confirming the decree for a dissolution again. of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :

#### LEG. REF.

<sup>1</sup> For Court-fee on memorandum of appeal, see Art. 7 of Sch. II to the Court-Fees Act (VII of 1870).

evidence on commission in England. 167 I.C. 743=18 Pat.L.T. 686=1937 Pat. 82.

SEC. 55.—The language of S. 55 provides expressly for an appeal from all orders passed by the District Judge. It is one of the sections dealing with 'procedure' and must apply only to the procedure to be followed and the Court to which appeals lie. An appeal lies from an order of the Court fixing amount of maintenance under S. 41. 1937 Lah. 862. See also 1937 Lah. 417, cited under S. 17, *supra*. During the proceedings under the Divorce Act, Court passed an order after hearing the arguments of parties. Party affected by order appealed. The opposite party contended that appeal was not competent. *Held*, that an appeal lay from such order under S. 55. 39 P.L.R. 262=1937 L. 176. Order for payment of ali-

mony is to be executed as a decree, and contempt proceedings are not the proper remedy. 32 C.W.N. 179. See 19 I.C. 53=6 Bur. L.T. 10.

SEC. 56.—Leave to appeal to Privy Council—High Court enhancing rate of alimony for wife without her preferring appeal—Question of law—Leave conditional on husband placing the wife in funds for contesting the appeal. See 1930 M. 159=58 M.L.J. 54.

SEC. 57.—This section prohibits a re-marriage within six months after the decree absolute. 30 I.C. 413=38 M. 452. See also 29 P.R. 1913=19 I.C. 778=22 P.L.R. 1913. A second marriage by the successful petitioner in a suit for dissolution of marriage within six months of the date of the decree for dissolution is null and void. 48 C. 636=64 I.C. 924=25 C.W.N. 710 (F. B.). See also 34 A. 203=9 A.L.J. 108. *Held*, also that the reputed wife was not entitled to any permanent alimony. 48 C. 636=25 C.W.N. 710.

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

58. No clergyman in Holy Orders of the [\* \*]<sup>1</sup> Church of England

English clergyman not compelled to solemnize marriages of persons divorced for adultery.

[\* \*]<sup>2</sup> shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

59. When any minister of any church or chapel of the said [\* \*]<sup>1</sup> Church

English minister refusing to perform ceremony to permit use of his church.

refuses to perform such marriage service between any persons who, but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister

in Holy Orders of the said church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

#### XIV.—MISCELLANEOUS.

Decree for separation or protection order valid as to persons dealing with wife before reversal.

60. Every decree for judicial separation or order to protect property obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order, and of the reversal, discharge or variation thereof.

All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or

Indemnity of persons making payment to wife without notice of reversal decree or protection order.

done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at

some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued,

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

61. After this Act comes into operation, no person

Bar of suit for criminal conversation.

competent to present a petition under sections 2 and 10, shall maintain a suit for criminal conversation with his wife.

62. The High Court shall make such rules<sup>3</sup> under this Act as it may from

Power to make rules.

time to time consider expedient, and may from time to time alter and add to the same :

#### LEG. REF.

<sup>1</sup> The word "United" was repealed by the Repealing Act (XII of 1873).

<sup>2</sup> The words "and Ireland" were repealed by *ibid*.

<sup>3</sup> For rule in force in Bombay as to confirmation of decrees for dissolution of marriage, see Bom. R. & O.

SEC. 61.—Section does not forbid the Crown to prosecute and punish an alleged adulterer under S. 497, I. P. Code, when moved to do so by an injured husband. 1928 L. 50=108 I.C. 381. See also 158 I.C. 6=1935 O.W.N. 1015=1935 O. 506.

SEC. 62.—See 29 I.C. 178=29 M.L.J. 269.

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure.<sup>1</sup>

All such rules, alterations and additions shall be published in the Official Gazette.

### SCHEDULE OF FORMS.

#### NO. 1.—PETITION BY HUSBAND FOR A DISSOLUTION OF MARRIAGE WITH DAMAGES AGAINST CO-RESPONDENT, BY REASON OF ADULTERY.

(See Sections 10 and 34.)

In the (High) Court of  
To the Hon'ble Mr. Justice

[or To the Judge of ]  
The day of 186  
The petition of A.B., of

SH EWETH,

1. That your petitioner was on the day of , one thousand eight hundred and , lawfully married to C.B., then C.D., spinster, at .  
2. That from his said marriage, your petitioner lived and cohabited with his said wife at and at , in , and lastly at , and that your petitioner and his said wife have had issue of their said marriage, five children, of whom two sons only survive, aged respectively twelve and fourteen years.

3. That during the three years immediately preceding the day of one thousand eight hundred and , X.Y., was constantly, with few exceptions, residing in the house of your petitioner at aforesaid, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said C.B., in your petitioner's said house committed adultery with the said X.Y.

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage and that the said X.Y., do pay the sum of rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit.

(Signed) A.B.\*

#### Form of verification.

I, A.B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

#### NO. 2.—RESPONDENT'S STATEMENT IN ANSWER TO NO. 1.

In the Court of the day of  
Between A.B., petitioner,  
C.B., respondent and  
X.Y., co-respondent.

C.B., the respondent, by D.E., her attorney [or vakil], in answer to the petition of A.B., says that she denies that she has on divers or any occasions committed adultery with X.Y., as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.  
(Signed) C.B.

#### NO. 3.—CO-RESPONDENT'S STATEMENT IN ANSWER TO NO. 1.

In the (High) Court of The day of  
Between A.B., petitioner,  
C.B., respondent and  
X.Y., co-respondent.

X.Y., the co-respondent, in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said C.B., as alleged in the said petition.

Wherefore the said X.Y., prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition.

(Signed) X.Y.

#### NO. 4.—PETITION FOR DECREE OF NULLITY OF MARRIAGE.

(See section 18.)

In the (High) Court of

#### LEG. REF.

<sup>1</sup> See now the Code of Civil Procedure (Act V of 1908).

<sup>2</sup> If the marriage was solemnized out of

India, the adultery must be shown to have been committed in India.

<sup>3</sup> The petition must be signed by the petitioner.



To the Hon'ble Mr. Justice

[or to the Judge of ]  
The day of 186 .  
The petition of A.B., falsely called A.D.

SHEWETH,

1. That on the day of , one thousand eight hundred and , your petitioner then a spinster, eighteen years of age, was married in fact though not in law, to C.D., then a bachelor of about thirty years of age, at [some place in India.]

2. That from the said day of , one thousand eight hundred and until the month of , one thousand eight hundred and , your petitioner lived and cohabited with the said C.D., at divers places, and particularly at aforesaid.

3. That the said C.D., has never consummated the said pretended marriage by carnal copulation.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said C.D., was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said C.D., with respect to the subject of this suit.

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) A.B.

Form of verification.—See No. 1.

No. 5.—PETITION BY WIFE FOR JUDICIAL SEPARATION ON THE GROUND OF HER HUSBAND'S ADULTERY.

(See section 22.)

In the (High) Court of  
To the Hon'ble Mr. Justice

[or To the Judge of ]  
The day of 186 .  
The petition of C.B., of , the wife of A.B.

SHEWETH,

1. That on the day of , one thousand eight hundred and sixty , your petitioner, then C.D., was lawfully married to A.B., at the Church of in the

2. That after her said marriage, your petitioner cohabited with the said A.B., at and at , and that your petitioner and her said husband have issue living of their said marriage, three children, to wit, etc., etc.<sup>1</sup>

3. That on divers occasions in or about the months of August, September and October, one thousand eight hundred and sixty , and the said A.B., at aforesaid, committed adultery with E.F., who was then living in the service of the said A.B., and your petitioner at their said residence aforesaid.

4. That on divers occasions in the months of October, November and December, one thousand eight hundred and sixty , the said A.B., at aforesaid, committed adultery, with G.H., who was then living in the service of the said A.B., and your petitioner at their said residence aforesaid.

5. That no collusion or connivance exists between your petitioner and the said A.B., with respect to the subject of the present suit.

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

[Signed] C.B.<sup>2</sup>

Form of verification.—See No. 1.

No. 6.—STATEMENT IN ANSWER TO No. 5.

In the (High) Court of

B against B.

The respondent A.B., by W.Y., his attorney [or vakil], saith,—

1. That he denies that he committed adultery with E.F., as in the third paragraph of the petition alleged.

2. That petitioner condoned the said adultery with E.F., if any.

3. That he denies that he committed adultery with G.H., as in the fourth paragraph of the petition alleged.

4. That the petitioner condoned the said adultery with G.H., if any.

Wherefore this respondent prays that this (Hon'ble) Court will reject the prayer of the said petition.

(Signed) A.B.

LEG. REF.

<sup>1</sup> State the respective ages of the children.

<sup>2</sup> The petition must be signed by the petitioner.

No. 7.—STATEMENT IN REPLY TO No. 6.

In the (High) Court of

*B* against *B*.

The day of

The petitioner, *C.B.*, by her attorney [*or vakil*], says,—

1. That she denies that she condoned the said adultery of the respondent with *E.F.*, as in the said paragraph of the statement in answer alleged.

2 That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with *G.H.*, as set forth in the fourth paragraph of the petition.  
(Signed) *C.B.*

No. 8.—PETITION FOR A JUDICIAL SEPARATION BY REASON OF CRUELTY.

(See section 22.)

In the (High) Court of  
To the Hon'ble Mr. Justice

[*or To the Judge of* ]

The day of 186

The petition of *A.B.* (wife of *C.B.*) of

SHREWETH,

1. That on the day of one thousand eight hundred and your petitioner, then *A.D.*, spinster, was lawfully married to *C.B.*, at

2. That from her said marriage, your petitioner lived and cohabited with her said husband at until the day of , one thousand eight hundred and , when your petitioner separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage, the said *C.B.*, habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of one thousand eight hundred and , the said *C.B.*, in the highway and opposite to the house in which your petitioner and the said *C.B.*, were then residing at aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of *F.D.*, your petitioner's brother.

5. That subsequently on the same evening, the said *C.B.*, in his said house at aforesaid, struck your petitioner with his clenched fists a violent blow on her face.

6. That on one Friday night in the month of , one thousand eight hundred and , the said *C.B.*, in , without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the day of , one thousand eight hundred and , your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at , that from and after the said day of , one thousand eight hundred and , your petitioner hath lived separate and apart from her said husband and hath never returned to his house or to cohabitation with him.

8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said *C.B.*, and also order that the said *C.B.* do pay the costs of and incident to these proceedings.

(Signed) *A.B.*

Form of verification.—See No. 1.

No. 9.—STATEMENT IN ANSWER TO No. 8.

In the (High) Court of

The day of  
Between *A.B.*, petitioner, and  
*C.B.*, respondent.

*C.B.*, the respondent, in answer to the petition filed in this cause, by *W. J.*, his attorney [*or vakil*], saith that he denies that he has been guilty of cruelty towards the said *A.B.*, as alleged in the said petition.

(Signed) *C.B.*

No. 10.—PETITION FOR REVERSAL OF DECREE OF SEPARATION.

(See section 24.)

In the (High) Court of  
To the Hon'ble Mr. Justice

[*or To the Judge of* ]  
The day of 186  
The petition of *A.B.*, of

SHEWETH,

1. That your petitioner was on the \_\_\_\_\_ day of \_\_\_\_\_, lawfully married to \_\_\_\_\_.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_, this (Hon'ble) Court, at the petition of \_\_\_\_\_, pronounced a decree affecting the petitioner to the effect following to wit,—

[Here set out the decree.]

3. That such decree was obtained in the absence of your petitioner, who was then residing at \_\_\_\_\_

[State facts tending to show that the petitioner did not know of the proceedings; and, further, that had he known he might have offered a sufficient defence,]

or

That there was reasonable ground for your petitioner leaving his said wife or that his said wife.

[Here state any legal grounds justifying the petitioner's separation from his wife.]

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) A.B.

Form of verification.—See No. 1.

## NO. 11.—PETITION FOR PROTECTION-ORDER.

(See section 27.)

In the (High) Court of  
To the Hon'ble Mr. Justice

[or To the Judge of \_\_\_\_\_].  
The \_\_\_\_\_ day of \_\_\_\_\_ 186 \_\_\_\_.  
The petition of C.B., of \_\_\_\_\_,  
the wife of A.B.

SHEWETH,

That on the \_\_\_\_\_ day of \_\_\_\_\_ she was lawfully married to A.B.

at \_\_\_\_\_  
That she lived and cohabited with the said A.B., for \_\_\_\_\_ years at \_\_\_\_\_,  
and also at \_\_\_\_\_, and had had \_\_\_\_\_ children, issue of her said marriage,  
of whom \_\_\_\_\_ are now living with the applicant, and wholly dependent upon  
her earnings.

That on or about \_\_\_\_\_, the said A.B., without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her.

That since the desertion of her said husband, the applicant hath maintained herself by her own industry [or on her own property, as the case may be] and hath thereby and otherwise acquired certain property consisting of [here state generally the nature of the property.]

Wherefore she prays an order for the protection of her earnings and property acquired since the said \_\_\_\_\_ day of \_\_\_\_\_, from the said A.B., and from all creditors and persons claiming under him.

(Signed) C.B.

## NO. 12.—PETITION FOR ALIMONY PENDING THE SUIT.

(See section 36.)

In the (High) Court of

B against B

To the Hon'ble Mr. Justice

[or To the Judge of \_\_\_\_\_].  
The \_\_\_\_\_ day of \_\_\_\_\_ 186 \_\_\_\_.  
The petition of C.B., the lawful wife of  
A.B.

SHEWETH,

1. That the said A.B., has for some years carried on the business of \_\_\_\_\_, at \_\_\_\_\_, and from such business derives the net annual income of from Rs. 4,000 to 5,000.

2. That the said A.B., is possessed of plate, furniture, linen and other effects at his said house \_\_\_\_\_ aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10,000.

3. That the said A.B., is entitled, under the will of his father, subject to the life interest of his mother therein, to property to the value of Rs. 5,000 or some other considerable amount.<sup>1</sup>

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon'ble) Court may seem meet.

(Signed) C.B.

Form of verification.—See No. 1.

LEG. REF.

income as accurately as possible.

<sup>1</sup> The petitioner should state her husband's

## NO. 13.—STATEMENT IN ANSWER TO NO. 12.

In the (High) Court of

B against B.

A. B., of \_\_\_\_\_, the above-named respondent, in answer to the petition for alimony, pending the suit of C.B. says:—

1. In answer to the first paragraph of the said petition, I say that I have for the last *three* years carried on the business of \_\_\_\_\_, at \_\_\_\_\_, and that, from such business, I have derived a nett annual income of Rs. 900, but less than Rs. 1,000.

2. In answer to the second paragraph of the said petition, I say that I am possessed of plate, furniture, linen and other chattels and effects at my said house aforesaid, of the value of Rs. 7,000, but as I verily believe of no larger value. And I say that a portion of the said plate, furniture and other chattels and effects of the value of Rs. 1,500, belonged to my said wife before our marriage, but the remaining portions thereof, I have since purchased with my own moneys. And I say that, save as hereinbefore set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs. 5,000, that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs. 7,000, out of which I shall have to pay to my father's executors the sum of Rs. 2,000, the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent. per annum.

4. And in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me which she did on the \_\_\_\_\_ day of \_\_\_\_\_ last, has been considerably diminished, and that such diminution is likely to continue. And I say that out of my said income, I have to pay the annual sum of Rs. 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And, in further answer to the said petition, I say that, when my wife left my dwelling house on the \_\_\_\_\_ day of \_\_\_\_\_ last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value of, as I verily believe, Rs. 800 at the least; and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills due to me from certain lodgers of mine, amounting in the aggregate to Rs. \_\_\_\_\_, and that she has ever since withheld and still withholds from me the same sum.

(Signed) A.B.

## NO. 14.—UNDERTAKING BY MINOR'S NEXT FRIEND TO BE ANSWERABLE FOR RESPONDENT'S COSTS.

(See section 49.)

In the (High) Court of \_\_\_\_\_, I, the undersigned, A.B., of \_\_\_\_\_, being the next friend of C.D., who is a minor, and who is desirous of filing a petition in this Court, under the Indian Divorce Act, against D.D., of \_\_\_\_\_, hereby undertake to be responsible for the costs of the said D.D., in such suit, and that, if the said C.D., fail to pay to the said D.D., when and in such manner as the Court shall order all such costs of such suit as the Court shall direct him (or her) to pay to the said D.D., I will forthwith pay the same to the proper officer of this Court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_

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(Signed) A.B.

THE DOWER ACT (XXIX OF 1839).<sup>1</sup>

Year.	No.	Short title.	Amendments.
1839	XXIX	The Dower Act, 1839.	Repealed in part, VIII of 1868; XII of 1891; X of 1914.

## LEG. REF.

<sup>1</sup> Short title, "The Dower Act, 1830". See the Indian Short Titles Act (XIV of 1897).

The whole Act, except as to marriages contracted before 1st January, 1866, was repealed by the Repealing Act (VIII of 1868).

As to dower when the marriage was contracted before the 1st January, 1886, the Act has been declared, by the Laws Local Extent Act (XV of 1874), S. 3, to be in force in the whole of British India, except as regards the Scheduled Districts.

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[16th December, 1839.]

*An Act for the Amendment of the Law relating to Dower.*

1. WHEREAS it is expedient to extend the amendments in the English law of dower contained in the 1<sup>st</sup> Statute 3rd and 4th William IV, Chapter CV, to the territories of the East

India Company in cases which, but for the passing of this Act, would be governed by the English law of dower as it existed previously to the passing of the aforesaid Statute;

It is hereby enacted that the words and expressions hereinafter mentioned, which in their ordinary signification have a more

Interpretation. confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to messages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof;

[\* \* \* \* \*]<sup>2</sup>  
2. .[\* \* \* \* \*]<sup>3</sup> When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land.

3. .[\* \* \* \* \*]<sup>3</sup> When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof: Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

4. .[\* \* \* \* \*]<sup>3</sup> No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

No dower out of estates disposed of.

5. .[\* \* \* \* \*]<sup>3</sup> All partial estates and interests, and all charges.

## LEG. REF.

<sup>1</sup> Short title, "The Dower Act, 1839". See the Short Titles Act, 1896 (59 and 60 Vict., c. 14).

<sup>2</sup> The words "and every word importing the singular number only shall extend and

be applied to several persons or things as well as one person or thing" were repealed by Act X of 1914.

<sup>3</sup> The words "And it is hereby further enacted, that" in Ss. 2 to 6 were repealed by the Amending Act (XII of 1891).

Priority to partial estates, charges and specialty debts.

created by any disposition or will of a husband, and all debts, incumbrances; contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

6. [\* \* \*

Dower may be barred by a declaration in a deed.

1 A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

7. [\* \* \*

or by a declaration in the husband's will.

2 A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of free-hold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land.

8. [\* \* \*

Dower shall be subject to restrictions.

2 The right of a widow to dower shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

9. [\* \* \*

Devise of real estate to the widow shall bar her dower.

3 Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

10. [\* \* \*

Bequest of personal estate to the widow shall not bar her dower.

2 No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will.

11. Provided always, [\* \* \*

Agreement not to bar dower may be enforced.

3 that nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them.

12. [\* \* \*

Legacies in bar of dower still entitled to preference.

2 Nothing in this Act contained shall interfere with any rule of equity or of any Ecclesiastical Court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

13. [Certain dowers abolished.] *Rep. by the Amending Act, 1891 (XII of 1891).*

14. [\* \* \*

Act not to take effect before the 1st July, 1840.

2 This Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of July one thousand eight hundred and forty, and shall not give to any will, deed, contract, engagement or charge executed, entered into or created before the said first day

LEG. REF.

<sup>1</sup> The words "And it is hereby further enacted, that" in Ss. 2 to 6 were repealed by the Amending Act (XII of 1891).

<sup>2</sup> The words "And it is hereby further

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enacted, that" in Ss. 7 to 10, 12 and 14 were repealed by *ibid.*

<sup>3</sup> The words "And it is hereby further enacted" were repealed by *ibid.*

of July one thousand eight hundred and forty the effect of defeating or prejudicing any right to dower.

15. [\* \* \*]<sup>1</sup> This Act shall not be construed to affect any right of property in land otherwise than by modifying the law of dower in cases governed by the English law of dower, or to extend or alter the jurisdiction of any of Her Majesty's Courts of Justice.

### THE EASEMENTS ACT (V OF 1882).

Year.	No.	Short title.	Amendments.
1882	V	The Indian Easements Act, 1882.	Application extended, VIII of 1891; Amended, XII of 1891; X of 1914. Continued in force (with modifications) in territory transferred to Delhi Province Act VII of 1915, S. 3, Sch. III.

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#### LEG. REF.

<sup>1</sup> The words "And it is hereby provided

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[17th February, 1882]

*An Act to define and amend the law relating to Easements and Licenses.*

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

Preamble.

## PRELIMINARY.

Short title.

1. This Act may be called "The INDIAN EASEMENTS ACT, 1882"<sup>1</sup>:

<sup>2</sup> It extends to the

territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg; and it shall come into force on the first day of July, 1882.

Local extent.

Commencement.

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons of the Bill which became Act V of 1882, see *Gazette of India*, 1880, Pt. V, page 494; for Report of Select Committee, see *ibid.*, 1881, Pt. V, p. 1021; and for proceedings and debates in Council relating to the Bill, see *ibid.*, 1881, Supplement, pp. 687, 766 and *ibid.*, 1882, Supplement, p. 172.

The Act has been extended under S. 5 of the Scheduled Districts Act, XIV of 1874, General Acts, Vol. II, to the Schedule District of Ajmer-Merwara, see *Gazette of India*, 1897, Pt. II, p. 1415.

<sup>2</sup> The Act was extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant-Governor of the N.-W.F.P. and Chief Commissioner of Oudh by Act VIII of 1891, printed Bombay Code, Ed. 1894, Vol. I.

SEC. 1.—Act is not retrospective. 14 A. 185 (F.B.); 1934 A.L.J. 728=1934 A. 336. Act is a complete Code and only in places where it is not in force, the Courts rely upon English sources for the law of easements and upon justice, equity and good conscience. 34 I.C. 450=20 C.W.N. 1158. See also 31 C. 503=31 I.A. 53=8 C.W.N. 425 (P.C.); 7 Bom.L.R. 825. The Limitation Act is remedial and gives a right where there is no other right at all, but it does not exclude or interfere with other titles and modes of enjoyment (as) easement. 29 M.L.J. 685=31 I.C. 528. Act not in force in Punjab. 85 P.R. 1902; 102 I.C. 447=1927 L. 492. See also 46 P.E. R. 226=1944 Lah. 417. Also not in force in Bengal. 22 C. 366. But its principles may be applied even in Provinces where the Act is not in force as such. 22 C. 366; 1941 Cal. 289; But see 102 I.C. 447=1927 L. 492; 91 I.C. 881=1926 C. 307; 1941

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

Savings.

(a) any right of the [Crown]<sup>1</sup> to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

#### LEG. REF.

<sup>1</sup> Substituted by A.O. for 'Government'.

Cal. 289=199 I.C. 689. Principles of the Act applied to Berar. *See* 94 I.C. 923=1926 N. 376; 155 I.C. 966=1935 P. 188. Applicability to Burma. *See* 6 R. 667=114 I.C. 519=1929 R. 31; 13 R. 748. Although the Easements Act does not apply to Burma, the Court must have regard to that Act while deciding a question relating to an easement. 1940 Rang.L.R. 93=1939 Rang. 421. The Act is not retrospective in its effect and its provisions were extended to United Provinces of Agra and Oudh by Act VIII of 1891. Neither the Indian Easements Act of 1882 nor the Amending Act VIII of 1891 can affect the rights which were acquired before 1891. 1934 A.L.J. 728=1934 A. 336. Decisions of the Calcutta High Court on question of easement and licence are not to be relied upon as authorities in places where the provisions of the Easements Act are in force. 9 O.W.N. 986=1933 O. 69=8 Luck. 278.

SEC. 2 (a).—Where a part of the sources of irrigation for a ryotwari village is a Government tank, Mirasdars who have from time immemorial cultivated their wet lands with the tank water have a preferential right to irrigate from the tank over assignees of waste land from the Government. 51 I.C. 734. A ryotwari proprietor can claim a supply of water for irrigation of his lands from a Government channel. But it is for the Government to distribute water in any way it thinks fit. 34 M.L.J. 425=45 I.C. 80. No one has any right to interfere with the Government's exercise of its general power of distributing and limiting the supply of water for irrigation in ryotwari villages. But if the Government dams up water and prevents it from going to plaintiff's land there is a right of suit. 26 I.C. 18=1914 M.W.N. 788. Government is no doubt bound to supply water to wet fields, but the ryots have no vested interest in the maintenance of any particular channels for their supply. The ryots cannot claim as against Government any right to take water to their fields by any particular channel. 1930 M. 621=125 I.C. 74. A ryotwari tenant has no right of easement in respect of water supply from any particular channel. 54 M. 793=1931 M. 284=61 M.L.J. 563. Where the evidence was to the effect that when the land is undulating only the lower lands were cultivated and the

higher lands were regarded as catchment areas but it was not proved that the unoccupied waste lands from the higher levels had ceased to be Government property, *held*, that under those circumstances it should not be said that the cultivator of the lower lands had acquired an easement as against the Government for the surface water on the higher lands. 7 R. 487=1929 R. 300. The construction and control of works and sources of irrigation is the special function and duty of the Government in India. 24 M.L.J. 36=14 I.C. 261. *See also* 28 M. 72=15 M.L.J. 32; 1 M.L.J. 47; 16 M. 333; 7 B. 209; 28 B. 105. A ryot in respect of ryotwari lands is entitled to receive from the Government a supply of water necessary and sufficient for the irrigation of his registered wet fields. The Government have got the right to regulate the method and manner of supply. But as an incident to the tenure there is a right in the ryot to receive the said water. Where the water of a natural stream which was until 1893 falling into Thangal and exclusively used by the ryots of a village, was diverted by them in 1893 into a tank and for over 30 years it has been the customary method to take the water of the stream to augment the supply of the tank without which it would be impossible to cultivate registered wet lands under the ayacut of the tank, the Government must be taken to have impliedly recognised this as the customary method of supply for the time being for the irrigation of the wet fields. The fact that the stream is not shown as the source of irrigation in the settlement register cannot curtail the rights of the ryots. If with the consent and approval of Government water had been diverted from 1893, and Government chose to permit wet cultivation on a large extent knowing full well that a without the aid of such water it would not be possible for the ryots to do so, the ryots must be deemed to have a right conferred on them by Government, a right to the said water, and any interference of such right by any one is actionable. The ryots can sue for a declaration of their rights and for an injunction restraining interference with such rights by the ryots of another village. 46 L.W. 472=1937 Mad. 957. *Where the Government as upper riparian owner seeks to use the waters of a public stream not for a riparian tenement, but for the purpose of filling a tank situate at a long distance, by putting up a permanent dam across the river, the right*

(b) any customary or other right (not being a license in or over immoveable property) which the [Crown]<sup>1</sup> the public or any person may possess irrespective of other immoveable property; or

(c) any right acquired, or arising out of a relation created before this Act comes into force.<sup>2</sup>

<sup>2</sup>[3. All references in any Act or Regulation to sections 26 and 27 of the Indian Limitation Act, 1877,<sup>3</sup> or to sections 27 and 28 of Act No. IX of 1871<sup>4</sup> shall, in such territories, to which this Act extends, be read as made to sections 15 and 16 of this Act.]

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937 for 'Government'.

<sup>2</sup> Substituted by the Repealing and Amending Act X of 1914, S. 2 and Ch. I.

<sup>3</sup> Repealed by Act IX of 1908.

<sup>4</sup> Repealed by Act XV of 1877.

to divert water to such a tank in such manner is in the nature of easement and not a riparian right. The lower riparian owner is therefore entitled to insist that there should be no excessive user and that the easement should be enjoyed in a manner consistent with his rights and without increasing the burden of the easement. If the Government claims the easement by prescription, it is for the Government to show the extent of the prescriptive right. The burden is not on the lower riparian owner in an action by him against the Government on the ground of excessive user, to prove that he has suffered damages as a result of any specific act of the Government. The suit cannot be regarded as one between two riparian proprietors. If it is proved that silt has accumulated over or near the dam in a way calculated to obstruct the natural flow of water over the dam, the plaintiff (lower riparian owner) is entitled to relief against the defendant (Government) unless the latter can show that the plaintiff's remedy is barred by limitation. The obstruction caused to the free flow of water in the river by such accumulation amounts to a "nuisance," and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and damages. The position is the same even when natural causes combine with the existence of the dam to bring about the obstruction. The fact that the Government has acquired a right by prescription to maintain the dam would not give the Government any immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam. Nor can a plea of limitation be raised in respect of the removal of such obstruction. The injury caused to the lower riparian owner by such obstructions is in the nature of a "continuing wrong" within the meaning of S. 23, Limitation Act, and the lower riparian owner would have a cause

of action accruing *de die in diem* until the opposing party acquires a prescriptive right to maintain the obstruction. It is also very doubtful whether a prescriptive right could be acquired at all in respect of a shifting or changing mass like silt accumulation. The acquisition by the Government of a prescriptive right to maintain the dam will not of itself entitle them to all the waters intercepted by the dam, but only to such water as they have been accustomed to take. If they are entitled to draw water through a channel with certain dimensions, they cannot enlarge the dimensions of that channel. 174 I.C. 229=46 L.W. 862=1938 Mad. 180. Customary right proof of. See 90 I.C. 976=1926 A. 130. See also 37 C.W.N. 18=1933 C. 539=146 I.C. 427.

SEC. 2 (b): CUSTOMARY RIGHT.—A custom in order to be valid must be ancient, invariable, reasonable and certain, whereas an easement need not be reasonable. 29 N. L.R. 85=142 I.C. 153=1933 N. 74. When it is found that the inhabitants of a village have certain legal rights arising out of immemorial user of certain land as a village *gopat*, which they have never surrendered, the Courts are bound to defend and enforce such rights. 60 C.L.J. 213=1935 C. 201. Customary rights—Right of pasturage by long user—Villagers' right to graze cattle over lands of adjacent village—Owner not their landlord—Enforceability of such rights. See 63 C. 851. Customary right and prescriptive right—Distinction. 71 M. L.J. 268; 66 C.L.J. 270. The customary right referred to in S. 2 (b) of the Easements Act must be one which is possessed irrespective of immovable property. The right for drainage, that is for the water, which is in or comes on to the land of a person to flow over certain other ground, is a right which is connected with the immovable property owned by him. Such a right, therefore, does not amount to a customary right, but amounts to an easement under S. 4 of the Easements Act. 1936 A.L.J. 1160=1936 A. 879. Use of building as a mosque with consent of zamindar—If licence—Nature of right. 156 I.C. 922=1935 A.L.J. 1269=1935 A. 891.

A CLAIM TO PROFITS *a prandre* over the soil of another such as a right to fish without stint and for commercial purposes which might lead to the destruction of the sub-

## CHAPTER I.

## OF EASEMENTS GENERALLY.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.
- "Easement" defined.

ject-matter is a claim of right unknown to law and a custom alleged in its support is bad and unreasonable. Though this principle is not, perhaps, applicable to the case of a right in gross (fishery) vested in the inhabitants of a particular village the fact that the fish is to be taken for commercial purposes and the fact that under the custom alleged, any of the persons has the right to bring in as many others as he chooses on payment of a nominal fee are factors which stamp the custom with considerable uncertainty as regards the persons entitled to exercise the right and unreasonableness that stand in the way of its being pleaded as having created a right. Further, though the payment of a reasonable fee is not real objection to the validity of a custom if one such existed, the fact that the fee was paid per head of persons fishing was antagonistic to the idea of a right enjoyed without leave and licence. 37 C.W.N. 18=1933 C. 539. See also 61 C. 45=151 I.C. 813=1934 C. 461.

**CUSTOMARY EASEMENT AND CUSTOMARY RIGHT, DISTINCTION BETWEEN.**—A customary easement remains an easement and can exist only for the beneficial enjoyment of other land. It is merely appurtenant to the dominant heritage and cannot exist in gross. A right over property that exists in gross and not for the beneficial enjoyment of other property is not an easement, though it may be a customary right. Such rights exist independently of the Easements Act and are expressly excluded from its operation by S. 2 (b). Merely because the villagers have a right to graze in the C class forest land, they cannot be said to be occupiers of it, nor is the claim to go through a particular field in order to reach the C class forest a claim for the beneficial enjoyment of their houses in the abadi. A right of passage by the villagers through a particular field for going to the Government forest with their cattle is not an easement but a customary right. 29 N.L.R. 85=1933 N. 74. See also 71 M.L.J. 268.

Sec. 4.—See 1937 A.L.J. 249=1937 A. 428=I.L.R. 1937 A. 511.

**OVER WHAT PROPERTY AND HOW CAN EASEMENTS BE ACQUIRED.**—Easements can be acquired over artificial structures such as flat masonry, or roofs of shops. 45 I.C. 585=21 O.C. 78. Claim to property, or in the alternative to an easement over the same is competent. 41 C.L.J. 370=1925 C. 788; 1938 Nag. 415. See also 1939

Nag. 197; 1939 Sind 110; 1933 Bom. 122; 1939 Bom. 149. In order that a plaintiff should prove the right to an easement, he must show the exercise of that right with the necessary *animus* throughout the statutory period. The question of *animus* is a question of fact. Though a plaintiff in a case to establish right of easement may in his pleadings raise inconsistent pleas, yet if he leads evidence to show that he is the owner of the land over the statutory period or some part of it, he clearly destroys his case which is dependent upon his showing that he is not the owner of the land over the statutory period and has not claimed the rights of owner but the exercise of the rights over the land of another. In such a case the plaintiff must necessarily fail on both the grounds as one plea is fatal to the other. I.L.R. (1939) Kar. 307=1939 Sind 110. Neither writing nor registration is necessary for the creation of easement. 96 I.C. 276, following 31 A. 612. The right of easement necessarily implies both the dominant and servient tenements belonging to different persons. No easement could be acquired in favour of one property as against another both owned by the same man. 24 S.L.R. 208=1930 S. 34; 1940 Rang.L.R. 93=1939 Rang. 421; 1937 Cal. 572=I.L.R. (1937) 1 Cal. 569. Easement and ownership—Distinction—Person exercising easement right—Cannot acquire title to the land by adverse possession. See A.I.R. 1944 Pat. 261. For the acquisition of an easement along with other things it is essential that the dominant owner must be a fixed or ascertained person or body of persons capable of acquiring the right. Where the evidence shows that Sindhis in general had been making use of the land in question, *held*, that this could not establish a right of easement as Sindhis in general are a variable body of persons who in law are incapable of acquiring any right. 1940 Mar.L.R. 122 (Civ.). A suit to enforce an easement can be brought not only by the owner of the land but also by the occupier. 123 I.C. 230=1930 S. 152. The right of person to go and take water from a well standing on a neighbouring land is a right of easement and the Court can grant an injunction restraining a stranger from interfering with the plaintiff's right. It is not necessary for the plaintiff to prove that the servient tenement is the tenement of the particular defendant who has interfered with his right. 27 A.L.J. 1120=1929 A.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Dominant and servient heritages and owners.

779. Private persons who merely happen to reside in houses in a public lane cannot sue for alleged encroachments in that lane, for no right of easement can be acquired over a public lane. 118 I.C. 520=1929 A. 504.

ILLUSTRATIVE CASES.—(1) WHAT ARE EASEMENTS.—The definition of easement applies to a projection of eaves in a dry country as well to a country having abundant rainfall, the purposes of the eaves being only to discharge rain water. 38 B. 1=21 I.C. 352=15 Bom.L.R. 876. See also 38 Bom.L.R. 264=1936 B. 219.

PRIVACY, RIGHT OF.—The law does not recognise the right of privacy unless it depends upon prescription, grant or local usage. 10 P. 280=133 I.C. 163=1931 P. 212; 159 I.C. 683=1935 A. 1062. See also 40 P. L.R. 483; 28 I.C. 674; 1934 All. 527; 22 Bom.L.R. 226; 1929 All. 809; 1935 A.L.J. 432 cited under S. 18 *infra*.

EASEMENT AND LICENCE.—See 29 Bom. L. R. 312. Easement necessarily connotes the existence of a dominant tenement and a servient tenement. Hence a concession given to villagers personally to enjoy the shamlat of another village is not a right of easement but a licence. 152 I.C. 141=1934 Pesh. 96. The possession of a *punkh* or eaves overhanging another's land is an easement and is no occupation of property. 37 B. 491=15 Bom.L.R. 551. See also 38 Bom.L.R. 264=1936 B. 219. Right of way for the use of the sweeper, who is also a Municipal servant can be acquired as an easement. 28 Bom.L.R. 601=95 I.C. 170=1926 B. 282.

QUASI EASEMENTS.—See 176 I.C. 966=1938 Sind 145, cited under S. 18, *infra*.

WHAT ARE NOT EASEMENTS.—Right to bury in another's land does not fall within the general definition of "easement". It cannot be deemed a right. 66 I.C. 640=34 C.L.J. 319. The right to bury or cremate the dead on land belonging to other persons cannot be acquired by prescription. 138 I.C. 325=33 P.L.R. 157=1932 L. 256. Such a right can be acquired by dedication or by prescription as a mode of acquisition or extinction of substantive or primary rights by lapse of time, described as acquisitive prescription. 60 C.L.J. 566=39 C. W.N. 387=1935 C. 357. Private rights of way, not appurtenant to a dominant tenement, like public rights of way, are not easements. They are rights in gross and can be enforced as such. 59 I.C. 319. A right of passage over a public road is not an easement. 48 A. 560=1926 A. 538. A right to go on to a neighbour's land to gather the fruits therefrom a portion of a

tree alleged to belong to the plaintiff is not an easement. Such a right cannot be acquired by prescription. 43 M.L.J. 152=1922 M. 398 [(1895) A.C. 1 Foll.]. A general right of easement to use a roof as a place of setting or drying clothes or for other purposes can be acquired under the Act. User may be either by the dominant owner or by his tenants beyond the statutory period. User without permission is user as of right. 45 I.C. 585=21 O.C. 78. A person has no right to cut off the overhanging branches and the penetrating roots of a tree belonging to his neighbour when the tree is growing partly on his land and partly on his neighbour's land for many years past. 22 Bom.L.R. 790=44 B. 705. But see 114 I.C. 512. Where a soapnut bush which had taken root exclusively on the plaintiff's land was shown to have spread over largely on a tamarind tree on the land of the defendant and it was shown that the plaintiff alone had been enjoying the produce, *held*, that the adjoining owner was not entitled to claim the produce or prevent the owner from collecting the same. *Quære*, whether when the fruits have fallen on the land of the adjoining owner from the overhanging branches the owner of the tree can go over the adjoining land without committing trespass to collect such fruits. 8 Mys.L.J. 136.

WHO CAN ACQUIRE EASEMENTS.—S. 4 of the Act shows that not merely the "owner" but even an "occupier" may acquire an easement. 52 L.W. 610=(1940) 2 M.L.J. 655 and there is no *prima facie* reason why the enjoyment of a person as an "occupier" should not be tacked on under S. 15 to his enjoyment as "owner" if there is no interruption in his user. 1934 M. 575=67 M. L.J. 262. See also 20 N.L.J. 99; I.L.R. (1937) All. 511=1937 A.L.J. 249=1937 All. 428. Where the easement of a right of way in respect of a stair case existed for the benefit of the dominant tenement, the upper storey of certain shops, and later on a right of way in respect of the same stair-case but for the benefit of a different dominant tenement altogether, namely a mosque, is claimed, it was *held* that the owner of a right of way was not entitled to transfer the right in such a manner. 1938 A.L.J. 1238=1939 All. 194. Where a person who has already completed 20 years user becomes a co-sharer, he cannot claim any right of easement. The position will be the same even if easement has been established in a previous suit. 23 Pat. 115=A.I.R. 1944 Pat. 261.

NO RECIPROCAL EASEMENTS.—It is not possible to acquire a reciprocal easement for

*Explanation.*—In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth: the expression “beneficial enjoyment” includes also possible convenience, remote advantage, and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

*Illustrations.*

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(c) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(d) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

the benefit of the servient tenement by the exercise of an easement by the dominant owner. 22 I.C. 514=19 C.L.J. 45.

**PROFIT A PRENDRE.**—The right to hunt in a jungle and to appropriate the game is a right known in English law as a right to profit *a prendre* in gross. 2 P.L.J. 323=39 I.C. 868. A right *in gross* or profit *a prendre* may be established by the same sort of evidence as is used to establish either a profit *a prendre* appurtenant or an easement in the ordinary sense of the word. (5 C. 945; 19 C. 544 and 14 C.L.J. 572 Ref.) 61 C. 45=151 I.C. 813=1934 C. 461. The right which involves the total exclusion of the owner of the soil from its enjoyment, such exclusion not being physically for user by person claiming it cannot be claimed as an easement. 130 I.C. 546=1931 S. 1=25 S.L.R. 257. See also 37 C.W.N. 18=146 I.C. 427=1933 C. 539. There is no easement known to law which gives exclusive and unrestricted use of a piece of land. Hence there can be no easement which would prevent the owner of the servient tenement from making ordinary use of his land, and if the easement demanded would entirely oust the owner of a holding, such an easement cannot be claimed. 154 I.C. 468=1935 R. 56. The right of “*lagan*” attached to the ownership of the front part of the “*ghat*” to use the back part under certain conditions is a right of easement and is enforceable against a purchaser even if he had no notice of the right claimed. 1931 A.L.J. 267=1931 A. 207. The ordinary right of ryotwari, land-holders against Government to water sufficient to irrigate their fields is not an easement within the meaning of S. 4. It is an incident of ryotwari tenure whether it be regarded as having a contractual or proprietary origin. 54 M. 793=1931 M. 284=61 M.L.J. 563.

**PERMISSIVE USER.**—No question of easement could arise where the user of the defendant's land was permissive. 21 A.L.J. 436=1924 A. 50.

**PARTY WALL.**—Where a co-owner raises the height of a party wall with the consent or acquiescence of the other owner, the wall so raised is also joint unless the other co-owner has consented to the exclusive user of the wall by the party raising it. 1932 L. 48=32 P.L.R. 755. Where one of the joint owners of a party wall had made a hole therein and enjoyed light through the hole for more than 20 years, *held*, that he had acquired an easement and the other owner could not close the hole. 33 P.L.R. 930=1933 L. 28.

**SEC. 4: (EXPL.).**—A lessee of land who has taken it for building purposes cannot acquire a right of way by easement over other lands owned by his lessor. Such a lessee by reason of his being the owner of the materials of the house, would not become an owner within the meaning of S. 4 of the Easements Act, by virtue of the Explanation that “land” includes also things permanently attached to the earth. I.L.R. (1938) All. 538=1938 A.L.J. 436=1938 All. 293 (F.B.).

**SECS. 4, 12 & 15.**—An easement of light like any other easement, must be acquired, under S. 12 of the Act, by the owner or on his behalf, by the person in possession. Therefore, if a lessee acquires a right to light, he acquires it on behalf of the owner, *i.e.*, the absolute owner; and he cannot acquire it on behalf of the owner as against such owner. A man cannot acquire an easement as against himself. Hence a lessee cannot, under the Easements Act, acquire a right to light by prescription over adjoining property which belongs to his landlord. A lessee who builds a house as a permanent

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

*Illustrations.*

(a) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(b) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(c) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

6. An easement may be permanent, or for a term of years or other limited

Easement for limited time period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

structure on the land comprised in the lease does not become the owner of the house for more than the leasehold interest in the land. That is the ownership of a chattel and an easement cannot be annexed to a chattel. An easement of light cannot therefore be acquired on behalf of a house, apart from the land. 45 Bom.L.R. 795=1943 Bom. 443=I.L.R. (1943) Bom. 690. Where a person claims in a suit rights of ownership, possession and enjoyment in respect of certain properties and fails in it, he cannot subsequently bring a suit claiming rights of easement over the same properties. A person claiming rights as easement must be conscious of the fact that the property over which he was exercising his rights were not his own and that it belonged to another. He cannot be said to establish a right of easement, when it is shown that during part of the prescriptive period he has exercised the right now claimed by him as easement, not as a right over property of another, but as a right over property which at the time he considered to belong to himself. 48 Bom.L.R. 25 (F.B.).

Sec. 5.—The right to use a staircase is not a continuous easement as defined in S. 5 of the Act. 117 I.C. 381=1929 L. 848. Artificial water-courses or openings for taking water from a tank or bund are apparent and continuous easements. (34 M. 487; 2 M. 46 and 1924 M. 108, Ref.) 1930 P. 7=11 P.L.T. 637=124 I.C. 385. Right of repair being a discontinuous easement is not lost even though not enjoyed within 2 years next preceding suit. 1941 N.L.J.

C.C.M.—273

655.

COURT-FEE.—Claim to injunction by person in occupation of property—Maintainability—Enquiry into title of plaintiff in property—If arises—Court fee. (1940) 2 M. L.J. 655.

SEC. 7: GENERAL.—NATURAL RIGHTS AND EASEMENTS.—The right incident to the ownership of land, in the nature of easement but not a right of easement as such, is called a natural right and is distinct from the right of easement. Where one is claimed, the other does not arise. 54 I.C. 504. As to water-course, the water of which is largely increased in volume by percolation *see* 64 I.C. 158. The ownership of free natural elements, such as air and water and of all wild animals living therein is obtained by occupancy or appropriation. 3 P.L.T. 53=64 I.C. 346. An occupier of abutting lands cannot be restrained in the exercise of his natural rights simply because he becomes a lessee of other lands not abutting. 24 I.C. 685=1914 M.W.N. 481. Where the water of a stream has been used for irrigating only abutting lands, the owner of abutting lands cannot be restrained from using more than a reasonable quantity by another to whom no material diminution is caused. 24 I.C. 685. The actual and not a mere threatened use of a stream which has been used for irrigating only near-by lands to irrigate lands other than those abutting on the stream gives a right to sue. 24 I.C. 685. A ryotwari tenant has no right of easement in respect of the water-supply from a particular channel. 54 M. 793=1931 M. 284=61 M.L.J. 563.



- (a) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Exclusive right to enjoy.

**ILLUSTRATIVE CASES.**—No one has power for the safety of his own property, to direct or interfere with a natural stream running a natural outlet, and if he does so, he will be liable in damages to any one who is injured by his act. 19 A.L.J. 736=43 A. 688. Where the rain water falling on plaintiff's land which is on a higher level, flows across defendant's land which is on a lower level, the plaintiff's right is a natural right not acquired by prescription, and it cannot be interfered with by the defendant. 24 I.O. 91=12 A.L.J. 685. See also 27 I.O. 268=19 C.W.N. 54. There is no easement of prospect or of privacy. 36 C.L.J. 406=1923 C. 256 (But see also cases under S. 18, *infra*.) Every one may build upon or otherwise utilise his own land regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. 1923 C. 256. If windows are opened the neighbour may, by building on his own land, obstruct the light which would otherwise reach them. 1923 C. 256. Same principle has been applied to partition of joint properties. 36 C.L.J. 406=1923 C. 256. On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. 1923 C. 256. Every person has a right to do anything on his own land with regard to the diversion, storage or the uses of water in any way he chooses provided that he does not allow or cause that water to go upon his neighbour's land so as to affect it in some other way than the way in which it had been affected before. 41 I.O. 47. Every one is entitled, in the absence of controlling rights of easement or servitude regarding his premises, to protect his premises against the flow of water from adjacent lands or houses. 243 P.L.R. 1912=16 I.O. 797 (29 M. 539 Rel.). The fact that the water discharged from a dominant tenement flows over the servient tenement without a definite channel, cannot prevent the acquisition of an easement. 40 C. 458=17 C.W.N. 306 (F.B.). (8 C.W.N. 244, Over.) Even the rights of the riparian owners may be acquired by easement. 1923 L. 594. A person has no right to obstruct the water of a stream except to the extent to which he has had prescriptive use. 41 I.O. 47.

**MEANING OF WORDS.**—“Owner” does not necessarily mean absolute owner. 42 M. 567=37 M.L.J. 28=50 I.O. 291. It includes

limited owner such as lessees or persons having derivative interest in the property. 42 M. 567. An occupier of zemindari lands is an “owner” within the meaning of illustration (j) to the section. 24 I.O. 685=1914 M.W.N. 481. The term “natural right” to drain covers only the right to allow rain water falling on land of a naturally higher level to drain off by surface flow along whatever lines the water could find its way on the neighbouring land. The right to drain off water brought according to the custom and usages of the country along irrigation channels upon the land may also be said to be a natural right. 44 I.O. 500=1918 M. W.N. 167. Each upper owner in a system of connected tanks in different villages supplied with water by or through a permanent or artificial channel, is entitled in the flood season, to fill his tank, which is of sufficient storage capacity for Ayakut and they must, subject to this, allow the water to flow freely on to the lower tank till the last of them is supplied. 41 I.O. 24=6 L.W. 572. Whatever may be the means adopted to let out the surplus, the owner of the tank in such cases, cannot increase the storage capacity of his tank beyond its capacity at the beginning which, in many cases, can only be proved by the customary flow of water. 41 I.O. 24. An easement right to keep a latrine on another man's land is unknown to law and cannot be acquired by prescription. 29 I.O. 865=19 C.W.N. 864.

**RIPARIAN RIGHTS.**—The lower proprietor owns a natural servitude without claim to compensation to the higher, in respect of water naturally flowing upon it; but the higher land owner cannot exceed his natural right by sending water not going there naturally. Short of this the upper owner may interfere with the flow of water. 36 M. 149=25 M.L.J. 276. A riparian proprietor is entitled to use the water of the stream for irrigation of his lands without causing injury to other riparian proprietors. 18 I.O. 284=37 M. 369 (note). Natural stream—Interception of flow of water by upper riparian owner—Stream and feeding channels flowing in well defined courses—Lower owner is entitled to sue for mandatory injunction. I.L.R. (1937) Mad. 510=(1937) 1 M.L.J. 216=1937 Mad. 210=45 L.W. 188. See also 1945 N.L.J. 80=1945 Nag. 106. Riparian right is a natural right and is not lost by non-user. Until some other person acquires a right of easement to substantially diminish the water available to the owner, the riparian right cannot be affected or lost. 104 I.O. 781=1927 M. 1167. It is a right incidental to the ownership of the land upon which the air or the water lies, just as much.

as is the right to make the silt deposited by rivers or the lava thrown up by a volcano or rain or snow falling from the sky. 3 P. L.T. 53=64 I.C. 316. Erecting a dam across the bed of the river is a common method of using the water of a stream by a riparian proprietor. 64 I.C. 316. Water of stream—Diversion of, for purposes of irrigation—Permanent masonry structures—Claim to right of—Evidence disproving but disclosing right to diversion by erection of temporary structures of. 34 C.W.N. 512=1930 P.C. 42=58 M.L.J. 285 (P.C.). A riparian proprietor should not take more water than he was taking before, but he can use the water to raise wet crop in lands in which it was customary to raise only dry crops. 18 I.C. 294=37 M. 369. An easement exists for the benefit of the dominant tenement alone and the servient owner cannot insist, on its continuance by the dominant owner or claim damages for abandonment. 65 I.C. 84. If water running through an artificial channel on a neighbour's land has all along been flowing to the plaintiff's land it is open to the plaintiff to insist on its continuance on the footing of a lost grant or old arrangement. 65 I.C. 84.

**PERCOLATING WATER.**—Water flowing in a known channel or percolating through the soil is not the subject of property or capable of being granted to any body. Two of the exceptions to this rule are (1) where the water flows to a person's property and there is no one to share with him the use of the water or to call him to account for any use he may make of it; (2) where flowing water is appropriated or taken into possession, but the right of property exists during such possession only. Where the source of a stream is not known and there is no natural flow of the water in a known and defined channel outside the limits of the land of a person, such person is the owner of the water collected on his land. I.L.R. (1945) Nag. 273=1945 N.L.J. 80=A.I.R. 1945 Nag. 106. Though according to the theory of decisions about percolating water, no one, not even the owner of the soil under which it flows, has any property in such water till it reaches a defined channel, and though there is therefore no infringement of any right of property by appropriating such percolating water yet an owner may be guilty of a breach of contract, if by appropriating underground percolating water from his land, he causes diminution of a supply which he is obliged by law to maintain. 54 M. 793=1931 M. 284=61 M.L.J. 563. The doctrine of percolating water flowing underground in undefined channels as settled by English decisions should not be applied to the water carried in sandy bed of an Indian river in dry months between monsoon to monsoon. Necessary modifications must be made in the English law of flowing water to

make it applicable to the tropical countries 54 M. 793. As between owners of land no one has a right of property in water flowing underground in undefined and unknown channels by percolation. As a consequence of this, one owner has no right of action against another, who by sinking wells or by other works on his own land, draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him and this even when it is done from an improper motive or maliciously. But that other owner cannot go on his neighbour's land, dig there and take the underground water found there and justify his action because the water was running in undefined channels, as that would be trespass and be an actionable wrong. These things should be done on one's own property. 54 M. 793. The right to take from an irrigation channel such water as may be reasonably required for the cultivation of a second crop of the customary character upon the suit land and for this purpose to construct, whenever necessary, a *chappakatu* or temporary growing of the required length in the bed of the irrigation channel is not of too indefinite a character to be incapable of acquisition by prescription. 58 I.A. 195=54 M. 427=61 M. L.J. 1 (P.C.). So far as the right to build is concerned, the fundamental position is that every person is entitled to build right up to the limits of his own property. In doing so, he must not infringe the rights of the owner of adjoining property. But these rights have first to be acquired. If they are not acquired, then the fundamental position remains. If the fundamental position is that a man is entitled to build right up to the limits of his own property, then the mere fact that he exercises that right cannot be regarded as an actionable nuisance. The remedy of a person who does not want to be incommoded by such building is to refrain from building upto the edge of his own property. He should take care to leave such gap between his land and the other persons' as will, in his opinion, ensure him that privacy and comfort which he desires. As the ordinary law does not prevent a person from building as he pleases on his property provided it does not amount to an actionable nuisance, Municipal Corporations and Town Improvement Trusts are entrusted with special powers to regulate buildings. But those powers can only be exercised by those bodies. If those bodies are satisfied or decline to take action, no one else can claim the right to wield the powers with which those bodies have been specially endowed by statute. Where the plaintiff and the defendant are adjoining owners of land, and the Municipal Committee, after considering the objections of the plaintiff, gives sanction to the defendant to build on his land on certain terms agreed to by him, but the defendant

(b) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Rights to advantages arising from situation.

does not fulfil those terms, it is not open to the plaintiff to sue the defendant complaining that the defendant has broken his agreement with the Municipal Committee. In the first place the agreement with the Municipal Committee cannot be looked upon as a contract, and in the second, the Municipal Committee is not the plaintiff's delegate or trustee. 1945 N.L.J. 295=A.I.R. 1945 Nag. 231.

Sec. 7 (b).—The owner of higher lands. is entitled to discharge surface water over adjacent lower land. 41 I.C. 863=22 C.W.N. 666. See also 205 I.C. 22; 1942 Cal. 261. Right to discharge surface water on land at lower level—Nature of—Such right if may be extinguished—Change in original disposition of lands—Effect of. See A.I.R. 1942 Cal. 261. Where owing to the silting up of a stream into which the water thus discharged ultimately flowed, the level of the bed of the stream became higher than the adjacent lower land to the inconvenience thereof, held, that dominant owners were still entitled to exercise their rights. 22 C.W.N. 666. A plaintiff cannot claim damages for injury caused to the crops on his land by the shade caused by trees standing on his neighbour's land. 19 N.L.B. 191=1924 N. 69. It cannot be said that every owner of a field has the right to have the sun's rays fall on it from every possible direction. 1924 N. 69. There cannot be such a right, for if it were allowed, the use and enjoyment of the adjoining fields by their owners would be very largely restricted. 1924 N. 69. Every owner has got the right to open apertures in his own wall and unless by doing so he invades the privacy of any other pre-existing and well established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures. 1933 L. 847.

Sec. 7. ILLUS. (d).—The right referred to in Ill. (d) to S. 7 is the right of every owner of land to so much light and air as pass vertically over the land. No one is entitled to light and air which pass laterally or at an angle to the vertical unless he has acquired such a right by prescription. Even when such a right has been acquired by prescription or agreement, a person cannot maintain a right of action unless he can show not only that the right has been infringed but that there has been a substantial nuisance to his comfortable and beneficial occupation of the premises. 1945 N.L.J. 295=A.I.R. 1945 Nag. 231.

LIGHT AND AIR—PREScriptive RIGHT  
—EXTENT TO WHICH IT MAY BE  
CLAIMED.—The owner of a dominant

tenement who has acquired a prescriptive right to the use of light and air through certain defined apertures can insist on the preservation to him of only such quantities of light and air as might be reasonably required for comfortable occupation. He is not entitled to the excess even if he had enjoyed it in the past. If there is an infringement he could sue the person guilty thereof only if the diminution amounted to an actionable nuisance. This principle applies at least in the Provinces where the Easements Act does not apply but the Limitation Act does. A.I.R. 1945 Cal. 438. See also I. L.R. (1942) Kar. 225. The right to receive light across another's land is not a natural incident of property but can only be acquired as an easement either by grant or prescription. Unless and until such a right has been acquired in the manner of other easements, no amount or mode of obstruction is actionable. I.L.R. (1942) 1 Cal. 488=46 C.W.N. 136=A.I.R. 1943 Cal. 35. As to right to sue for infringement, see 44 Cr.L.J. 288; 207 I.C. 83; 204 I.C. 370. *Obiter*: Where a landlord is not himself in occupation of any premises affected by interference with easements of light and air connected with those premises, he is not entitled to relief unless he proves that by reason of the interference with the easements of light and air enjoyed by those premises he has been damaged apart from the damage or inconvenience caused to the tenant in occupation. The Court is not concerned with inconvenience caused to a tenant of the plaintiff who is not a party to the suit. I.L.R. (1942) Kar. 306=A.I.R. 1943 Sind 17.

The user of a building has no materiality whatsoever in cases of the easement of light and air. Even a tenement which is vacant and unoccupied for the statutory period of 20 years or over can during the same period of non-occupation acquire easement rights over the servient tenement. A.I.R. 1945 Cal. 438. Where the owner of a dominant tenement has acquired an easement right to light and air and his right is infringed in such a way as to amount to a nuisance he cannot be compelled to make structural alterations to provide ventilation, in order to enable the servient owner to commit nuisance. A.I.R. 1945 Cal. 438. In order that the infringement of an easement of light and air may not amount to an actionable nuisance the balance of light and air left must be sufficient for comfortable occupation having regard to the ordinary notions of mankind, the word 'mankind' being understood to mean mankind of the locality or class to which the parties belong. It would be wholly contrary to the ordinary notions of people in India that

*Illustrations of the Rights above referred to.*

(a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d) The right of every owner of land to so much light and air as pass vertically thereto.

(e) The right of every owner of land, that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

*Explanation.*—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the “subjacent and adjacent soil” mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

they should sleep in a room at night with all the doors open. Moreover, occupation means occupation by all the members of the family and the occupation of a room with the doors open would not be appropriate in the case of females. Therefore, the habitability of a room from the point of ventilation cannot be judged on the hypothesis that the doors would be kept open. Hence in considering whether the ventilation had been affected to such an extent as to make the room unfit for comfortable occupation the doors cannot be taken into consideration. A.I.R. 1945 Cal. 438. Both under the Limitation Act and the Easements Act the easement of light and air is acquired by a building and not by any particular room in a building. Therefore, if such an easement has been acquired and if it has been infringed, in judging whether the diminution has been such as to amount to a nuisance regard must be had not merely to the effect upon the particular room where the aperture or apertures are situated but to the entire building. A.I.R. 1945 Cal. 438. An infringement of an easement right of light and air becomes actionable only when the obstruction amounts to a nuisance. Where the proof as regards the extent of obstruction is not definite or satisfactory, the test of the 45 degrees rule may be adopted as a valuable guide, though there is no rule of law or rule of evidence to that effect. The Court has to take into consideration the locality in which the tenement is situate as also the fact that the tenement has other sources of light and air. 23 Mys.L.J. 93. Merely because there is a change in the use to which the dominant tenement is put subsequent to the acquisition of the right to light and air by the dominant owner by prescription, it does not follow that that is interruption in the enjoyment of the right of free passage of light and air to the dominant tenement, and the dominant owner does

not lose the right he has acquired. 23 Mys. L.J. 93.

SEC. 7, ILLUS. (e).—Where the defendant, who was the owner of the land adjoining that of the plaintiff, dug a drain at a distance of about 2 feet 2 inches from the plaintiff's wall to a depth which went below the foundation of the plaintiff's wall and the plaintiff's wall collapsed as a result of it and the plaintiff brought in a suit for damages, *held*, that as there was artificial pressure upon the building of the plaintiff and that artificial pressure had produced a greater stress than the stress which the soil was able to bear when deprived of the support of the subjacent soil of the defendant, the plaintiff could not succeed unless he proved the right of easement for 20 years. 1930 A.L.J. 340 = 1929 A. 885. The right of support of land in its natural condition by adjacent land is a natural right and incidental to the ownership of property. Any change in the land supported which converts its natural character into an artificial character such as would be caused by placing buildings upon it or excavating it would obviously impose a changed or increased burden on the adjoining land the effects of which would not alter or increase the previous obligation unless the existence of an easement could be proved. 1929 A. 885. The right to the support of land in its natural state vertically by the subjacent strata and laterally by the adjacent soil is a right to which the owner of the surface is of common right *prima facie* entitled. The right of an owner of land to the support from adjacent or subjacent soil is not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support. 11 R. 47 = 143 I.C. 202 = 1933 R. 18. See also 1930 A.L.J. 340; 59 C. 363 = 131 I.C. 667 = 1932 C. 542.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

*Explanation.*—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

SMC. 7. ILLU. (g).—Indian Courts should be liberal in recognising irrigation rights as natural rights of as strong a character as any other, provided the lower riparian owners are not injured and the quality and the wide participation of the benefits of the natural stream are not interfered with. 34 M.L.J. 223=43 I.C. 113. In India a riparian owner must be confined to the land which is on the bank of the stream or which extends from that bank to a reasonable depth in land. 34 M.L.J. 223. A depth of more than half a furlong would usually be unreasonable. 34 M.L.J. 223. The right of a riparian owner is not restricted to lifting up of water from a natural stream and carrying it at once to the land but extends to the temporary storage of water in wells before carrying it on to the irrigated lands. 34 M.L.J. 223. Every land owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. 4 P.L.T. 81=2 P. 110. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. 2 P. 110. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to. 2 P. 110. If he should acquire such an easement the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the surface water, that is, water not passing through a defined channel. 2 P. 110. But see also 65 I.C. 84. Lost grant—Presumption of—Artificial water course—Channel constructed by person owning three villages—Channel having source in first village and passing that and second village and then to third village—Water intended solely for benefit of third village—Villages passing into hands of different owners—Right of owner of third village to bed and bunds—No presumption of lost grant. *Held:* that the presumption of a lost grant or legal origin could

not be applied to the circumstances of the case and the first and second of these and not the owner of the third village was entitled to the bed and bunds of the channel in the villages belonging to them; the fact that those two villages had previously belonged to the same proprietor would not justify any presumption of a grant to the same person as owner of third village P; and all that the Court could say in such a case was that the proprietor of those two villages had parted only with such rights as were necessary for allowing the channel to pass through their lands. 1945 M.W.N. 71. 165=58 L.W. 71=A.I.R. 1945 Mad. 176=(1945) 1 M.L.J. 9.

SMC. 7. ILLU. (h), (i) AND (j).—No riparian owner is entitled to obstruct a public river. 21 Cr.L.J. 55=54 I.C. 407. Riparian owner has a right to the usufruct of the river or stream which passed through his land. This is not an absolute or exclusive right to the flow of the water but to the reasonable enjoyment of the same. 10 I.C. 181. The right which an upper owner has to allow rain water on his land to flow out to the adjacent tenement is a natural right under the Easement Act. 125 I.C. 529=1930 M. 676. See also 1938 A.L.J. 486=1938 All. 363. A riparian owner is not entitled to impound the water flowing in defined and natural channels, but is entitled only to use it as it passes. The rights of a riparian owner are subject to the right of a lower riparian owner to have the water of the channels or streams flow in the customary manner down to him. Interference with such flow is an actionable wrong especially where the flow is totally cut-off. 1937 M. 310=(1937) 1 M.L.J. 216 (F. B.); I.L.R. (1937) Mad. 510=45 L.W. 188. There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels. This principle is embodied in Ill. (i) to S. 7 of the Easements Act. But the right of the superior proprietor is not quite absolute. It would not

for instance be within his right to introduce water which was foreign to the land. Further there is no obligation upon the owner of the lower land to submit to an artificial discharge of water from his neighbouring lands. When land is so located that water naturally or in the course of ordinary agricultural operations descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. The upper proprietor may drain his land and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage or by introducing alteration in the mode of drainage cause the drainage water to flow to his neighbour's land in an injurious manner. The upper owner further, is not entitled to do anything that will throw on the inferior tenement any water which would not naturally come there. The upper proprietor has no doubt the right to collect the water falling from the higher ground in one body in the course of draining the land. But that right is again not absolute. That can only be done without hurting the inferior tenement. 47 L.W. 564=1938 Mad. 649=(1938) 2 M.L.J. 108. See also 18 Pat.L.T. 806=1938 Pat. 71; 1938 Pat. 73=174 I.C. 710. A person who rightfully possesses land on a higher level has the right to discharge the surplus rain water which falls on his land on to the land on the lower level when it has a natural drainage in that direction. The owner of the lower land is bound to accept this water, and cannot raise artificial barriers on his land which will cause the water to accumulate on another's property. He cannot do this even if it is necessary to protect his own property. Of course such a right can be acquired in special ways, which must be pleaded and proved. I.L.R. (1945) Nag. 750=1945 N.L.J. 452. It is now well settled that the right of an upper land-owner to throw his surface water on to land at a lower level is a natural right, and not in the strict sense of the word 'an easement'. In other words, it is a right which is not acquired, but is an incident of property owing its origin to the disposition and arrangements of nature. It is incapable, therefore, of being lost by non-user or extinguished permanently, and the maxim "*tantum prescription quantum possessum*" has no application. But these natural rights and liabilities may be altered by contract or grant, express or implied, as well as by enjoyment of an adverse easement obstructing the flow of the water from the higher to the lower ground. It follows, therefore, that if any artificial alteration is made in the configuration or disposition of the lands or any conditions are otherwise created affecting the exercise by the upper owner of his natural right to discharge his surface

water to the lower level such as by excavating a khal or channel between the two tenements then this fact alone will not be sufficient to determine whether the natural right is thereby merely suspended for the time being or finally extinguished. The purposes for which, and the circumstances in which the altered conditions are brought into existence as well as the subsequent mode of user or enjoyment will all have to be looked into. 74 C.L.J. 95. See also 205 I.C. 22; 1942 Cal. 261. In India the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations, is a customary right and not a natural right. (Dictum of *Sadasiva Aiyar, J.* to the contrary in 1913 M.W.N. 167 not approved.) Every landowner has a natural right to deal with his surface drainage water as he pleases; he can collect it and use it on his own land or he can let it find its way by gravitation to his neighbour's land if that is at a lower level than his own land; but the owner of the lower land may acquire by prescription, as an easement restricting this natural right, the right to throw water back to the land at a higher level. Hence where the owner of the lower land has acquired an easement to restrict the natural flow to such an extent as it may be restricted by a bund which has been in existence for over 25 years, the owner of the higher land cannot claim to breach the bund at a particular point to let out the water unless he has acquired such a right as an easement. (*Wright v. Howard*, 24 R.R. 169; 1 M. 335 and 24 O. 865, Rel. on.) 14 R. 544=163 I.C. 453=1936 R. 282. See also 17 Mys.L.J. 123=44 Mys.H.C.R. 105. The owner can exercise this right to drain off the water that collects on his land or that is brought into his land, by opening vents in the bund which he has put up along the boundary between his land and the adjoining land lower down, so long as no damage is caused to the owner of the adjoining land. 52 M. 426=1929 M. 337=56 M. L.J. 311. The right of a riparian owner to use the water of a stream either for irrigation or manufacture is an extraordinary use of water and is subject to the condition that the use of the water by other proprietors should not be affected. 51 I.O. 949. Natural stream—Riparian owners—Rights of—Interception of flow of water by upper riparian owner—Stream and feeding tributaries flowing in well-defined channels—Right of lower owner to sue for mandatory injunction. 168 I.C. 337=1937 M. 810=(1937) 1 M.L.J. 216. It is not rightful to a higher riparian owner to use the water for irrigation in such a way as to interfere with an easement acquired by prescription by a lower riparian owner. 44 I.C. 19. Where through his own fault flood-water accumulates on a man's land, his neighbour is entitled to put up bunds to protect his land.



The former cannot claim a right of natural drainage and restrain the latter from putting up the bund. 1 B. 427—1924 B. 86.

**Natural right of drainage—Extent of right.** 107 I.C. 203; 24 N.L.R. 122—1928 N. 184.

Where a stream, having a continuous flow at the beginning, subsequently diverts itself, it is a natural stream and the owners of the land below cannot put a dam across it to the damage and injury of upper owners. 28 M. L.J. 98—26 I.C. 800. Where there is a competition between the rights of the owner of land on a higher level to allow water to pass in its natural flow without obstruction and the rights of the owner of the lower land to use it as he pleases, the latter's right must give way to the former. In such a case, the owner of the lower land cannot erect a bund to obstruct the flow of water. 52 I.C. 128. An owner of land through which a river or other natural channel flows is not bound to clean it though he is bound within certain limits as between himself and other riparian owners not to do anything which will obstruct the flow of water or materially interfere with their rights. 33 A. 619—8 L.L.J. 640. A riparian proprietor can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is allowed to descent. 52 I.C. 276—20 Cr. L.J. 612. Under certain circumstances, and provided the flow of water in the stream is not materially prejudiced and interfered with, an upper riparian owner may have a right to divert water for the purposes of irrigation even by the putting up of a bund. 1934 M. 583—40 L.W. 373—67 M.L.J. 373. The quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which the water bears to entire value. 52 I.C. 276. Riparian proprietors can permanently divert water for agricultural purposes and irrigation. The question is whether the use was reasonable having regard to the custom of the adjoining country. 43 I.C. 235—3 Pat.L.J. 51. Where a riparian owner has made a diversion for the irrigation of his own tenement, the surplus water which would otherwise be wasted may be taken in a channel by another riparian owner to irrigate his land. 43 I.C. 235. The policy of law should be to encourage and protect all beneficial use of the water. 43 I.C. 235. As to limitation for suit, *see ibid.*

**Natural lake or maduga belonging to Government bounded by Zamindari villages—Riparian rights—Right of Zamindar to use lake water for irrigation of lands abutting on the lake free of charge—Right of Government to levy water cess.** 163 I.C. 87—1936 M. 550.

**RIGHT TO PUT A DAM.**—Plaintiffs as lower riparian proprietors sued the upper riparian

proprietors complaining that the putting up of a dam by the defendants higher up interfered with the flow of water in the stream and claimed a declaration that the defendants had no right to use the water for irrigation, a direction for the demolition of the dam put by the defendants and for a permanent injunction prohibiting the defendants from ever putting up a dam across the river. The defendants in their written statement claimed that what they did was in the exercise of their riparian rights as upper owners and did not plead any special rights founded on contract, custom or prescription. The lower appellate Court framed the injunction in the form, that the defendants be prohibited from putting up such a dam as will cause diminution to the flow of water to which plaintiffs would be entitled. *Held*, that in the light of the rights declared by *illus. (h) and (j) of S. 7 of the Easements Act*, the proper decree to be passed was to declare that the defendants are entitled to such rights in the stream as belong to an upper riparian owner and that they are not entitled to put up the dam complained of in the plaint, and to restrain them, their agents and servants by an injunction from interfering with the stream in such a way as to diminish materially the flow of the stream. 1934 M. 583—67 M.L.J. 373. All that the decided cases lay down is that the rule in *Bylands v. Fletcher* about the absolute liability for damage, negligence or no negligence, when water which is stored on land escapes, does not apply in the case of irrigation tanks in India which have been used from time immemorial as storing places for water for the convenience and benefit of surrounding areas of land. That, however, does not entitle a person to enlarge his store of water by flooding land on a higher level belonging to somebody else, or if he is permitted for one reason or another to do this during certain periods of the year, it does not entitle him to travel further and enlarge either the period or the area of inundation beyond that which was originally permitted. I.L.R. (1945) Nag. 750—1945 N.L.J. 452.

**PRECARIOUS SUPPLY OF WATER—NO RIGHT OF EASEMENTS.**—Where there has been no continuous and consistent use of the water by the owner of lands lower down, by the aid of which he could raise his crops and which could be deemed beneficial, in some years the water was insufficient and in some years it was excessive, he cannot be held to have obtained any prescriptive right to the supply of water in sufficient quantity. 56 M. 696—1933 M. 646—65 M.L.J. 179.

**PRIVACY, RIGHT OF.**—There is no inherent right to privacy, and such a right, if it can arise at all, can arise only by prescription, grant or local usage. 10 P. 280—133 I.C. 163—1931 P. 212. *See notes under S. 18, infra.* It cannot be said that the custom of



## CHAPTER II:

## THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Who may impose easements.

*Illustrations.*

(a) A is a tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

privacy which exists in the United Provinces protects the apartments of men as well as women. The custom and law as to privacy is that new constructions should not be made to overlook apartments which are generally occupied and used by women and have been so occupied and used for a period sufficiently long to establish a right of privacy. It would be stating the custom too widely to lay down that any portion of any house used and occupied by men should be protected. I.L.R. (1945) All. 607=1945 A.L.J. 213=A.I.R. 1945 All. 335. The owners of a house which has been exposed to the view of their neighbours cannot claim a greater right of privacy than they had in fact enjoyed, merely because some new construction has been put on at a place from where the identical portion of the house of the complaining party had been visible. A plaintiff cannot be granted any relief in a case where there has been no fresh invasion of his right of privacy but merely a more restricted view has been brought about, by an alteration in the house of the defendant and by this restricted view a suspicion has been created in the mind of the plaintiff that some one might unobserved look into that part of the house which was always open to the same view. 1945 O.W.N. 313=A.I.R. 1945 Oudh 308. Right of privacy—Custom as to—Kaira district in Gujarat—Injunction to restrain invasion. See 44 Bom.L.R. 401.

Sec. 8.—An easement right can be conferred by the owner of the servient tenement for cash consideration and whether it takes the shape of a sum paid in cash once for all or paid from time to time cannot make any difference in the legal nature of the right conferred on the owner of the dominant tenement. 27 I.C. 920=2 L.W. 27. Uninterrupted enjoyment to raise a presumption of right, must have been acquiesced in, by the owner of the servient tenement where from continued user the Court is asked to presume a grant of a right of way. 54 I.C. 936. Knowledge of such user on the part of the servient owner is an essential condition to the acquisition of an easement. 54 I.C. 936. The presumption of lost grant is allowed only when the enjoyment of easement cannot be otherwise accounted for. 50 I.C. 933; 1927 C. 363. A right of way can be created by a verbal agreement. 9 Bur.L.T. 222=34 I.C. 95. Whether a grant of an easement arises by implication on a conveyance of

land depends on the intent of the parties, which must clearly appear, in order to determine the intent the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter. 36 C.L.J. 406=1923 C. 256. Right to *lagan* in a river ghat can be acquired as an easement by prescription. 1931 A.L.J. 267=1931 A. 207. Where a Zamindar has been using the water of a channel for irrigating his lands from the time of the permanent settlement, the Court may presume from the long possession and enjoyment a right to use the water free of charge. Though an actual grant of an easement is not discovered or proved it will be presumed. 45 I.A. 302=37 M.L.J. 724=24 C.W.N. 446 (P.C.). 118 I.C. 225=1929 A. 862. A tenant can acquire a right of easement to take water from a well standing in the adjoining land held by another tenant under the same landlord. 118 I.C. 225=1929 A. 862. The nature of a permanent tenure is such that it permits of the creation of easements by its holder. 115 I.C. 884=1929 P. 124. The public, as such, cannot acquire the ownership of immovable property or an easement on such property by prescription. But the user by the public may be evidence of a dedication. 44 M.L.J. 638=47 M. 116=1923 M. 624. A dedication to be valid must be to the public at large and not to any section of it. 47 M. 116. As to construction of deeds granting easement, see 19 B. 799; 60 P.R. 1888. Where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purpose for which the access would be required at the time of the grant. Where by an award the defendants were given a right of way to their house (without any qualifications) over a courtyard belonging to the plaintiffs and subsequently built a new privy in their house, the right of way granted to them includes a right of passage for the privy cleaner. 34 Bom.L.R. 1150=1932 B. 574. The mere finding that a *pornala* is old is no finding in law that easement has been established with respect thereto. 66 I.C. 922=3 L.L.J. 58.

(b) *A* is a tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B*'s consent, impose an easement thereon which will continue after the determination of his life-interest.

(c) *A*, *B* and *C* are co-owners of certain land. *A* cannot without the consent of *B* and *C*, impose an easement on the land or on any part thereof.

(d) *A* and *B* are lessees of the same lessor, *A* of the field *X* for a term of five years, and *B* of a field *Y* for a term of ten years. *A*'s interest under his lease is transferable; *B*'s is not. *A* may impose on *X*, in favour of *B*, a right of way terminable with *A*'s lease.

9. Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Servient owners.

#### Illustrations.

(a) *A* has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B*'s stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset: provided that *A*'s supply is not thereby diminished.

(b) *A* has, in respect of his house, a right of way over *B*'s land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that *A*'s right of way is not thereby obstructed.

10. Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

*Explanation.*—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half the amount for the time being due on the mortgage.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Lessee.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or, on his behalf, by any person in possession of the same.

Who may acquire easements.

**PARTIES.**—In a suit relating to easements, all servient owners are necessary parties. 14 C.W.N. 15.

**SEC. 9.**—Application of section to customary rights. See 6 A. 497.

**SEC. 10: MORTGAGOR.**—Mortgagor has no right to create any easement over the mortgaged land, to the detriment of the mortgagees without their consent. (85 P.E. 1902, Rel. on.) 149 I.C. 949 (2)=1934 L. 199.

**SEC. 11.**—Although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor, he may claim a right of easement based on immemorial user. 36 C.L.J. 161=50 C. 356=1923 C. 8. Where the enjoyment of a right to take water from the landlord's tank was continued uninterrupted for a long series of years, such enjoyment should be attributed to a legal origin and the Court should presume a grant or an agreement. 50 C. 356. A tenant can establish his right to irrigate

his field from his landlord's tank by proof of open and continuous user from time immemorial. 50 C. 356. If the user of the easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of the intervention of such tenancy should not be sufficient to defeat the right acquired by the lapse of time unless, indeed it is further shown that the landlord, up to the time he granted the lease was in ignorance that any such right was claimed. 36 C.L.J. 161=50 C. 356.

**SEC. 12.**—Tenant in the dominant tenement enjoying an easement as of right, acquires it for the landlord. 81 I.C. 540=19 C.W.N. 1211. See also 1938 A.L.J. 436=1938 All. 293 (F.B.); 1943 Bom. 443=45 Bom.L.R. 795. He cannot acquire it as against the landlord. 29 C. 363=9 C.W.N. 856; 14 A. 185 (F.B.). See also 1 C.W.N. 151. Where a person is in possession of the property on behalf

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

Easements of necessity and quasi easements.

13. Where one person transfers or bequeaths immovable property to another,—

of the owner and enjoys the easement, he can claim easement under S. 12. 151 I.C. 141=1934 A. 527. *See also* 1943 Bom. 443. A tenant can acquire by prescription the right to irrigate his field from the landlord's tank by open and continuous user. 18 I.C. 597. A tenant of land having even a permanent tenancy cannot acquire an easement by prescription in other lands of his lessor. 38 M.L.J. 28=54 I.C. 948. Where a common third person is a tenant of both the plaintiff's and defendant's shops and the plaintiff through his shop claims a right of way over the land of the defendant, it is not open to the defendant to contend that the period during which the said third person was a tenant of the defendant and the plaintiff should be excluded from the period of 20 years during which the plaintiff claims to have enjoyed the right of way. 1939 A.L.J. 68=1939 All. 339.

SECS. 12 AND 15.—According to S. 12, it is the owner of the immovable property who alone can acquire an endorsement. A right of way or other easement mentioned in S. 15 must have been enjoyed in the manner laid down therein by the owner or occupier of the dominant heritage. As such, the user of a particular pathway by the visitors to the dominant heritage could not confer a right of way in respect of it on the owner of the dominant heritage. 1939 A. 90=1938 A.L.J. 1142. The lessee is not in the position of an owner of immovable property under S. 12 for the purpose of a right of way. Though he may be an owner of immovable property for purpose of acquiring easements under the first and second paragraphs of S. 15, when a case of right of way arises, he comes under the third paragraph of S. 15 and anything which he would acquire would be as the person in possession of the land which is the site and he would acquire for the benefit of the owner of the site. I.L.R. 1938 All. 538=1938 A.L.J. 436=1938 All. 293 (F.B.). *See also* 19 C.W.N. 1211=31 I.C. 549; 1943 Bom. 443. In the case of a lessee of a site, who is also the owner of the house which he has built thereon, so far as the use of light or air or support for his buildings is concerned, he is an owner of the building and may, under the first two paragraphs of S. 15, acquire such easements, and he would not

acquire them for any one except himself under S. 12. But when the question arises of a right of way or a right to flow of water he comes under paragraph 3 of S. 15 and anything which he would acquire, would be as the person in possession of the land which is his site, and he would acquire on behalf and for the benefit of the owner of the site. 179 I.C. 884=1930 Sind 39.

SEC. 13. WHAT ARE EASEMENTS, OF NECESSITY.—Easement of necessity means an easement absolutely necessary for the use of the dominant tenement and not merely one necessary for the more convenient enjoyment. 38 A. 467=9 I.C. 628; 17 A.L.J. 672=50 I.C. 646; 48 I.C. 670; 30 I.C. 756. *See also* 167 I.C. 414=1937 O.W.N. 252=1937 O. 263; 1937 Pat. 589; 154 I.C. 468=1935 R. 56; 90 I.C. 900=1925 M. 680. An easement of necessity is one which the law creates according to the doctrine of implied grant in a particular case. 60 I.C. 504. It is one without which the dominant tenement cannot be used at all. (*Ibid.*) 1923 O. 250 (15 A. 270; 33 A. 467; 19 B. 79; 28 M. 495, *Ref. to*). The scheme of S. 13 is perfectly clear. It provides for six different situations which may arise where one person transfers or bequeaths immovable property. Cls. (c) and (d) deal with the effect on the transferor's rights. The dominant heritage is only entitled to the quasi-easements if they are apparent and continuous; where property was originally in the ownership of two brothers and after partition one of the brothers sells certain of his plots to another and the latter obstructs the irrigation of the transferor's lands from the lands transferred, the transferor can claim such a right even though the deed of transfer is silent on the point. The easement claimed is an apparent and continuous easement and it must be deemed to have been reserved by the transferor when he parted with the other fields. 1941 N.L.J. 415=1941 Nag. 287. If for the enjoyment of the agricultural plots, the possession of which has been transferred by the Zamindar to the tenant, it is necessary for the tenant to enjoy for agricultural purposes certain easements in the land of the village site which belongs to the Zamindar, under S. 13 of the Act, the tenant is entitled to those easements. 1934 A.L.J. 662=150 I.C. 1117=1934 A. 802. An easement of necessity means an easement without which the property retained

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

cannot be used at all and not one merely necessary to the reasonable enjoyment of that property. 1930 P. 7; 1923 O. 250. The mere fact that it is absolutely necessary for a person to use a way does not constitute an easement of necessity. 26 I.C. 485. It is a question of fact from the circumstances of each case as to whether an easement of a claim is an easement of necessity or not. There can be an easement of necessity to take water from other's land. 103 I.C. 862=1927 M. 963; 17 I.C. 966=16 C.L.J. 417. See also 1941 Nag. 287. A right of way of necessity ceases of the dominant owner can approach the place through his own land. 60 I.C. 504. See also 1923 O. 250. An easement of necessity cannot arise in any other way than by severance of tenements. 46 I.C. 327=4 L.B.R. 246. See also 14 B. 452; 26 C. 510=3 C.W.N. 409=24 M.L.J. 552. There is ordinarily no reservation by implication of easement in favour of the grantor except in the case of an easement of necessity. 17 I.C. 966=16 C.L.J. 417. See also 45 Bom.L.R. 491=1943 Bom. 265. As a right of easement of necessity arising out of a severance by partition arises from a presumed grant, no grant can be presumed where the rights of parties have been definitely settled in a partition suit. 59 I.C. 89. As to quasi-easements, see 1928 L. 497=115 I.C. 758; 96 I.C. 913=1926 L. 473. The doctrine of implied grant does not confer any title to any easement which is not non-apparent. 1930 P. 7=11 P.L.T. 637=124 I.C. 385.

**ILLUSTRATIVE CASES.**—Where the owner of one of two tenements originally held by a common owner, claims a right of way over the other tenement, it was held, that having regard to the enjoyment of the right of way for twenty years, there was a grant of the right to the plaintiff at the time of the severance of the tenements. 49 I.C. 798=29 C.L.J. 51. There is a presumption of easement of necessity both in respect of the portion granted as well as the portion retained by the grantor. 65 I.C. 22=34 C.L.J. 518; 31 I.C. 541=19 C.W.N. 1211. Plaintiff and defendant owned a common courtyard. Before partition of the courtyard, plaintiff had the right to pass his water through the drainage which existed in the yard. The onus lay on the defendant to show that the right which plaintiff possessed prior to the partition had been extinguished by some agreement or rule of law. 53 I.C. 584=101 P.R. 1919. The mere fact that plaintiff had acquired another tenement through which he could pass his water did not deprive the easement in questions of the character of an easement of necessity. 53 I.C. 584. **Quasi-easement—**

**Property on slope—Partition—Person holding dominant position possesses easement to drain water through the lower portion.** See 115 I.C. 758. Where two houses situated on opposite sides of a land were connected by a bridge which had been destroyed and which plaintiff wanted to re-build but the defendant objected and the Municipality also refused permission, the re-building of the bridge could not be allowed as the houses had passed to different persons. 9 P.L.R. 1911=9 I.C. 402. A person who builds on the extreme limit of the boundaries of his land has no legal right to compel his neighbour to allow him or his workmen to pass through his courtyard or to carry on building operations from there without his permission, unless he has acquired an easement by 20 years' uninterrupted user. No easement of necessity could possibly be acquired by him, if the two tenements were never owned by one person. 39 P.L.R. 66=1937 L. 320.

**RIGHT OF PASSAGE FOR SWEEPER.**—No easement of necessity can be granted unless the easement is necessary for the enjoyment of the property. Sweepers passing through residential houses would give rise to such a state of inconvenience as to make the houses for all practical purposes uninhabitable for people of ordinary decency and cleanly habits. Where plaintiff's houses were solely dwelling-houses and the locality was one in which respectable people dwell and the part over which the right of sweepers to carry buckets after cleaning plaintiff's latrine was claimed, was already being used by the sweepers who carried buckets from the defendant's latrine. *Held*, that to compel the plaintiff to have his night soil buckets carried out through the houses would destroy as residential dwellings the houses which were the properties sold by the original owner of the whole plot of land as dwelling-houses and as such it was an easement of necessity. *Held, further*, that the hardship inflicted on the owner of the servient tenement was not very great because the sweepers who served the plaintiff's latrines would only pass along the path already used to a great extent by the sweepers who cleaned defendant's latrine, and they would walk along the path with two buckets instead of only one. 1935 R. 127.

**SEC. 13 (a).**—The words "If an easement is necessary" in S. 13 (a) imply an absolute necessity and not a mere convenience. It is not enough to show that, in the absence of an easement, there would be inconvenience felt, but it should be shown that there is absolute necessity of the easement for the enjoyment of the pro-

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement ;

party. 160 I.C. 955=1936 M. 142; see also 1938 Lah. 800=40 P.L.R. 787; 1942 Bom. 305=44 Bom.L.R. 673; I.L.R. (1937) Nag. 204=1937 Nag. 179; 178 I.C. 803=1939 Pat. 164; I.L.R. (1939) Nag. 580=1939 Nag. 197=1939 N.L.J. 297. Under S. 13 (a) a person is entitled to get a way for enjoying his *barwarchi khana*. He is entitled to a way up to the public road. 194 I.C. 859=1941 Oudh 585. A plaintiff who claims a right of passage through the field of another under S. 13 (a) has to prove that he has no alternative means of access, however inconvenient, to his field. He cannot be said to have an alternative way unless he had the lawful right to use that way. The grant which arises by implication of law in the case of such easements is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the quasi-dominant tenement without using the quasi-servient tenement. 1942 N.L.J. 441. Where a purchaser can otherwise provide for a passage, he has no easement of necessity of passage over the property of his transferor. 1930 A.L.J. 1070=123 I.C. 762=1930 A. 560. See also 1923 O. 250; 72 I.C. 199; 50 I.C. 756. But see 1924 C. 363 (alternative route extremely inconvenient). A house-owner in order to repair his wall on his neighbour's side of the premises can go to the other side of the wall on the land of his neighbour. 16 I.C. 893. See also 28 Bom.L.R. 403=94 I.C. 673=1926 B. 328. But the easement does not extend to going over the neighbour's roof for that purpose. 16 I.C. 893. A person is also entitled to enter his neighbour's house or land to protect his eaves which project over the neighbour's house. 16 I.C. 893. A *pankh* or projection of a roof of a house over the neighbouring land is an easement and not a trespass or occupation of property giving rise to any rights to the property covered by the projection by adverse possession. Such a right has to be acquired like any other easement by grant or prescription, and once it is acquired by prescription, it becomes absolute under S. 15 of the Easements Act. 163 I.C. 293=33 Bom.L.R. 264=1936 B. 219. On a severance of tenements the transferee of plots sold for building purposes acquires as an easement under the provisions of S. 13 (a) of the Easements Act the right of lateral support for the building which is intended to be constructed on the plots sold, against the adjoining plots of the severed property. 164 I.C. 1025=1936 O.W.N. 865.

Sec. 13 (b).—In order to bring a case within S. 13 (b), it must be established

*inter alia* that the easement claimed is apparent and continuous. 117 I.C. 381=1929 L. 848. Under S. 13 (b) the necessity need not be absolute. Even a qualified necessity such as has been described with reference to the previous enjoyment is quite enough. Rule applied to claim for the flow of water from the roof through a spout. 7 O.W.N. 652=125 I.C. 840. The existence of vents through which adjoining lands were being irrigated is evidence of an apparent, continuous and necessary easement which passes to the transferee under S. 13 (b). 45 M.L.J. 724=1924 M. 108. Under S. 13 (b) read with S. 5 of the Act, a right of way, though apparent, if it is formed way, is a discontinuous easement, and therefore it does not fall under S. 13 (b); it cannot be regarded as an easement of qualified necessity, or a *quasi-easement*. There is no warrant for holding that a formed way must be regarded as a continuous easement. Having regard to the provisions of the Indian Easements Act it is not open in India in cases where the Easements Act applies to follow the English decisions subsequent to the Act and to hold that a formed and metalled pathway would be an apparent and continuous easement for the purpose of determining the rights of parties under S. 13 (b) which also applies to a continuous easement. Even if it be a formed way, it does not pass an easement of qualified necessity under S. 13; it can only pass as an easement of absolute necessity, that is to say, where it is not possible to have any other way for passage. 44 Bom.L.R. 673=A.I.R. 1942 Bom. 305. See also 1941 O.W.N. 1410. An act done for the proper enjoyment of an easement such as closing the vents after irrigation or in the course of the enjoyment of an easement which is continuous would not render the easement a non-continuous easement. 45 M.L.J. 724. The Easement Act does not apply in the Punjab and any question of easement arising in that province will have to be answered in accordance with the principles of English Law as embodying the principles of equity, justice and good conscience. Easements under English Law can only be, in the absence of custom, created either by a grant, express, implied or presumed or by statute. An easement of necessity like a right of way cannot therefore be held to exist in the Punjab when not only does a vendor not reserve that right in the portion of the premises retained by him either expressly or impliedly but expressly authorises the vendee on the other hand to close it if it were not otherwise closed within a certain period mentioned in the sale deed. 46 P.L.R. 236=A.I.R. 1944 Lah. 417.

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clause (a), (c) and (e) are called easements of necessity.

SEC. 13 (c) AND (d).—Right to submerge adjacent lands cannot be claimed as an easement falling under Cls. (c) and (d) of S. 13. 1931 M. 561=60 M.L.J. 662.

SEC. (d).—See 29 I.C. 695.

SEC. (e) AND (f).—Cls. (e) and (f) must not be confused. Under Cl. (e) plaintiff has to prove that the easement claimed was necessary for the enjoyment of the property allotted to him by partition. Under Cl. (f) he has to prove that the easement was apparent, continuous and necessary for enjoying share as it was enjoyed when the partition took effect and that no different intention was expressed or necessarily implied in the partition. 25 O.C. 251=1923 O. 57. See also I.L.R. (1939) Nag. 580=1939 Nag. 197. Under S. 13 (e) there is no question of what was the practice at the time of partition, but what were the necessities of the case at the time of partition. So where a piece of land is partitioned into two contiguous plots A and B and before partition owner of A was using B land to pass over to a public road, but there was also another passage for the owner of A to do so without passing over B land, the owner of A cannot claim an easement of necessity against B under S. 13 (e). 165 I.C. 81=1936 N. 182. No right of way by easement can be acquired by a person who builds an *osara* on another man's land even though with his acquiescence. 9 I.C. 813. Where lands which were originally enjoyed in common were divided at a partition and the common well situate in one of the fields was the source or irrigation for all the lands and one of the persons sued for a right of easement to take the water from the well across the other person's lands, *held*, that S. 13 (e) of the Easements Act applied. 127 I.C. 520=1930 A. 313 (1). Right to use water from well. See 22 Bom. L.R. 415=45 B. 80; 100 I.C. 939=1927 L. 383. Where a well was in existence before the partition and the question was raised whether after partition the owner of the higher plot was entitled to let, the well water

flow on to the adjacent lower plot. *Held*, that the right accrued to the owner of the higher plot as a *quasi*-easement and not easement of necessity. 1930 M. 676=125 I.C. 529. There cannot be an easement of necessity in respect of a right of way, if there is an alternative route or way. But where the alternative route is extremely inconvenient there may exist an easement of necessity in respect of a more convenient pathway. 1924 O. 363=70 I.C. 173. Under S. 13 of the Easements Act in case of partition if an easement is one of necessity, a person to whose share certain property falls is entitled to the easement apart from any question of its being apparent or continuous. An easement of necessity can however only arise when the property cannot be used at all without the easement and not where the easement is merely necessary for the reasonable or more convenient enjoyment of the property. Thus a right of way over a road cannot be claimed as an easement of necessity when there is another means of access to the property. 53 M. 449=1930 M. 609=59 M.L.J. 956. In considering questions of easement of necessity convenience is not the test but absolute necessity, and in this matter S. 13 (e) is the same as the law in England. A right of way of necessity only arises when there is no other possible legal mode of getting at the land and an easement of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the *quasi*-dominant tenement. Where he acquires by purchase the property though which he can reach the several portions of the dominant tenement the old easement ceases to exist. 127 I.C. 646=1930 M. 789. Right to light when easement of necessity. 1897 Bom.P.J. 471. Decree for room implies right of access thereto. 1887 Bom.P.J. 113. As to use of well and privy, see 1886 Bom.P.J. 128. Grant of right of way in general terms includes right of way for privy cleaner. 34 Bom.L.R. 1150=1932 B. 574. Where there is a grant of right of way over



Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

*Illustrations.*

(a) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.

(b) A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(c) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(d) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.

(e) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(f) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(g) A the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(h) A, the owner of two adjoining houses, Y and Z, sells Y to B and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

a defined path way servient owner cannot substitute another way. (1943) 2 M.L.J. 519.

**CONTINUOUS EASEMENT.**—Under Indian Law no express reservation is necessary for an existing easement to continue in favour of the grantor. 1931 M. 561=60 M.L.J. 662.

**Continuous easement—Agricultural land—Right to inundate land by storing water—Partition between co-owners—Rights *inter se*.** 60 M.L.J. 662. A drain is an apparent and continuous easement and S. 13 (f) applies to the same. If the easement is necessary, not in the sense of absolute necessity, but necessary for enjoying the share of the dominant tenement as it was enjoyed when the partition of joint property took effect, it would pass to the owner of the dominant tenement. 57 L.W. 354=A.I.R. 1944 Mad. 441=(1944) 2 M.L.J. 1=1945 M.W.N. 19. See also 44 Bom.L.R. 673=1942 Bom. 305. Right to bury dead can be acquired by prescription. 95 I.C. 458 [78 P.L.R. 1908; 27 P.R. 1923 (P.C.)]; 26 B. 898, Foll.].

**LANDS NOT BEING CONTIGUOUS—RIGHT OF DRAINAGE—PROOF.**—The case of a plaintiff who was merely acquired the right to discharge his water on to the intervening land and the case of a plaintiff who, has acquired the right of carrying it across that intervening land and discharging it upon the land further away are quite different. In the

former case he is not entitled to sue the person who is on the other side of the intervening land whereas in the latter he may be entitled to do so. Plaintiff was held, entitled to carry his water by means of a syphon sluice under the Government channel up to the boundary of the defendant's land and there discharge it into a channel over that land. 40 L.W. 483=1934 M. 632.

**SECS. 13, 24, 25 AND 27.**—A house was originally partitioned between two brothers, one of whom got the ground floor and the other the first floor. Subsequently the ground floor became vested in the defendant and the first floor in the plaintiff. The plaintiff claimed that as owner of the first floor he was entitled to the right of support from the ground floor and other attendant rights. *Held*, that the plaintiff was entitled to support to his first floor from the ground floor of the defendant, but that the defendant was not liable to keep the ground floor in repair, in order to make this right of support effective; that the plaintiff could enter upon the ground floor for the purpose himself of doing the necessary repairs and the Court would grant an injunction to protect those rights. This right of support is an easement and not a natural right. There cannot be a natural right of support for something which itself has no natural existence. I.L.R. 1939 Bom. 375=41 Bom.L.R. 37=1939 Bom. 210.



(i) A, the owner of two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(j) A, the owner of two adjoining buildings, sells one to B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(k) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and is subjacent support from A's land as is necessary for the safety of the house.

(l) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(m) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building, immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(n) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B on the house and grounds.

14. When <sup>1</sup>[a right] to a way of necessity is created under section thirteen, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way, but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

#### LEG. REF.

<sup>1</sup>Substituted for "right," by Act XII of 1891.

SEC. 15: NATURE OF PRESCRIPTIVE RIGHTS.—The law relating to the acquisition of easements under this Act appears to be the same as under the English Prescription Act. 35 I.C. 749=4 L.W. 128. *Section not exhaustive* and does not preclude other titles or modes of acquisition as by grant. 96 I.C. 317=1926 M. 788. See also 1929 M.W.N. 528; 56 B. 82=34 Bom.L.R. 92=1932 B. 130; 48 I.C. 962=14 N.L.R. 35. There is nothing to prevent a claim to title by lost grant being made under the Indian law apart from S. 15 of the Easement Act. The Act is remedial and is neither prohibitory nor exhaustive. 59 M. 979=1936 M. 682=71 M. L.J. 187. See also 1929 M.W.N. 528. Easements are not capable of being possessed and unless such rights have ripened into prescriptive rights recognized by law, mere enjoyment for anything less than the statutory period does not confer on the enjoyer a right to maintain an action against a trespasser interfering with his enjoyment. 1940 Oudh 111=1939 O.W.N. 992. One of the necessary conditions of a right of easement is that it must be certain. Thus, where only a right of way is claimed and allowed, the decree must state the limits of the pathway. 188 I.C. 431=1934 P. 420. Easements are not capable, in an exact sense, of being pos-

sessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the expiry of twenty years. 29 I.O. 255=38 M. 280. When user is proved, the presumption is that it is of right. 86 I.C. 595 (2)=1925 L. 344. There is no reason why the expression "as of right" which appears both in S. 26, Limitation Act, and S. 15, Easements Act, should not receive the same interpretation as in English Law. 30 S.L.R. 32=163 I.O. 137=1936 S. 61. "Claiming title thereto"—Meaning See 46, Mys. H.C. Rep. 621. Where a person makes a payment for the use of land, such user is by license and is not a user by right. 1933 A.L.J. 516=1933 A. 623. *Long continued user* would be ascribed to lawful origin. 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.). The person claiming easement must show that his user was as of right but the law presumes that it is as of right, that is to say it has a lawful origin, if he proves open and notorious user. On proof of the fact of enjoyment from time immemorial there must arise a presumption of a legal origin for the right claimed. Hence where a person had been exercising his right of way for himself, for his servants and for his carts from remote past as appurtenant to his shop and relations between the parties were not such as to indicate that the user was attributable to leave or license, it must be presumed that his user was as of right.

I.L.R. 1939 Nag. 580=1939 Nag. 197. That presumption is, however, rebuttable, and the defendant may show that the facts are such that the user was not as of right, e.g., he can show that the user was under license not amounting to a grant, or he can show fraud or force, or secrecy. Those would show that it was not as of right. 20 N.L.J. 12=171 I.C. 121. See also 1939 Sind 110. Ineffectual opposition to the exercise of what is claimed to be a right of easement is evidence rather in support of the right than of its non-existence. 58 I.A. 195. While the mere putting forward of a wider claim in legal proceeding is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be ascribed is one which the Court must answer. The question in each case is one of fact as to whether the acts of user are referable to a purported character of owner or to the claim to an easement. Even in the case of an enjoyment from time immemorial, it would be equally necessary for the plaintiff to prove a user as of right as an easement as distinguishable from a right of ownership. 1930 P. 7. The mere claim of the higher right of ownership does not prevent a person from acquiring the lesser right of easement, provided he could show that he asserted certain rights over the servient tenement for the benefit of the dominant tenement belonging to him. 1930 P. 7. An easement is a restriction in favour of one owner or occupier of the immovable property of the rights of ownership of the immovable property of another owner. The restriction cannot be built up or asserted without consciousness of the rights which are restricted. 23 N.L.R. 117=104 I.C. 431=1927 N. 334. Right of easement can be established not only by terms of the grant but also by circumstantial evidence and presumptions. 58 I.A. 195=54 M. 427=35 C.W.N. 605=61 M.L.J. 1 (P.C.). Where there is evidence of long enjoyment in a particular way, it is the duty of the Court, to clothe the fact with right. 148 I.C. 215=1934 Pat. 11. It is open to the Court to infer a grant from immemorial user alone when such user is open, as of right and without interruption. But a grant will not be inferred if the user may be explained in some other way than by a grant. 155 I.C. 719=60 C.L.J. 321=1935 C. 253. See also 30 S.L.R. 32=163 I.C. 137=1936 S. 61. See also 22 Pat.L.T. 699=1941 Pat. 260. User from time immemorial may no doubt give rise to a presumption of a lost grant or public dedication of a right of way. But user short of that may also be the foundation of such a presumption. For the purpose of presuming dedication, there can be no hard and fast rule as to the length of time for which the user must be proved. Whether or not dedication may be presumed really depends upon the facts and circumstances of each case. The mere fact that user has not been proved for a long series of years may not always be a conclusive reason

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for shutting out such a presumption. 44 C. W.N. 1029. It is open to the Courts to recognise acquisition of the easement by the claimant if he could prove continuous enjoyment for the requisite period by himself or his immediate predecessor in occupation of the property. 168 I.C. 921=1937 Nag. 38. Under S. 15 there are two requirements to be fulfilled: first the enjoyment must be up to within two years of the date of suit and secondly that up to that time it must have been enjoyed for 20 years and without interruption. The period of enjoyment up to within two years of the suit need not be a period of actual user up to the last moment, provided the absence of user does not amount to absence of enjoyment; whether it does or not is a question which depends on the facts of each case. The onus is on the person claiming the easement to prove the user. If there is not merely non-user but actual abandonment, then the person claiming the easement cannot succeed. 15 Luck. 509=1940 O.W.N. 267=1940 Oudh 197. This Act does not contemplate any acquisition of easement against an occupier of land and not against an owner. An easement is acquired in the land and not against one or more of the persons interested in the land. Under S. 15 the right acquired by prescription is absolute; it is not possible to hold that such a right exists only against the occupier and not against the owner. The right which is absolute is a right in the land itself and an absolute right against all persons connected with the land whether as owners or as occupiers. Where an easement of light and air is claimed on the ground of 30 years' user over land held by a Railway Company, but it is found that the land is the property of the Government, the claim must fail and cannot succeed when there is no allegation or proof of 60 years' user; the plaintiff cannot claim on the basis of 30 years' user, a right as against the Railway company as occupier as distinct from the Government as owner. 1937 A. 428=1937 A.L.J. 249. See also 1937 N. 38; 1939 Sind 110. Land appurtenant to a residential house need not be actually adjoining the house. Where a tenant uses certain land opposite to his house but on the other side of a public way for the purposes of tethering his cattle, such land can be regarded as appurtenant to his house. 1936 O.W.N. 536=1936 O. 324. The user over a land purported to be exercised as owner cannot be made the basis of an easement. 104 I.C. 503. See also 1930 P. 7; 56 B. 427=34 Bom. L.R. 1015=1932 B. 513. A person cannot acquire an easement unless he acts with the knowledge that it is a case of a dominant and a servient tenement and that he is exercising a right over property which does not belong to him. Where the defendant has consistently claimed ownership in the land, he cannot claim to have acquired an easement as the user has not been with the *animus* of enjoying the easement as such in the

land of another. The question of immemorial user has nothing to do with it. 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. S. 4 of the Easements Act shows that not merely the "owner" but even an "occupier" may acquire an easement and there is no *prima facie* reason why the enjoyment of a person as an "occupier" should not be tacked on under S. 15 to his enjoyment as "owner", if there is no interruption in his user. 152 I. C. 216=1934 M. 575=67 M.L.J. 262. See also 1937 A. 428=1937 A.L.J. 249. To support a claim to a prescriptive right of way over a pathway, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. It is not necessary that it should be used every moment to constitute enjoyment. Cessation of user is not inconsistent with the continuance of the enjoyment of the right. Cessation of user for a time while the right is being acquired does not stand on a different basis from that where the right has already been acquired by 20 years' user. But an enjoyment physically incapable of interruption would not confer any right of easement by prescription. 60 C.L.J. 412=1935 C. 282. In calculating the period of twenty years, as provided in S. 15 it is not sufficient to take into account a period of less than 20 years before a suit in which the plaintiff's right is contested, and the rest of the twenty years during the continuance of, and after, the suit. Where before the expiry of the period of 20 years the plaintiff files a suit which is contested by the defendant and decided against the plaintiff, his inchoate right comes to an end, and no period subsequent to the filing of that suit can be added to the period before the filing of that suit to make up the period of 20 years of peaceable enjoyment without interruption. I.L.R. (1942) Kar. 306=A.I.R. 1943 Sind 17=207 I.C. 83. The presumption of constructive enjoyment can no more be made in favour of a person acquiring easement by prescription than the presumption of constructive possession made in favour of a trespasser acquiring prescriptive title. If there is a grant, it is construed against the grantor but in case of prescriptive right, its extent must be measured and determined by the accustomed user. It is on this principle that a servitude acquired for one purpose cannot lawfully be used for another. Hence where a person has by prescription acquired a right of way on other's land for himself, his servants and carts, the right of way cannot be presumed to include the passage for sweepers. Nor can such a presumption be based on the circumstances that the houses occupied by the parties had at one time belonged to a common owner unless the way was necessary for enjoying the tenement which was purchased by the person claiming easement. I.L.R. (1939) Nag. 580=1939 N.L.J. 297=1939 Nag. 197. Beaumont, C.J.—There is no reason why if the owner of a piece of land proves that for 20 years he has in fact exercised right of

passing and re-passing over adjoining land *nec vi, nec clam, nec precario*, he should be unable to establish an easement of way over such adjoining land merely because when he exercised that right he believed he had a right of ownership in the adjoining land which right he was unable to establish in a Court of law. 144 I.C. 998=35 Bom.L.R. 144=1933 B. 122. See also 41 Bom.L.R. 168=1939 Bom. 149=I.L.R. (1939) Bom. 140; 1939 Sind 110. A customary right differs from a prescriptive right in the sense that no fixed period for its enjoyment is necessary. 20 I.C. 467 (20 M. 389 and 2 Beng. L.R. 454 and 459, Rel.). See also 71 M.L.J. 268; 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.); 142 I.C. 153=1933 N. 74. A prescriptive right or easement is a right existing in a particular individual, while a customary right belongs to no particular individuals but attaches to a locality and is capable of being enjoyed by all who, for the time being, own land in the locality. 20 I.C. 467. A prescriptive right to light and air cannot be acquired as an easement for limited period, e.g., when the servient heritage is in the occupancy of a tenant. 42 M. 567=37 M.L.J. 28. The word "imposition" of an easement does not necessarily mean imposition by some act, such as grant, but includes imposition by omission to prevent acquisition by prescription. 42 M. 567. Government land in the management of Municipal Board—Proof of user for 60 years essential—Land leased out to tenant whether makes any difference. 1928 O. 17=4 O.W.N. 1035. When a person prays the Court to presume a lost grant as against Government, it is reasonable to infer that such a grant cannot be presumed, unless there is evidence of a user which would be sufficient to establish a right by prescription and against Government, that is to say, unless there is evidence of sixty years' user. At any rate, it is impossible to infer a lost grant on the basis of immemorial user when the evidence shows positively that fifty years ago no such grant had been made. 162 I.C. 97=1936 M. 692. See also 71 M.L.J. 187=59 M. 979. If it is found that for a sufficiently long time, covering a period of over 30 years, all the water, both rain water as well as water brought on to the upper land by artificial means for agricultural purposes, is allowed to pass into the lower land without any interruption by the proprietor thereof, the Court will easily infer a custom and that the customary conditions of the locality require such user. The doctrine of lost grant can be invoked for the purpose of inferring such a custom. It is not necessary that the words "lost grant" or "customary user" should in so many words be pleaded. All that is necessary to be alleged in order to infer a doctrine of lost grant or a claim based on prescription is long, continual and peaceful possession. The fact that both the proprietors are ryotwari owners holding under the Government, a common landlord, is no bar to the acquisition of a title by prescrip-

tion or lost grant, by one against another. The estate of the ryotwari proprietor is an estate in the soil and is heritable and alienable, and he has sufficient estate to support a grant of an easement. 59 M. 979=1936 M. 682=71 M.L.J. 187. The approval of any person's plan for building does not necessarily imply that the Municipality intended to grant an easement over an adjoining lane belonging to it. 160 I.C. 955=1936 M. 142. Where a compromise confers upon the defendant a right to construct a bundh on the plaintiff's land the defendant cannot set up adverse possession with regard to the land and can claim nothing more than a right of easement to maintain a bundh on the land. The right to repair the bundh must be presumed in defendant's favour, such right being incidental to the existence of the bundh. 22 Pat.L.T. 699=1941 Pat. 260.

**What rights can be acquired.**—A prescriptive right is acquired if plaintiff's privies are cleaned by scavengers passing over the land of the defendant for twenty years to the knowledge of the defendant without obstruction by defendant. 50 I.C. 34. All that a defendant whose eaves project over plaintiff's land can acquire after 20 years is an easement imposing the burden on the servient tenement of having that projection over it. 46 B. 827=24 Bom.L.R. 305. Where one of the joint owners of a party wall had made a hole therein and enjoyed light through that hole for more than twenty years, the acquires a right of easement of light and the other owner cannot close the whole. 33 P.L.R. 930. Removal of support of a wall before accrual of right of easement by prescription to neighbour is not actionable. See 1928 N. 91. See also 59 C. 363=138 I.C. 667=1932 C. 542; 11 R. 47=1933 R. 18. A suit for perpetual injunction restraining the defendant from removing the necessary lateral support to which the plaintiff's land is entitled is a suit in the nature of a quia timet action and the plaintiff, in order to succeed, must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable. Therefore excavation and removal of the earth on his own land by a defendant, without leaving sufficient support to the adjoining plaintiff's land to enable it to remain in its natural state, does not per se constitute an actionable invasion of the latter's right; and such an act to constitute a valid foundation for a claim by the adjoining plaintiff for damages must be coupled with actual damage or injury to his property. 11 R. 47=143 I.C. 292=1933 R. 18. See also 63 C. 441=62 C.L.J. 283=1936 C. 564. Private rights of fishing in public water may be acquired either by a grant from the Crown or by prescription from which a grant may be presumed. 39 C. 53=11 I.C. 180=15 C.W. N. 972. Whether exclusive rights can be acquired in a tank or navigable river by

proof of mere enjoyment. 39 C. 53. Right to ferry though not an easement is in the nature of an easement and may be acquired by user. 9 I.C. 846. A prescriptive right to dam up a stream is acquired by the continued exercise of the right for twenty-five or thirty years. 26 M.L.J. 385=24 I.C. 547. In the case of shrotriem grant the right of Government over the minerals is not lost by limitation. 23 I.C. 144=15 M.L.T. 277. Mere non-user for not less than two years before suit independent of any adverse act on the part of the owner of the servient heritage does not amount to cessation or abandonment of the right of easement within the meaning of S. 15. Expl. II clearly relates not to the period after which the easement has ceased to be enjoyed but to any interval of non-user within the 20 years of enjoyment. 98 I.C. 886=1927 M. 238. The term "interruption" refers to an adverse obstruction and not a mere discontinuance of user. 60 C.L.J. 412=1935 C. 282.

**What Right cannot be acquired.**—The right to drive cattle to the grazing ground through the jungle of another village is not a right which can be acquired as an easement though enjoyed for any length of time. 43 A. 345=19 A.L.J. 126. As to right of way for agricultural purposes, see 50 B. 635=28 Bom.L.R. 1158=1926 B. 537. Right to store manure by non-agriculturist, see 5 O.W.N. 296. A right to bury or cremate the dead on land belonging to another cannot be acquired by prescription. 138 I.C. 325=32 P.L.R. 157=1932 L. 256. See also 1934 A.L.J. 809=1934 A. 868. An easement of light and air through apertures of windows in a wall cannot be acquired by prescription, when the wall in question is a joint wall belonging to both the parties, because it is the essence of an easement that it should be a right over property not belonging to the claimant but to some one else. I.L.R. 1938 Bom. 53=40 Bom.L.R. 115=1938 Bom. 215. The principle that easement of light and air through windows opened in a joint wall cannot be acquired by prescription cannot apply where the whole wall to its full height is not proved to be joint. The party who wants the whole wall to be treated as a joint wall must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built, they cannot be blocked up unless there is an agreement to close them when the other house is raised and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already-acquired easement of light and air through the windows in the upper wall. I.L.R. (1940) Bom. 140=42 Bom.L.R. 186=1940 Bom. 153.

**Customary Easement and Customary**

Right, distinction between. See 142 I.C. 153 =1933 N. 74 cited under S. 2, *supra*. Customary right and prescriptive right—Distinction between. 71 M.L.J. 268=1936 M. 923.

**Water Rights.**—Where the plaintiff had been enjoying the water by means of channels through which water passed to a tank, for a certain number of years, no prescriptive right was acquired to receive the water through the channels unobstructed. 23 Bom. L. R. 1004=46 B. 115. See also 43 L.W. 330. A prescriptive right of easement to discharge surplus water on the defendant's land through a channel across the public road cannot be acquired. 19 C.L.J. 42=21 I.C. 857=18 C.W.N. 378. Where an underground channel had been in existence between the lands of the plaintiff and defendant across a public pathway, for over twenty years to the knowledge of the public authorities, and the plaintiff had been accustomed to discharge the water from his land through this channel on to the defendant's land, and it appeared that the channel was a pucca one constructed with brick and chunam covered over with stone, and the public authorities actually approved of it as a public convenience. Held, though an easement in the strict sense of the term may not have been acquired against the Secretary of State—the enjoyment having been short of 60 years—the channel must be considered to have been used by the plaintiff in a lawful manner, and that the plaintiff can maintain an action against the defendant when the latter interfered with the plaintiff's user of the channel. 40 L.W. 281=1934 M. 543=67 M.L.J. 382. No easement or prescriptive right can be acquired by a ryotwari landholder in water in a Government channel irrigating the lands. 45 I.C. 80=34 M. L.J. 425. See also 71 M.L.J. 268; 43 L.W. 330. There can be no possessory rights in connection with incorporeal rights. (*Ibid.*) A right to irrigate his punja land through a channel in the adjoining nanja land of another ryot can be acquired by a ryot by prescription. If such right has been enjoyed for over 20 years, he can get a declaration of such right. It is not necessary that the plaintiff should establish a right to water against the Government for this purpose. 1937 M.W.N. 920. Under S. 15 a right of fishing cannot be acquired by prescription, but from uninterrupted user such a grant may be presumed. 43 I.C. 962=14 N.L.J. 35. See also 37 C.W.N. 18 (A claim of fishery without stint and for commercial purposes which might lead to the total distinction of the subject-matter is a right unknown to law and the custom alleged in its support is unreasonable). See also 46 L. W. 466=1937 Mad. 823=(1937) 2 M.L.J. 350 (Right to throw filthy water on another's land can be acquired by prescription).

**Overhanging trees.**—An owner or occupier of land has no right to allow his trees

to overhang his neighbour's land, and he cannot acquire such a right by prescription. 40 L.W. 639=67 M.L.J. 442. No right of easement can be acquired in respect of a tree which gradually projects over his neighbour's land insensibly and by slow degrees. The owner of a tree has consequently no right to prevent a person lawfully in possession of land into which or over which its roots or branches have grown, from cutting away so much of them as project into or over his land. But it is a settled maxim that a grantor shall not derogate from his grant. Where an owner of two adjacent plots of land transfers or sells one of them together with a tree standing thereon, which is not a tiny plant or sapling, but an ancient tree of about 100 years old whose growth has practically ceased, it must be held that a right to project the existing boughs of the tree over the vendor's land is also transferred to the vendee. To allow the transferor to cut off the branches overhanging his land (which has not been transferred) would be to violate the maxim that the grantor shall not derogate from his grant. If he intends to reserve to himself the right to lop off the projecting branches, he should expressly reserve. It is not necessary that the vendee should be given under the sale deed an express right to project the branches, in order to entitle him to prevent the vendor from cutting off the branches. 47 L.W. 324=1938 Mad. 511=(1938) 1 M.L.J. 510. An owner of land can cut the branches of trees standing on his neighbour's land which overhang on his land. The fact that the two plots of land were once held in common ownership and the plot with the trees thereon with the branches overhanging on the other is transferred by partition or sale makes no difference so far as the application of the rule is concerned. To have the branches of a tree overhang on the land of another is not in the nature of a right of easement, and it cannot be acquired by prescription at common law or statute either under English law or Indian law. In other words, there is no right of easement or customary right to have the branches of a tree overhang on another man's land. To allow the branches of one's tree to overhang on another's land is to commit a nuisance which that another has a right to abate by cutting off the branches. 1936 M. 702=71 M.L.J. 296. A right to overhang the branches of one's trees over the land of his neighbour may, no doubt, by apt words be granted. But such a grant cannot be implied from a grant of the land with the trees on it, because the result of allowing the branches to overhang over an unlimited and indefinite area of the neighbour's land would subject that land to a burden which would virtually deprive him of his right to use his land as owner. But so long as the branches are allowed to overhang, the owner of the trees will also be the owner of the branches and

the produce thereon, and it may be that the adjoining owner will have to permit the owner of the trees to take the produce. 1936 M. 702=71 M.L.J. 296.

**Right of way.**—One of the necessary conditions of a right of easement is that it must be certain. Where a right of way is claimed and allowed, the decree should state definitely the limits of the pathway. When the two termini are known, the right to the way does not fail merely for want of a defined track between them and if the owner of the servient tenement does not point out the line of such way, the dominant owner must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough and there are ruts in it and so forth. 148 I.C. 431=1934 P. 420. A right of way once defined by the grant cannot be altered and the dominant owner is entitled to exercise his strict rights unless he can be induced to consent to a way of a deviation. There is no provision in the Easements Act enabling a servient owner to substitute, in the case of an easement by grant a new pathway in place of the old one. 56 L.W. 521=1943 M.W.N. 767=A.I.R. 1943 Mad. 741=(1943) 2 M.L.J. 519. Where a passage has been found to have been used openly, uninterruptedly and peaceably for about 50 years, it can be presumed that the right had a legal origin and that those using it had a right to use it. 1939 A.L.J. 821=I.L.R. (1938) All. 754=1939 All. 586. A person who is in enjoyment of an easement, such as a right of way, but who has not acquired a title to it by prescription or otherwise, cannot ordinarily maintain an action to prevent its obstruction by a stranger. An action can only be maintained in very exceptional cases where access to his land would otherwise be cut off altogether or if the obstruction to the user of the right of way will have the effect of substantially depriving a person of the enjoyment of his property. I.L.R. (1941) Mad. 367=53 L.W. 8=1941 Mad. 176=(1941) 1 M.L.J. 145 (F.B.). It is true that an owner can subject one part of his property to a quasi-easement in favour of another part and if afterwards he alienates a portion of his land, the purchaser takes the portion with all the convenience or quasi-easements which the proprietor has attached to it. But this applies only when the quasi-easements are continuous and apparent. There could be no implied grant where the easements are not continuous and non-apparent. A right of way is neither continuous, nor always an apparent easement, and hence would not ordinarily come under the above rule. Exception is no doubt made in certain cases where there is a "formed road" existing over one part of the tenement for the apparent use of another portion or there is "some permanence in the adaptation of

the tenement" from which continuity may be inferred, but barring these exceptions an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement. Where, however, a deed of conveyance describes the property conveyed as bounded by a common passage, an implied grant of a right of passage may be presumed, and the extent of such right has got to be gathered from the language of the document, as well as from the surrounding circumstances of the case. Ordinarily such right of passage does not include the right to use it as a mehort passage for the cleansing of a privy. 41 C.W.N. 1169=1937 Cal. 661. See also 1939 N.L.J. 297=1939 Nag. 197. Right of way, acquisition of. See 24 Bom.L.R. 298=1922 B. 79; 1924 C. 359; 9 I.C. 965=13 C.L.J. 316; 44 C.W.N. 1029; 45 M. 633=42 M.L.J. 417; 39 M.L.J. 74=60 I.C. 171; 1938 A.L.J. 1142 (User by visitors to dominant heritage); I.L.R. 1938 A. 538 (User by lessee of land for building purposes).

**Who can acquire.**—A claim of higher right of ownership does not prevent another person from acquiring a right of easement, if he can show that he converts certain rights of enjoyment over the land in question for the benefit of another land of his own. 62 I.C. 633. A right once established by immemorial user, is not extinguished by non-user or interruption for more than two years. 62 I.C. 633. As to what is immemorial user, see 56 B. 82=34 Bom.L.R. 92=1932 B. 130. The terms "immemorial user" and "from time immemorial" had a connotation in English Law which obviously could not be applied to Indian society and circumstances. 56 B. 82=1932 B. 130. A right of way cannot be acquired by a tenant over the lands of the landlord within his tenancy except by grant. 34 I.C. 450=20 C.W.N. 1158. See also 1936 S. 61=30 S. L.R. 32. It is true that a lessee of land cannot acquire a right of way or any other easement over land owned by his lessor as having been peaceably and openly enjoyed by a person claiming title thereto and of right within the meaning of the third clause of S. 15; in such a case the tenant's occupation is in the eye of the law that of his landlord. But where a lessee of land owns a building built upon land leased to him, he may, so far as the use of light and air or support for his building is concerned, acquire rights of easement in respect of such right, air or support under Cls. (1) and (2) of S. 15, and these rights cannot be objected to as being incapable of being acquired by him on behalf of his lessor as well as against him, for those rights are acquired by him for himself, and for none other than himself, as owner of the building. I.L.R. (1941) Kar. 381=1941 Sind 211. See also 198 I.C. 418. The mere grant of leave and licence of a right of way by the landlord to his tenant, will not invest the latter with



a right of way enforceable in suit. 20 C.W.N. 1158. A prescriptive right cannot be acquired by one tenant against another tenant of the same landlord. 31 I.C. 549=19 C.W.N. 1211. See also I.L.R. (1937) 1 Cal. 569=1937 Cal. 572 (mukarrari lease holder); 1939 Rang. 421; 148 I.C. 215=1934 P. 11; 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. Whether one permanent tenure-holder can acquire an easement against another permanent tenure-holder under the same landlord. 31 I.C. 540=19 C.W.N. 1211. A tenant in a zamindari cannot acquire the right to irrigate his land held by him as a tenant, with water from the tank belonging to the Zamindar. 56 I.C. 598=11 L.W. 600. Where the tenants of a zamindar have been using water from his tank for raising a second crop on their manyam lands for over 20 years openly and continuously and without interruption, their right to take water for a first crop being admitted by the zamindar, and it is found that at no time for considerably over 20 years has the Zamindar claimed or recovered compensation for the water taken by the tenants for the second crop, a presumption arises in favour of the tenants that they have been using the water as of right; and when no permission of the zamindar or any facts to negative the claim as of right, are proved the tenants have a prescriptive right to get an amount of water sufficient to irrigate their lands without any liability to pay for it. The fact that in some years there may not have been enough water to irrigate as large an area as in other years and that in some years there may have been an amount sufficient to irrigate a larger area will not make the right incapable of being prescribed for as being of a precarious nature. 1937 M.W.N. 895=46 L.W. 643=1937 Mad. 953. Where two persons hold adjoining plots of land under a temporary lease by the Government terminable at three months' notice and transferable only with the sanction of the Government, one of them cannot acquire a right of way by user over the land which is in possession of the other as he cannot be said to have enjoyed the alleged easement as of right. 30 S.L.R. 32=163 I.C. 137=1936 S. 61. The joint user of the water from a tank for the joint cultivation of a plot does not affect the nature of the right of easement which is a right over the servient heritage acquired by virtue of the joint ownership of the plot. The right prescribed for, is not a right to irrigate jointly but a right as part owners of a dominant heritage. 35 I.C. 749=4 L.W. 128. The essential requisite of prescription is that it should be acquired against specific individuals; prescription against one person cannot be tacked on to that acquired against others. 24 I.C. 519=28 M.L.J. 669. A dominant owner who is also a part owner of the servient tenement cannot acquire an easement over that tenement. In order to acquire an easement by prescription, it is

necessary that the right must be enjoyed in the character of an easement, and if a dominant owner is a part owner of the servient tenement, he would enjoy as of "right", not the easement but the soil itself. 41 C.W.N. 769=1937 Cal. 355. The principle that one trespasser cannot tack on to his own possession the possession of another trespasser cannot apply to the acquisition of a right of easement. Ownership and easement rights cannot co-exist as they are mutually exclusive. The adverse possession spoken of in connexion with acquisition of ownership means total exclusion of the rightful owner; whereas the enjoyment and user necessary for the acquisition of easement is consistent with the possession as well as the enjoyment by the rightful owner. The adverse possession in reality extinguishes the title of the rightful owner, but the enjoyment by a person claiming the right of easement does not in the least affect either the possession or the title of the owner. The easement only restricts the owner's rights in some ways in regard to the enjoyment of his tenement. Moreover, the right of easement is annexed to the land or tenement and cannot be acquired in gross as a personal right. 1937 N. 38. See also 1937 A.L.J. 249=1937 A.W.R. 215. It is open to the Courts to recognise acquisition of the easement by the claimant if he could prove continuous enjoyment for the requisite period by himself or his immediate predecessor in occupation of the property. 1937 N. 38. A caste is a corporation with civil rights and can acquire by user, title to a right of way, even if the user be only of a few members of the caste provided it is exercised on behalf of and for the caste. 24 I.C. 467=28 M.L.J. 110. See also 24 I.C. 519=28 M.L.J. 669 (Suit by Stanom-holder). A right of way over a ridge between two paddy fields claimed by the residents of a village is not a right in the nature of an easement but a right in gross as it is enjoyed independently and not for the beneficial enjoyment of any land belonging to the persons claiming it. 10 Cut.L.T. 13=A.I.R. 1944 Pat. 278.

**Easements, how acquired.**—A person to acquire the right of fishery by prescription, must show that he had an uninterrupted enjoyment of it openly, publicly and peacefully for over the statutory period; but where such an enjoyment was in exercise of a common right which he shared with others, he should show that his user was in assertion of a higher right than the general right, in himself, and for his exclusive benefit. 39 C. 53=11 I.C. 180. See also 37 C.W.N. 18. The right to establish and maintain a ferry over the property of another is a right of easement for which twenty years' user is necessary. 5 P.L.J. 500=1 P.L.T. 395. A person owning land on one bank of a river can acquire a right by easement which would entitle him to use the land belonging to another owner on the other side of the



river for the purpose of embarking and disembarking passengers. There is, however, no law in this country which would entitle him to restrain competition. He cannot prevent the owner of the land on the other side of the river from starting a rival ferry which is run between lands owned by him on both banks of the river. In other words, there is no right to a monopoly. Such an exclusive right can be claimed only under a Crown grant. 1935 A.L.J. 444=1935 A. 481. To establish a right under this section, twenty years of uninterrupted user must be shown. 25 I.C. 405=12 A.L.J. 693. As to presumption from long user, see 91 I.C. 987=1926 O. 237. As to the effect of unreasonable user, see 92 I.C. 465=1926 M. 625. The period of user must be twenty years or more ending within two years before the institution of the suit, wherein the claims to which such period relates is contested. 24 I.C. 126=12 A.L.J. 415. A statutory prescriptive title to an easement is impossible to be acquired under S. 15 unless and until the claim thereto has been contested in a regular suit. 29 M.L.J. 685. See also 1923 O. 29; 17 I.C. 22=10 A.L.J. 227. An easement is acquired by a suit being brought and 20 years prior user as an easement being proved. Thus it differs in some respects from other rights in that the mere efflux of time does not create an easement. It is the action brought which turns the easement into an indefeasible right. 44 P. L.R. 116=A.I.R. 1942 Lah. 124. In a case of a claim to a right of easement, the period of twenty years should end within two years of the suit. It is immaterial whether there was or was not a period of twenty years' user at some period beyond two years before the date of plaint. A period of twenty years' user in the fifteenth century, for instance, cannot have any bearing on a claim to easement. 1933 A.L.J. 516=1933 A. 623. A prescriptive right can be acquired only if the enjoyment of the easement ended 'before the beginning of the two years next' before the suit was instituted. 33 I.C. 503. See also 29 M.L.J. 685; 1923 O. 29. In a case not of prescriptive easement but of one arising from a grant, it is not necessary for the plaintiff to establish twenty years' exercise of the right of easement or its continuance till a time within two years before the institution of the suit. 150 I.C. 601=1934 A. 447. No minimum limit of time can be laid down to justify an inference of immemorial user. The question whether such an user is established depends on the circumstances of each case. 45 B. 1027=62 I. C. 65. Peaceable enjoyment means one without interruption or opposition by the servient owner sufficient to defeat the enjoyment. 49 I.C. 963=21 Bom.L.R. 709. The obstruction must find expression in something done on the servient tenement itself. 45 B. 1027=23 Bom.L.R. 422. Mere protest does not amount to such obstruction. 45 B. 1027. The mere fact that the land is waste does not necessarily show that no

right can be acquired over such land. If that were so, the right of user over almost every pathway in the mofussil would be lost, inasmuch as almost every pathway lies over waste land. 65 I.C. 509. In determining the question whether an user of way over waste land was as of right or not, the Court would have to consider the character of the land, the relation between the parties and the circumstances under which the user took place. 65 I.C. 509. See also 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. If an easement has been enjoyed for the statutory period peaceably and openly as of right, without interruption, the right becomes absolute. 26 I.C. 781. A long and uninterrupted user for a long series of years leads to the inference that the user had been as of right and that the right had a lawful origin. 35 I.C. 749=4 L.W. 128. Enjoyment may be peaceable notwithstanding oral disputes regarding it. 29 M.L.J. 685=31 I. C. 528. The adverb 'peaceably' indicates the manner in which the dominant owner must conduct himself in his use of the servient tenement, i.e., the person claiming a right of easement must not have deprived the servient owner of that right by use of force or secretly. 29 M.L.J. 685. See also 19 Mys.L.J. 339. Enjoyment for less than the prescriptive period if entitles the persons enjoying, to an injunction against trespasser. 30 I.C. 989=18 M.L.J. 515. The words "as an easement" do not mean that the enjoyment should be in the assertion of claim of an easement. III. (b) shows that the words were used in order to show that unity of title or possession makes the possession useless to create a right of easement. 38 M. 1=17 I.C. 112. See also 41 C.W.N. 769=1937 Cal. 355. Assertion of full ownership, which was however negatived by the evidence, may suffice to establish an easement, provided that the user was for the beneficial enjoyment of another land. 38 Mad. 1=17 I.C. 112. See also 49 M. 820=1926 M. 728. (F.B.); 56 B. 427=34 Bom.L.R. 1015=1932 B. 513. Mere acquiescence does not create an easement. 16 I.C. 893. When two houses originally owned by one and the same person have backyards opening into a lane which separates them, in the absence of evidence as to when the gates were opened the presumption is that they were so opened before severance, and the enjoyment of a right of way for over twenty years peaceably and as of right ending within two years before the suit creates a prescriptive right. 9 M.L.T. 274=9 I.C. 764. User which is neither physically capable of prevention by the owner of the servient tenement nor actionable, cannot support an easement. This principle applies both to affirmative, and negative easements. So long, therefore, as the two tenements were held in joint ownership there can be no acquisition of an easement by prescription in favour of one tenement against the other.

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years.

the right to such access and use of light or air, support or other easement sha'l be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation I.*—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

(*Sturges v. Bridgman*, 11 C.D. 852); 28 Bom.L.R. 1000 and 19 C. 253, Foll.). 56 B. 427=34 Bom.L.R. 1015=1932 B. 513; 69 C.L.J. 412=1935 C. 282.

**Sec. 15, Expl. 1.**—Where, in the absence of a licence or agreement, the defendants were found to have been using a way over plaintiff's land openly, peaceably and as of right for over the statutory period, held, the defendants had acquired an easement in respect of that right. 9 I.C. 640=9 M.L.T. 350. Continuous and peaceable user of easement of light and air for more than twenty years may give rise to a presumption that it existed with the consent of the owner of the servient heritage. 71 I.C. 831=1923 N. 192. See also 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.). The right to receive light across another's land is not a natural incident of property but can only be acquired as an easement either by grant or prescription. Unless and until such a right has been acquired in the manner of other easements, no amount or mode of obstruction is actionable. 46 C.W.N. 135. An easement of light and air need not be proved to have been enjoyed as of right. It is enough if there is enjoyment. 61 I.C. 569. An open user of road or path, without interruption, for a long time, not under permission or sufferance, is *prima facie* evidence of enjoyment as of right. 61 I.C. 569. The right to the lateral support to a wall from a neighbour's land, is acquired only by prescription. 68 I.C. 831=14 I.W. 728. See also 1929 M.W.N. 528. Where it was shown that the plaintiff's wall collapsed as a result of a deep drain cut close to the wall by the defendant, but it was not shown that any portion of the soil on the plaintiff's land had fallen into the drain and it was also not proved that the period of 20 years had expired before the alleged encroachment. Held, that S. 15 and not S. 7 applied to the facts of the case, and that the easement by prescription not having been established the plaintiff was not entitled to recover damages. 1930 A.L.J. 340. A right of way over one part may be acquired by grant, and over another, by prescription. 57 I.C. 853. Where a path-

way has been used by all the residents of the village, and on both sides of it about houses of the residents of the village, the presumption is that the passage has been kept for the common use of the residents of the village and is, therefore, a public pathway. Under such circumstances there must be a presumption of dedication of the land under the passage for public pathway. User for any number of years is not necessary to establish a right to pass over the public pathway. User, on the other hand, is merely an evidence of original dedication in such cases. 38 P.L.R. 500=1936 L. 797. A right of easement is claimable on the land of another by the owner of land. It is not a personal right, but it attaches to land and is exercisable over another's land. A public pathway, however, may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is the owner of some land. In other words, the existence of a dominant tenement is not necessary. 38 P.L.R. 500=1936 L. 797. The fact that a passage leading from a public place is not proved to terminate also at a public place is no reason for holding that it is not a public passage. Where it does not stop at the land of a private owner but proceeds further to a great distance, that is, an important factor in support of the claim of the public, especially when it is not shown that it has terminated in private grounds. 39 C.W.N. 303=60 C.L.J. 556. See also I.L.R. 1937 N. 21=1937 Nag. 322. When a public right of way is claimed over lands belonging to a private owner, it is not legitimate to presume from long user an intention to dedicate the lands for public use and then to examine the evidence adduced on behalf of the private owner to see if the presumption has been rebutted by him. The evidence must be examined as a whole and then the inference either in favour of or against the dedication must be drawn. It is wrong to deal with the evidence in compartments. 39 C.W.N. 303=60 C.L.J. 556. An easement exercised by the defendant was merely one of access from the road, over the strip of land belonging

to plaintiff, to the defendant's land for a limited and special purpose. A particular path left by the plaintiff for the exercise of the easement was blocked but another path was opened later on and had since been used; held, that the easement was a discontinuous, non-apparent, positive easement with nothing in its nature to limit it to a particular path and the creation of new path by the plaintiff did not constitute an interruption of the easement. 115 I.C. 884=1929 P. 124. The object of S. 15 of the Act in requiring that the user should be open is that it must be of a nature from which a presumption would arise that the owner of the land had knowledge that his land was being so used and that he had acquiesced in it. Where the evidence did not show that the cattle by using the defendant's land had formed any path on the land which would put the owner on inquiry and that the land was being continuously used for the purpose throughout the year and that a particular path was used but only showed that cattle simply strayed on the land, held, that no presumption as to constructive notice could arise and that the easement of the right of way for the cattle was not made out. 31 Bom.L.R. 120=1929 B. 144. Where the owner of a makwa tree complained of the construction of a wall by the defendant which prevented him from collecting the fruit of the tree, the branches of which overhang the wall, but it was found on the evidence that the wall was constructed three years before the suit was brought. Held, that assuming that the plaintiff had a right of easement, he could not enforce it because of S. 15 of the Easements Act. 114 I.C. 512.

**Mode of Enjoyment.**—The presumption of lost grant should not be made merely upon establishment of user for a period of 20 years or more. What has to be found as raising the presumption of lost grant is user from time immemorial, although the period for which such user need be proved must depend on the facts and circumstances of each case. 57 C.L.J. 31; 1937 Cal. 661=41 C.W.N. 1169. No presumption of a lost grant can be made in the case of the right of fishery where the use of the fishery was in harmony with the right of the public to fish by stakes which is acknowledged method of public fishing on the West Coast of India. 23 Bom.L.R. 939. Possession of the dar (space between two fishing stakes) for over sixty years does not perfect into an easement by way of prescriptive right. 23 Bom.L.R. 939. As to presumption of lost grant, see also 96 I.C. 317=1926 M. 788. For the acquisition of a right of easement a person must not only prove the doing of the necessary physical acts over the period prescribed by law but he must also show that he was setting himself up as the person who was doing those acts over the property of another. Proof of physical acts accompanied by the requisite animus or intention is necessary. I.L.R.

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(1943) A. 792=1943 A.L.J. 595=A.I.R. 1943 A. 362. A plaintiff is entitled to have his right of way declared if he establishes the terminus to and from which the way runs. And the right would be enjoyed in the way the servient owners point out as the tract. If no tract is pointed out, the plaintiff can enjoy the nearest route. 46 I.C. 374=22 C.W.N. 922. No use of property which would be legal if due to a proper motive, would become illegal, if prompted by an improper or even a malicious motive. 42 C. 164=20 C.L.J. 97=18 C.W.N. 1296. The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period. (Ibid.) It is not necessary to prove annual or continuous user, but only substantial enjoyment whenever the occasion required. The mere fact that the openings made were different in different years does not make the user indefinite when the channels through which the water was taken were the same. 15 C. W.N. 259=13 C.L.J. 670. The fact that the servient owner paid a certain sum for the repair of the embankment for his own benefit does not make the user permissive. 15 C.W.N. 259=13 C.L.J. 670. Period of twenty years to be completed prior to institution of suit—No right to protect inchoate right—Fact of servient owner of dominant owner suing in respect of easement immaterial. See 113 I.C. 525.

**Easement against Government.**—To claim 60 years' rule of easement, there must be Government ownership on the date when the easement is claimed and not at some antecedent period. 116 I.C. 806=1929 A. 382. See also 1936 M. 692. A plaintiff claiming a right of easement against Government must prove sixty years' peaceful and uninterrupted user and the rule of law that the burden of proof is shifted on to Government if the plaintiff proves possession for a sufficient number of years is not applicable if the plaintiff fails to prove the completion of even the prescriptive period necessary against a private individual. 26 I.C. 723=39 M. 304. See also 1928 O. 17=4 O.W.N. 1035; 45 I.C. 80=34 M.L.J. 425 (Acquisition of right in water in Government channel). If the plaintiff proves 30 years' possession, the Government must prove that he had no possession within 60 years. 16 I.C. 626=12 M.L.T. 159. The words "belongs to the Government" in S. 15 refer not to the time of the suit but to the duration of enjoyment. 41 M. 622=34 M.L.J. 395. When after 40 years' enjoyment against the Government, the latter transfers the land to a private person, the easement in order to become absolute must be enjoyed as against the transferee for a further period of 20 years. 41 M. 622. The period of 20 years must be computed from the time when the transfer was made to a private person. 41 M. 622.

**Government land in occupation of person**

**with limited right.**—S. 15 of the Easements Act insists on a period of 60 years' user not merely when the easement is claimed as against the Government but over any property belonging to Government. The word "belongs" in the section should not be restricted to cases where possession and ownership continue to remain with the Government and the clause applies to cases where any person with a limited right is in occupation of land belonging to Government. 40 L.W. 514=1934 M. 575=67 M.L.J. 262. See also 71 M.L.J. 268; 43 L.W. 330. A person claiming an easement against a transferee from the Government would have an option of either basing his claim upon user for a period of sixty years against Government and the transferee as such of the Government, or if he so preferred, he could ignore the period of prescription against the Government and base his claim entirely upon user for a period of twenty years while the property was in the possession of the transferee. I.L.R. (1943) All. 792=1943 A.L.J. 595=A.I.R. 1943 All. 362. The last paragraph of S. 15 of the Easements Act gives a personal privilege to the Government when the Government is a party in the suit just in the same way as Art. 149 of the Limitation Act confers a privilege on Government. The result is that once a plaintiff established that he had exercised his rights as an easement against the predecessor in interest of the defendant whether the predecessor in interest was the Government or not, his rights at the time when they are claimed in a suit against a private person becomes absolute since that private person could not claim the privilege which is the personal privilege of the Government. 1942 A.L.J. 483=A.I.R. 1942 A. 405.

**Property over which pathway lay belonging to Government—Rights of third Parties.**—The plaintiff as the owner of a certain survey number in a village sued to restrain defendants 1 and 2, who claimed to be trustees of a temple, from interfering with the plaintiff's use of a pathway across suit survey number and the Government also was impleaded as a party. The lower appellate Court found that the suit survey number belonged to the Government who had allowed its use in favour of the temple. On the contention that though for want of 60 years' user, the plaintiff had not acquired an easement as against the Government, he had by reason of 20 years' user acquired a limited right which was sufficient to prevail as against any interest which private persons like defendants 1 and 2 might possess in that property. Held, assuming the possibility of acquisition of an easement against the holder of a limited interest, the acquisition was possible only to the extent to which a grant might be possible within the terms of S. 8 of the Easements Act and as no such grant by the temple would be possible having regard to the nature of its interest in the property, the plaintiff would not by 20 years' user acquire prescriptive

right as against property which belonged to Government even to the extent of preventing defendants 1 and 2 from interfering with his user of the way. Held also, that though it might be a question whether a mere stranger could obstruct another person in the exercise of even what might be called an inchoate right of easement, the position of the defendants 1 and 2 could not be compared to that of a mere stranger or a licensee. 1934 M. 575=67 M.L.J. 262.

**Village pathway.**—A right of way claimed by the public or by a section of the public over lands described as a village pathway, is not a right of easement and is not governed by S. 26, Limitation Act. Such a right is a customary right and may also be traceable to dedication which may be inferred from user for a very long time. No fixed period of enjoyment is necessary in order to establish a customary right. 10 Cut.L.T. 78. See also 1942 O.W.N. 725.

**Burden of Proof.**—The onus of proving that a right of way has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for 20 years, lies upon the person asserting the right. 25 I.C. 499. See also 18 L.W. 404=1923 M. 674. The question in each case must be, what is the exact nature of the right which is shown by the evidence to have been acquired by the party? See 1923 M. 674, supra. S. 15 (1) applies both to continuous and discontinuous easements. 17 I.C. 22=10 A.L.J. 227. The question of animus is, in each case, a question of fact. Where enjoyment is proved, the person enjoying the right must be presumed to possess an animus which is manifestly to his advantage. 53 A. 16=1931 A. 877. Where it is a question of acquisition of an easement by prescription, the burden lies, entirely on the plaintiff to prove 20 years' enjoyment, and not mere possession for 12 years and then say the onus is shifted on to the defendant. 33 I.C. 503.

**Defences.**—When a right has begun to run under S. 15 and the servient holder sues to put an end to it, the defendant cannot plead in bar of it, Art. 32 of the Limitation Act. 33 I.C. 90. When the defendant has a right of support from the plaintiff's wall abutting on the defendant's property, for a roof of his adjoining house, it is an encroachment of that right if the defendant raises his wall and erects upon it another thatch resting on the plaintiff's wall. 33 I.C. 90. The limit of a party's right of support must be determined by his actual enjoyment up to the date of the encroachment complained of by the opposite party. 33 I.C. 90. As to right of support, see also 59 C. 363=1932 C. 542. If a man's ancient lights be interrupted, it is no answer to say that he can provide other sources of light for himself by making changes in his own tenement; for that defendant is willing to provide fresh light for him in another way. 36 M. 11=21 M.L.J. 742. Where a party causes injury to another, he cannot object

*Explanation II.*—Nothing is an interruption within the meaning of this section, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

to appropriate relief being granted to his opponent on the ground that he would suffer serious injury by being compelled to undo the mischief. 36 M. 11. There is no difference in the application of the law as regards the interference with ancient lights to buildings in cities and elsewhere. 36 M. 11. In order to establish a right of easement under S. 15, a plaintiff has to establish user for the statutory period. He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say, that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption is, however, rebuttable; and the defendant may show that, if he can, that the facts are such that the user was not as of right, e.g., he can show that the user was under license not amounting to a grant, or he can show fraud or force, or secrecy. Those would show that it was not as of right. 20 N.L.J. 12. See also 1936 S. 61.

*Nature of Obstruction (Expl. II).*—To constitute an actionable obstruction there must be substantial privation of light enough to render the occupation uncomfortable according to the ordinary notions of mankind. 9 I.C. 417=21 M.L.J. 313. Where the owner of the building is in the course of acquiring a right of easement by prescription when his house is burnt down, and he begins immediately to re-build his house and place the windows exactly in the same position as the old ones, he can be regarded as enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building. 46 B. 448=24 Bom.L.R. 83=1922 B. 3. If, however, there is any delay in re-building, then that might be evidence of an intention not to resume the user. 46 B. 448. Knowledge of the fact of enjoyment on the part of servient owner is essential to the acquisition of an easement where the Court is asked to presume a grant. 54 I.C. 936=16 N.L.R. 76. Active obstruction on the part of such owner would negative any such presumption. 54 I.C. 936. To negative submission to an interruption, the party interrupted need not have brought a suit. 54 I.C. 936. The question whether there has been submission to, or acquiescence in, an obstruction, is a question of fact, the burden of negating submission being on the party alleging that he did not submit. 54 I.C. 936. See also 116 I.C. 806=1929 A. 382. It is not enough, for supporting an action for obstruction of right, that there has been a diminution of light from what it was before. 49 I.C. 458=11 Bur.L.T. 109. The decrease in light should constitute a nuisance and make the house uncomfortable according to the ordinary

standards or humanity or unfit for business. 49 I.C. 458.

*Sec. 15, Expl. II.*—Under Expl. II, S. 15, it is not sufficient to prove that there was obstruction for a period of one year, but it is also essential that such obstruction should be acquiesced in for the same period by the claimant. 116 I.C. 806=1929 A. 382. Where the plaintiff's father's vendor had used a particular courtyard for the purpose of his business, for a period of about 12 to 15 years and after his death his son had closed down the business and did not use the courtyard for a period of nearly 6 years for his business, and the plaintiff after purchase from the son had used it for a similar business of his own for a period of about 12 years, it could not be said that the plaintiff had acquired a right of easement for there had been an interruption, and an intention to cease to enjoy the right. I.L.R. 1938 All. 840=1938 A.L.J. 867=1938 All. 587.

*Pleadings—Pleas of ownership and easement—Permissibility.*—No doubt as a rule, a plaintiff should not be allowed to put forward contradictory pleas, but the pleas of ownership and easement, though inconsistent, are not contradictory and can be put forward in the alternative. The important point to be considered in such a matter is the question *quo animo egerit* with reference to the user allowed by the plaintiff; in other words, if the plaintiff had used a way on an assertion of title of owner, he could not put forward such user in support of a right of easement. That view however does not prevent the putting forward of alternative pleas in a suit, though, at the trial of the suit, the character of the user and the question of *quo anima egerit* would have to be decided, and, if the user is proved, one plea would have to be affirmed and the other rejected. 29 N.L.R. 330=1933 N. 257. See also I.L.R. (1939) Nag. 580=1939 N.L.J. 297=1939 Nag. 197; 1939 Nag. 415; 1925 Cal. 788. Where a person alleges that he had ownership over the disputed plot *malikana wa mokhalifana* but fails to establish his claim in the suit is not thereby prevented from claiming in a subsequent suit rights of easement over the same plot. 1942 A.L.J. 483=A.I.R. 1942 All. 405. But see 48 Bom.L.R. 25 (F.B.). It is not the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of a dominant and servient tenement and that he is exercising a right over property which does not belong to him. A plaintiff may claim an easement and ownership in the alternative. If he shows that for the statutory period he has openly

*Explanation III.*—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

*Explanation IV.*—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to <sup>1</sup>[the Crown], this section shall be read as if for the words "twenty years," the words "sixty years" were substituted.

#### LEG. REF.

<sup>1</sup>Substituted for "Government" by A.O., 1937.

exercised certain rights which are in themselves sufficient to establish an easement, *prima facie*, he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement. A right to an easement by prescription cannot be defeated merely by showing that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement. I.L.R. (1939) Bom. 140=41 Bom.L.R. 168=1939 Bom. 149. See also 35 Bom.L.R. 144=1933 Bom. 122; 1939 Sind 110. The question of immemorial user or lost grant must be pleaded in every case before a person can be given relief on that head. Whether the action be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at Common Law, or under the Prescription Act. Where the plaintiffs did allege circumstances, namely, the user by themselves and by their ancestors of the land as pathway for 40 or 50 years, the plaint may on a liberal construction be taken to have relied upon long user leading to an inference of lost grant. 142 I.C. 458=1933 C. 215=56 C.L.J. 274. The presumption of lost grant should not be made merely upon establishment of user for a period of 20 years or more. What has to be found as raising the presumption of lost grant is user from time immemorial, although the period for which such user need be proved must depend on the facts and circumstances of each case. 57 C.L.J. 31. See also 41 C.W.N. 1169=1937 Cal. 661; 142 I.C. 458=1933 C. 215.

**Parties to suit in respect of Easement Right.**—Dominant and servient tenements owned by several persons—One of them may sue—Other owners need not necessarily be made parties. 41 C.W.N. 769=1937 Cal. 355.

**Secs. 15 and 16: Obstruction to ancient light—Remedy—Injunction or damages.**—The law does not know of any natural right, apart from a right of easement with reference to a right of passage or right to light and air. No one can claim any natural right against another unless he establishes an

easement to that effect. 160 I.C. 955=1936 M. 142. Where the defendant obstructs the ancient light of the plaintiff by erecting a building and plaintiff sues for injunction to have the building demolished or for damages the question whether an injunction or damages should be given must depend on the circumstances of each particular case. If damages will afford adequate relief to the injured party and the defendant has not been guilty of any high-handed action, or un-neighbourly conduct, damages are the appropriate remedy. If the property is still substantially useful to him, depreciation in value can be met by a decree for damages; but where the defendant's building deprives plaintiff to a very great extent of his best source of light and incidentally to a large extent of the beneficial use of his property, damages would not be adequate. 1933 R. 351. In order to constitute an actionable obstruction of ancient light, it is not sufficient that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises to prevent the plaintiff from carrying on his business as beneficially as before. The expression "carrying on the business beneficially" is not to be read as depending on the question whether or not the person carrying on the business is likely to lose a customer. The test is whether he would carry on the business less beneficially to himself, whether in discharging his duty to his customers on the one hand or in preserving his health and facility of transacting business on the other. 1933 R. 351.

**Plaintiff seeking injunction—Power of Court to direct enquiry as to damages.**—Where in a suit relating to an easement of light and air, the plaintiff seeks an injunction restraining the defendant from interfering with his right, the Court may order an enquiry as to damages, even though it holds that the plaintiff is not entitled to injunction. No such enquiry can however be ordered when the plaintiff has not proved any damage. 179 I.C. 884=1939 Sind 39.

**Decree for injunction against owner of servient tenement—Execution.**—Where the owner of a dominant tenement who has obtained an injunction restraining the owner of the servient tenement from building his house beyond a certain height and within a certain distance of his house, seeks to execute his decree by the demolition of the ad-



*Illustrations.*

(a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed as for the right of way has not been enjoyed "as of right" for twenty years.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the

Exclusion in favour of reversioner of servient heritage.

time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

*Illustration.*

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

17. Easements acquired under section fifteen are Rights which cannot be said to be acquired by prescription, and are called acquired by prescription. prescriptive rights.

None of the following rights can be so acquired :—

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ;

ditions alleged to have been made by the judgment-debtor, the question is whether the owner of the servient tenement has infringed the restrictions imposed on him by the original decree. If he has, he must be made to comply with the decree passed against him. The questions whether the decree-holder has re-built his house and has increased the burden on the servient tenement are not material questions. 39 P.L.R. 712=1937 Lah. 419.

**Secs. 15, 24 and 27.**—A right of way ordinarily entails a point of arrival and a point of departure, both of which must be fixed. A blind lane which is blocked up by a wall on one side, cannot be subject to a right of way. Where a person claims neither a right to pass along a lane nor a right to carry materials over it, but a right to remain on it for hours at a time for a certain number of days in a year and to dump materials there and keep them there in order to repair his own wall, the right claimed is not a right of way as ordinarily understood. Nor can it be called an accessory easement, as the right is claimed by the party to repair his own wall standing on his own land. The easement is a miscellaneous easement, and all that the party can claim is a right to enjoy what he has prescribed for in a reasonable way. The Courts have always leaned

against an unreasonable restriction on the servient owner's enjoyment of his own property. I.L.R. (1937) N. 21=1937 N. 322.

**Secs. 15 and 47: Right of repairs.**—The right of repairs being a discontinuous easement is not extinguished even though it was not enjoyed within two years next preceding the suit. 1941 N.L.J. 655.

**Sec. 16.**—The mere finding that a parnala is old is not sufficient to prove that an easement has been established with respect thereto. 66 I.C. 922. User against kanomdar—Effect as against jenmi or melcharathdar. 24 L.W. 691=1927 M. 73.

**Sec. 17, Cl. (a).**—The phrase "tend to the total destruction" of the subject of the right of easement, means such an interference as would render the dominant owner's right largely inoperative. 130 I.C. 546=1931 S. 1. Sec. 17 is intended to apply not to rights of irrigation in natural stream, but to rights in the nature of profits a prendre which do not include a right to water. 7 Pat.L.T. 547=1926 P. 187. Mere possibility of destruction at some future date is not what is contemplated by Cl. (a). 23 B. 666. Right of way over land or water cannot be acquired in every direction. 7 C. 145; 8 Beng.L.R. (A.C.) 118. So also an unlimited right of fishery. 9 C. 698=12 C.L.R. 382. See also 37 C.W.N. 18 cited under sec. 2, Cl. (b). Pri-



- (b) a right to the free passage of light or air to an open space of ground ;
- (c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank otherwise,
- (d) a right to underground water not passing in a defined channel.

18. An easement may be acquired in virtue of a Customary easements. local custom. Such easements are called customary easements.

vate right of way and highway may exist over the same land. 18 C.W.N. 378=19 C. L.J. 42.

CL. (b).—Extent of right to light by prescription. See 3 B.L.R. (O.C.) 41; 14 C. 839. For the purposes of sec. 17 (c) what is required is that the surface water shall not simply be water flowing on the surface, it must be gathered up in some way either in a defined channel or by being collected in some other way. The word "and" in the clause must be construed as "or". The qualities are not conjunctive. I.L.R. (1937) N. 13=1937 Nag. 310.

A person may acquire a right to easement of water over artificial channels or water derived from artificial tank or pools. 33 M.L.J. 674=44 I.C. 625 (7 M. 530, Foll.). Also in respect of tanks fed by rain water as well as surface water from neighbouring lands. 33 M.L.J. 674. Considering the position of the lands and the conditions of agriculture in Bombay, it must be held that where the plaintiff had been enjoying the water by means of channels through which water passed to a tank, for a certain number of years, no prescriptive right was acquired to receive the water through the channels unobstructed so as to entitle the plaintiff to seek the removal of these obstructions caused by the defendants. 46 B. 115=1922 B. 378. The right to take water from a river running through an undefined channel over the neighbouring lands is not one coming under S. 17 (c), but is a right which, though perhaps it could not be acquired by prescription as an easement, could be inferred from long user. 42 B. 288=45 I.C. 448=20 Bom. L.R. 398. See also 7 M.H.C. 37 (46). A presumption of lost grant can be made if the usage is long and uninterrupted and if it could form the subject of grant. 42 B. 288. As to what is "immemorial user", see 56 B. 82=34 Bom.L.R. 92=1932 B. 130. See also 58 I.A. 195=54 M. 427=61 M.L.J. 1 (P.C.). A right to the user of water flowing in undefined channels cannot be acquired by prescription. 64 I.C. 153. As to right to percolating water flowing under-ground in undefined channels, see 54 M. cited under S. 7.

Sec. 18.—A customary easement is not limited to easements of a kind which could not be recognized at all apart from official customs. 1924 A. 159. In order to establish a customary right it is not necessary to show that it has been exercised since time immemorial. It is sufficient to show that it has been openly enjoyed for such a length of time as suggests that, by agreement or otherwise, the usage has become a customary law of locality. It is not necessary to prove en-

joyment of the right for a period of 20 years. Where therefore the Mahomedans have been immersing their tazias at Muharram in two ghats of a tank for such a length of time as to suggest that the usage has become the customary law of the place, they have a customary right to use the ghats for immersing their tazias. There is nothing unreasonable in the custom and it is sufficiently certain and invariable. The mere possibility that the number of tazias immersed may eventually increase so much as to prove a nuisance, is too remote to make the custom unreasonable. 1938 Nag. 177. The right to use the ghats of a tank for the purpose of immersing tazias at muharram is a customary right and not an easement. 1938 Nag. 177. To establish a customary easement, the custom must be reasonable, certain, and the user must not have been permissive or exercised by stealth or force and the right should have been enjoyed for such a length of time as to suggest that by agreement or otherwise the user had become the customary law of the locality. 1939 N.L.J. 246=1939 Nag. 193. See also 42 C.W.N. 1102. A customary easement can only be in favour of a class or community and cannot be in favour of an individual. 119 I.C. 695. As to a proof of customary rights, see 90 I.C. 976; 1943 Oudh 83 (Village pathway); 1945 Pat. 118; 18 Luck. 632. Proof of a customary easement is immensely more difficult than proof of an easement under sec. 26 of the Limitation Act. The persons who rely on custom must prove that it was ancient, continuous, peaceable, certain and compulsory. Indiscriminate miscellaneous user of village land cannot establish the fact that such user had become a customary law of the place in respect of the persons and things which it concerned. The enjoyment is of too fugitive and patently permissive a kind to afford any support to it. Hence the taking of rubbish by some villagers over certain plots in their carts cannot make it a village pathway. 1942 A.W.R. (C.C.) 356 (3)=1942 O.W.N. 725. A Court should not decide that a local custom, such as cutting wood from a jungle exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggested that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned. 123 I.C. 377=1930 A. 338. A customary right is not an easement

*Illustrations.*

(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

in the legal sense of that term. Customary rights have their origin in grant or prescription but it is not necessary that in every case, there should be evidence from which a lost grant may be presumed. Nor is it necessary that the custom should be traced back for the whole time necessary to make it immemorial. 36 C.L.J. 280=1923. C. 200; I.L.R. (1941) Nag. 460. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and vice versa. The two rights are different, although the result may be the same. Consequently, where a claim of easement is based on a prescriptive title, it is not open to the appellate Court to treat the cases as one based on custom. 1924 L. 275. Nature to customary easement. See 18 M. 320. The distinction between a customary right and customary easement is seen in 46 M. 866=45 M.L.J. 333=1924 M. 197. See also 20 I.C. 467; 1933 N. 74; 61 M.L.J. 1=58 I.A. 195 (P.C.). Customary easements and prescriptive easements, distinguished. 2 P.L.R. 454; 29 M. 389. No fixed period is laid down by law as necessary to establish a customary right. See 46 M. 866=45 M.L.J. 333. Customary easement—Tenant's claim to take water from well for irrigation—Maintainability as against landlord, see 113 I.C. 729. One or more inhabitants of a village taking wood from the landlord's jungle without the latter's knowledge cannot by so doing for any length of time acquire a right to cut and appropriate wood contrary to the wishes of the latter. Similar acts done with the permission or acquiescence of the owner being referable to a licence express or implied cannot likewise confer a right as against him. 123 I.C. 377=1930 A. 338. Customary right of pasture on landlord's lands—Proof of. See 106 I.C. 195. See also 1944 M.L.R. 111.

**Illustrative Cases.**—Zamindars in U.P. cannot arbitrarily close a right of way used by occupancy tenants for more than thirty years. 1924 A. 159. In the case of a right of public way over a person's private property claimed by the members of the public at large or a right of a limited class such as the inhabitants of a particular village, the customary period of the public right to the village path must be proved by evidence where the interests claimed conflict with those of a private owner. They must be proved by such degree of evidence as is representative of either the public at large or of the particular village or the smaller community alleged to have the right of

user. To call three partisan witnesses who can in no sense be said to be representative of either the larger community of a general public or the smaller community of a particular village is no evidence whatever upon which a finding of public right or village custom can be found. 148 I.C. 498 (1)=1934 P. 30. Where it is alleged that there is a public pathway which has been infringed by the defendant, before the plaintiff can maintain an action for avoidance of the infringement, special damage must be proved. But where it is more or less a village pathway, wherein the residents on either side of the pathway and round about, may be considered to have a right acquired by long user of passing to and fro and this right is referable to a grant or agreement on the part of the zamindar, it is not necessary to prove any special damage and the residents of the neighbourhood can maintain an action for the avoidance of the obstruction without proving any special damage. Even if a proof of special damage is necessary a very small amount of inconvenience will entitle the plaintiff to the relief claimed. 1933 A. 919. A right of pasturage by virtue of a lost grant cannot be established by the inhabitants of a village as they are a variable number of persons. Such a right cannot also be established by prescription under sec. 26 of the Limitation Act, inasmuch as to establish such a right it must be shown that it has been peaceably and openly enjoyed by the persons claiming it without interruption for 20 years. That might be so with regard to some of the villagers but could not be so in the case of all the inhabitants. The only right of easement which can be claimed in a case like this is the right of easement by custom. 42 C.W.N. 1102. Where the residents of a particular locality claimed a customary right of easement to go over the land of the defendant, to collect firewood and burn Holi and perform some ceremonies, there and where such right is proved to have been exercised from time immemorial, it was held that the easement was not unreasonable and could be recognized by the Courts. 180 I.C. 233=1938 A.L.J. 1243=1939 All. 165. See also 1939 All. 387=1939 A.L.J. 391. A customary right of burial can exist, apart from provisions of this Act; hence where it is found that a certain family used a place as a burial ground customarily it was held not an easement but a customary right in the nature

of an easement. 31 I.C. 805=13 A.L.J. 1094. A right to bury a dead body is not an easement as contemplated by the Easements Act. Such a right cannot be acquired by prescription, though it can be acquired by grant or custom. When the origin of the right is peaceful, the Court can presume either a dedication on the part of the owners or a grant on their part, the origin of which is lost in antiquity. The question whether a plot of land is a graveyard or not is primarily a question of fact. 1934 A.L.J. 809=1934 A. 868. See also 32 P.L.R. 157=1932 L. 256; 60 C.L.J. 566=1935 C. 357=39 C.W.N. 387. Right to privacy is customary right. 10 A. 358; 5 B.H.C.R. 42; 9 B.H.C.R. 266; 8 B.H.C.R. 87; 2 Bom.L.R. 454. There is no inherent right of privacy attaching to any property and this is specially so in a town. Such a right must be acquired either by usage or by grant. 40 P.L.R. 483. See also 1939 Mar.L.R. 150 (Civil). If a right of privacy is established the intervention of a space between two houses cannot affect the right of privacy. 28 I.C. 674=13 A.L.J. 361. The purdah system is generally observed, by both Hindus and Muhammadans in the United Provinces except by the lowest classes. 28 I.C. 674=13 A.L.J. 361. Where the plaintiff is a "vaishya" living in a town and the defendant has opened a door which exposes the whole of the plaintiff's 'sahan' as well as the rest of the house to his view, there is an invasion of privacy. 151 I.C. 141=1934 A. 527. The right of privacy is an easement attached to land and not to a person. If there was a right of privacy existing in the house, it is not destroyed because the plaintiff herself has not always observed purdah. 151 I.C. 141=1934 A. 527. See also 1945 Oudh 15. A customary right of privacy is well established in U.P., and is based on the law as laid down in sec. 18 II (b). The doors and windows in the upper storey of a house on the other side of a lane just 19 feet wide which overlooked the courtyard of a house on the opposite side were directed to be so altered as not to overlook the said courtyard. 1944 A.W.R. (C.C.) 267=1944 O.A. (C.C.) 267. A right of privacy is a customary easement and may be acquired in virtue of a local custom. 1935 A.L.J. 432=1935 A. 754. Where a plaintiff brings a suit concerning his right of privacy, the omission on his part to allege the existence of a customary right of privacy is fatal to his case. 155 I.C. 365=1935 A. 649. See also 1935 A.L.J. 432=A.I.R. 1935 All. 754. Whether the houses in question are on the same side of a street or on the opposite side, a right of privacy exists and this right needs more protection when the person who invades it, is opposite to the person whose right of privacy is invaded and there is invasion of the right of privacy if a person constructs a room in the upper storey of his house overlooking another person's house. 24 I.

C. 683. In the province of Gujarat there is a customary usage which makes an invasion of the privacy an actionable wrong. 55 I.C. 949=22 Bom.L.R. 226. Where a custom of privacy existed in the locality in which the plaintiff lived and she sued the defendant that her right of privacy was infringed by certain construction made by defendant and where her house was already overlooked from another house and she did not show any reason why she did not object to being overlooked from that particular house and where she endured without protest the invasion of her privacy by the defendant for two years, she is not entitled to right of privacy, although her suit is brought within limitation. 119 I.C. 834=1929 A. 809. See also 40 P.L.R. 483. Where a person alleges that another infringed upon his right of privacy, he must prove that customary right of privacy exists in the neighbourhood in which he lives and further that he is individually or as member of his particular class entitled to take advantage of such custom. 51 A. 986=27 A.L.J. 1028=1929 A. 676. See also 1935 A.L.J. 432=1935 A. 754; 155 I.C. 365=1935 A. 649. A plaintiff is entitled to an injunction restraining his neighbour from opening such windows and ventilators as would infringe the plaintiff's right of privacy which he is entitled to by custom. 74 P.L.R. 1915=29 I.C. 154. A plaintiff cannot ask the defendant to close his windows on the ground of the invasion of his right of privacy when it is proved that the said windows do not look out upon the plaintiff's house but upon certain plots of land acquired by him less than twenty years. 15 I.C. 270. *Held*, on the evidence, that there was a custom of privacy with respect to the roofs of houses in the city of Larkhana in Sind. 66 I.C. 333. A Mahomedan cannot by custom acquire any right to say prayers on the land of another, except with the other's permission, express or implied. 9 I.C. 45. Where the plaintiffs as owners of cattle living in a particular village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at a particular 'Isthan' in a room, it does constitute a right of the plaintiff's to continue to make those offerings. 1939 A.L.J. 391=1939 All. 387. See also 1939 All. 165. The right to cut sugarcane, to extract, boil and concentrate the juice on a piece of land in the *abadi* is in the nature of a customary easement and can be acquired by a tenant against the landlord. 26 I.C. 122=12 A.L.J. 963. A custom to allow the neighbour's trees to overhang one's house and premises, is neither definite nor reasonable. Whether the right to retain trees overhanging another's land is customary easement. See 43 B. 164=47 I.C. 629=20 Bom.L.R. 826. See also 27 Bom.L.R. 653=39 I.C. 191=1925 B. 446. Right to use bathing ghat. See 20 A. 200. From use of tank for

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer

Transfer of dominant heri-  
tage passes easement.

or devolution takes place.

*Illustration.*

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

### CHAPTER III.

#### THE INCIDENTS OF EASEMENTS.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred

Rules controlled by contract  
or title.

to was imposed.

And when any incident of any customary easement is inconsistent with such rules nothing in this chapter shall affect such incident.

Incidents of customary ease-  
ments.

a long period dedication to the public can be inferred. *See* 91 I.C. 712=1926 O. 507; 1937 Pat. 388=16 Pat. 389=18 Pat.L.T. 348. (Tank attached to Hindu temple and enclosed—Rights of Mahomedans in general to bathe—No presumption of such customary right can arise from cause of bath of individual Mahomedans). A person who is entitled to put up a dam of turf and loose stones, is not necessarily entitled to substitute a tighter and stronger dam. 9 I.C. 636=9 M.L.T. 375. As to right to take water from another well, *see* 2 M.L.J. 290. A right to graze cattle in a jungle area of the village can be the subject of a customary right. 20 I.C. 467. *See also* 19 A. 172. The customary right of grazing is not recognised to an unlimited extent; the possessors of grazing right have no right to object, if a part of the waste land is brought under cultivation provided that the remaining waste lands are sufficient for grazing purposes. 1944 M.L.R. 111 (Civil). A custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is not unreasonable. 1924 P. 303. On the contrary, it seems to be an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose, in order to repair their houses. 1924 P. 303. The enjoyment of a right claimed to exist under an alleged custom must be enjoyed as of right, that is to say, all acts must be done under or by virtue of the custom. In order to establish the custom all acts must have been done without violence, without stealth or secrecy, and without leave or licence asked for or given either expressly or impliedly from time to time. No act which can be ascribed to a licence can ever support a claim of custom. A zamindar is the owner of the forest and of the waste land lying within his zamindari, and as proprietor can permit his tenants to graze their cattle on land which is not the communal land of the village, and to take dead wood, etc., from the forest or waste land

on payment of certain charges prescribed by him. But that is purely a matter of contract between the zamindar and the tenants. A right which can be so acquired on payment of fees or charges can hardly be regarded as a customary right though it may be exercised for a long series of years. 20 N.L.J. 131. A haveli is not like property held jointly in co-ownership in the sense that all the rules and incidents of joint property are applicable to it, where any co-owner may alienate his rights therein, for such a power of alienation would immediately defeat the very object of maintaining a haveli. The law of easements as such cannot be applied to a haveli, for an easement predicates a dominant and servient tenement vested in different persons. The rights of the owners over the haveli partake of the character of easements. They are quasi easements though not easements proper, the nature and extent of such rights being regulated by custom. Such rights can in law and in the nature of things only be attached to immovable property and can only be enjoyed by the owners of such property *qua* owners. 176 I.C. 966=1938 Sind 145. *See also* 1939 Nag. 193; 42 C.W.N. 1102.

SEC. 19.—*See* 14 S.L.R. 132; 18 B. 382. In a severance of tenements, easements used as of necessity or in their nature continuous will pass by implication of law without any words of grant, but easements which are used from time to time only, do not pass unless the owner by appropriate language shows an intention that they should pass. (*Polden v. Bastair*, 1 Q.B. 156, Rel. on.) 1930 P. 7.

SEC. 20.—*See* 25 C. 576; 76 P.R. 1900. There can be no question of easement as regards light and air in the case of joint property. *See* 28 Bom.L.R. 1000=97 I.C. 691=1926 B. 545.

SECS. 20 AND 23.—An owner of a large piece of land divided it into plots for building purposes and sold them to different persons reserving one part for himself and in each sale-deed, there was a covenant by which

Bar to use unconnected with enjoyment.      21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

*Illustrations.*

(a) A as owner, of a farm X, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(b) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but only by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and—when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

**Exercise of easement.**

**Confinement of exercise of easement.**

every purchaser bound himself to keep open a passage 15 feet wide for the common use of the other plot-holders. The defendants erected posts in the passage and reduced its width to 7 feet. In a suit by one of the other plot-holders, the lower Court applied sec. 22 of the Act, considered 10 feet width sufficient and granted a decree accordingly. *Held*, an easement of way over another's land by virtue of an agreement is governed by sec. 20 and not sec. 22, the rights in this case were governed by the contract between the vendor and the purchaser which should be given full effect to. English cases dealing with restrictive covenants held inapplicable to the present case where the right of way was defined both as to dimensions and direction. 55 B. 138=32 Bom.L.R. 1425=1931 B. 87.

SEC. 21.—Legal user cannot be restrained because it is prompted by improper motive. 18 O.W.N. 1296=20 O.L.J. 97. Grant of way in general terms includes right of passage for scavenger who cleans the privy. *See* 34 Bom.L.R. 1150=1932 B. 574.

SECS. 22 AND 23.—Easement confined to a particular purpose ought not to be extended to any other. 19 I.C. 984. As to extent of right of way, *see* 7 O. 145; (1891) Bom.P. J. 244; 15 W.R. 496; (1893) Bom.P.J. 53; 87 I.C. 899=1925 N. 389; 41 O.L.J. 379=87 I.C. 19=1925 C. 788; 20 N.L.J. 99. The general rule is that a right of way once defined cannot be altered and the dominant owner is entitled to exercise his strict rights unless he can be induced to consent to a deviation. 46 B. 910=24 Bom.L.R. 437. Sec. 22 does not deal with the question whether the servient owner, when once the right of way has been defined, can substitute a new way and recourse must therefore be had to the common law. 46 B. 910. The owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other. 42 O. 164=20 O.L.J. 97=18 O.W.N. 1296. A back-door of a house which was occasionally used by the sweepers or the ladies of the house cannot be converted into a main entrance to be used by males.

19 I.C. 984. Under sec. 22 the dominant owner must exercise his right in the mode which is least onerous to the servient tenement and cannot impose any additional burden on it. Where the easement right is only to use a roof as an open space, the holder cannot build over that portion. 1924 L. 287. *See also* 44 I.C. 500=1918 M.W.N. 167.

SCOPE OF SECTION.—No man can impose a new or increased restriction or burden on his neighbour by his own act, and an owner of an easement cannot, by altering his dominant tenement, increase his right. 24 O.W.N. 896=32 O.L.J. 27; 97 I.C. 169=24 A.L.J. 810. Every man may open any number of windows in his house looking over his neighbour's land. This right is a continuing one and a man can open new windows from time to time, provided no additional burden is imposed on the servient tenement. Even if the owner of the servient tenement has a technical grievance courts have a discretion to refuse an injunction. In the way a man has a right to open new outlets for drains and new spouts for leading rain water from the terrace of his building to his neighbour's land the Court will not grant an injunction, when it is found that no additional burden is caused to the land of the servient owner. What amounts to an additional burden is a question of fact. 20 N.L.J. 99.

ILLUSTRATIVE CASES.—Defendant who had a right to discharge water from his thatched roof to the plaintiff's roof pulled down his house and built a three-storied house with spouts, to discharge water on the plaintiff's land. *Held*, that the burden on the plaintiff's land was increased within the meaning of section. 30 I.C. 941=13 A.L.J. 791. A person is not entitled to enlarge his right of easement by increasing the volume of water flowing through a drain through which he was entitled to discharge only the main water and the ordinary waste water. 102 P.L.R. 1917=42 I.C. 284. Where the defendant blocked a water channel of the plaintiff by building a wall, the Court directed the opening of another channel through the defendant's land.

*Illustrations.*

(a) A has a right of way over B's fields. A must enter the way at either end, and not at any intermediate point.

(b) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

23. Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient herirage.

Right to alter mode of enjoyment.

*Exception.*—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient herirage.

*Illustrations.*

(a) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill provided that it can be worked by the same amount of water.

(b) A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.

(c) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature of the pollution.

(d) A, riparian owner, acquires as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant

Right to do acts to secure enjoyment.

without demolishing the wall. 29 I.C. 1002 = 13 A.L.J. 637. The extension of the projection of cornice beyond its original breadth and the consequent increase in the flow of rain water on the land of the servient owner or both constitute an addition to the burden of the servient owner. 24 O.W.N. 896 = 32 C.L.J. 27. The owner of the dominant tenement may raise the height of the eaves so long as he does not throw an increase burden on the servient tenement, but the projection of the new roof should not exceed that of the old, though at an increased height. 28 I.C. 169. But see also 138 I.C. 458 = 34 Bom.L.R. 395 = 1932 B. 224. Though the projection of eaves resulting in discharge of rain water is an easement according to sec. 23, III. (b) of the Easements Act, the mere projection of the eaves alone is not. The column of air occupied by a projection is not immovable property or any interest therein within the meaning of Art. 144, capable of being acquired by adverse possession. (37 B. 491 and 24 Bom.L.R. 305, Ref.) 34 Bom.L.R. 395 = 1932 B. 224. Re-construction of a house by the dominant owner involving a change in the situation of the roshandans does not mean a fresh easement requiring a fresh period of twenty years for its acquisition. 45 I.C. 985. Where the plaintiff's right of way is proved over a defined track, occasional deviation therefrom does not affect his right. 18 I.C. 85; 1926 N. 221. The prohibition of the user of a track, during particular season does not negative the claim of a general right of way, but is presumptive proof of a restricted right. 13 I.C. 85. Right of way for sweeper to go to privy of a house and clean it declared by a decree—Privy removed to a

different spot in the same house under orders of Municipality—No additional burden is imposed on the servient herirage, if sweeper entered and left the servient herirage land at the same point as before. 33 Bom.L.R. 1114 = 1931 B. 490. In the above case, the dominant herirage was not the privy, but the house within which it was enclosed, and so, the removal of it to another spot or re-building of it would not extinguish the easement under sec. 45. 1931 B. 490 = 33 Bom.L.R. 1114. See also 15 Bom.L.R. 876 (Projecting eaves); 24 B. 188 (Right to draw water); (1893) Bom.P.J. 143 (Discharging water); 23 B. 595 (Right of way).

*PROCEDURE.*—If the dominant owner exceeds the right, injunction and not damages is the proper remedy. 28 I.C. 169.

SEC. 23.—Whether any particular user of the passage by the dominant owner does not impose any additional burden upon the servient herirage, is essentially a question of fact (23 B. 595 and 50 B. 635, Rel. on.) 34 L.W. 369 = 1931 M. 128 = 61 M.L.J. 58. Where a house formerly used for residential purposes is used as godown for storing, the use of bullock-carts over the passage leading to the godown for carrying goods will throw additional burden on the servient tenement. 13 C. 136, Dist. (*Ibid.*) The right of flow of rain water does not include in law the flow of all kinds of water, e.g., sullage water. Passing of such water constitutes a nuisance and the servient owner has a cause of action against the dominant owner. 11 O.W.N. 657 = 1934 O. 237.

SEC. 24: PRINCIPLE OF SECTION AND ILLUSTRATIVE CASES.—The dominant owner has a right to do everything requisite to se-



owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

#### Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

#### Illustrations.

(a) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(b) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(c) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(d) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(e) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(f) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(g) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair.

cure to himself the fullest advantage of his servitude but thereby he should not impose any additional burden on the servient tenement. 39 I.O. 590 (2)=18 P.W.R. 1917. Repairing pipes on another's land. 23 C. 525. See also I.L.R. (1937) N. 21 (Right to enter on another's land in order to repair one's own wall standing on the land). Repairing roof. See 15 M. 286. On this section, see also 20 Bom.L.R. 403. The accessory rights mentioned in sec. 24 are not intended to deprive the servient owner of his rights of property unless such a result is absolutely essential. 42 B. 529=45 I.O. 422=20 Bom.L.R. 403. (Right to repair walls and eaves through which rain water was discharged). A person can also enter the neighbour's house or land to protect his eaves which project over the neighbour's house. 16 I.O. 893. Where the repair of the wall is reasonably necessary for its enjoyment the right to go to the neighbour's side of the premises to repair the wall is a necessary easement. 16 I.O. 893. See also 42 B. 529. The right does not allow going over the defendant's roof. 16 I.O. 893. Where the legal effect of one of the alternative adjudication in an award is to invest the owner of an estate with the right to claim an "easement" of necessity over the road leading from the public street to the parent estate,

this right must be claimed and established in appropriate legal proceedings against the owner of the servient tenement. It cannot be incorporated in the award by order of the Court purporting to act under G.P. Code, Sch. II, para. 12; 1930 L. 26.

SEC. 24, ILL. (d).—Public rights of way are not easements but arise from a dedication to the public evidenced by a deed or implied from custom and user. There can be no right of easement in favour of an indeterminate body of persons. 44 I.C. 868=14 N.L. R. 78. Where the owner of lands renders a way impassable, a person having a right to use the way may deviate from it and pass over adjoining land of the owner provided the deviation is reasonable. (*Ibid.*) Reading III. (d) along with sec. 24 it seems clear that the dominant power is only entitled to deviate from the original way and pass over the adjoining land of the servient owner to such extent as may be really necessary to secure the full enjoyment of his easement. Where the original way is blocked only in its northern portion, there is no justification for any deviation in the southern portion, as a distance of over hundred feet from the original way. Such a diversion can hardly be considered reasonable. 149 I.O. 949 (2)=1943 L. 199.



27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the

Servient owner not bound to do anything. dominant owner, to use the servient heritage in any way, consistent with the enjoyment of the easement : but he must not do any act tending to restrict the easement or to tender its exercise less convenient.

*Illustrations.*

(a) *A*, as owner of a house, has a right to lead water and send sewage through *B*'s land. *B* is not bound, as servient owner to clear the watercourse or scour the sewer.

(b) *A* grants a right of way through his land to *B* as owner of a field. *A* may feed his cattle on grass growing on the way, provided that *B*'s right of way is not thereby obstructed : but he must not build a wall at the end of his land so as to prevent *B* from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) *A*, in respect of his house, is entitled to an easement of support from *B*'s wall. *B* is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) *A*, in respect of his mill, is entitled to a watercourse through *B*'s land. *B* must not drive stakes so as to obstruct the watercourse.

(e) *A*, in respect of his house, is entitled to a certain quantity of light passing over *B*'s land. *B* must not plant trees so as to obstruct the passage to *A*'s widows of that quantity of light.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :—

Extent of easements.

Easement of necessity.

An easement of necessity, is co-extensive with the necessity as it existed when the easement was imposed.

The extent of any other easement and the mode of its enjoyment must be

Other easements.

fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed

or acquired.

SEC. 27: PRINCIPLE OF SECTION.—See 85 I.C. 608=1925 A. 348; 87 I.C. 899=1925 N. 389; I.L.R. (1937) Nag. 21. Where water flowing underground in a defined subterranean channel which forms the source of supply for the plaintiff's springs is abstracted by the defendants by digging a channel on their own land very near the springs. *Held*, that plaintiff could restrain by injunction any attempt to divert the underground channel or diminish his water-supply. 25 Bom.L.R. 789=47 B. 809=1923 B. 305. On this section, see also 20 B. 788; 13 A.L.J. 637.

SEC. 28 (a).—A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. A right of way of any one kind does not include a right of way of any other kind. The right of way appurtenant to the enclosure of a mosque can be used only for the purpose of passing to and from that enclosure, and the managers of the mosque cannot impose any additional burden on the adjoining lands by removing boundary walls or opening new passages from the enclosure of the mosque. If a man has power to make a way across another person's land he must exercise his power in a reasonable manner and have due regard to the convenience of the servient owner as to avoid inflicting on him needless and unreasonable injury. 7 Luck. 540=1932 O. 274. A right of way of one kind, *e.g.*, for persons, cattle and carts, etc., does not include a right of way of another kind; *e.g.*, for sweepers removing nightsoil, in the absence of evidence as to the probable intention of

parties, and the purpose for which the right was imposed or acquired. 59 I.C. 426=22 Bom.L.R. 1131. See also 90 I.C. 149=26 Cr.L.J. 1493. But see 34 Bom.L.R. 1150, where the grant of right of way was unrestricted. Where an easement is claimed over another's property, the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. But when a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, *e.g.*, the user of a way for horses may include the right to lead smaller animals as well, but not larger animals or loads. 65 I.C. 579. The user of a path for the passage of men, carts and palanquins, may also entitle the dominant owner to take cattle, processions and corpses along the path. 65 I.C. 579.

ROAD AND HIGHWAY—DISTINCTION.—A road or path over which individuals or a limited class of public have a right of passage is not a highway. An owner of land adjoining a highway is entitled to such highway at any point at which his land actually touches it, but he has no such right in the case of land adjoining a road not subject to the public right of passage. 7 Luck. 540=1932 O. 274.

SEC. 28 (b), (c) AND (d).—As regards an easement of light, there is no rule defining the measure of the dominant owner's right or requiring an angle of 45 degrees through which rays of the sun are to be received. 1923 A. 542. To sustain an action, there must be substantial privation of light enough to

In the absence of evidence as to such intention and purpose—

- Right of way. (a) a right of way of any one kind does not include a right of way of any other kind :
- (b) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made :
- Right to light or air acquired by grant. (c) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :
- Prescriptive right to light or air. (d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and
- Prescriptive right to pollute air and water. (e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.
- Other prescriptive rights.
29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.
- Increase of easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

render the occupation of the house uncomfortable according to ordinary notions. 1923 A. 542. See also 20 M.L.J. 29=7 M.L.T. 245; 7 Bom.L.R. 352; 7 Bom.L.R. 73; 173 I.C. 380=1938 Sind 37; 29 B. 157; 35 C. 661; 18 C.W.N. 933=27 M.L.J. 117=42 C. 46 (P.C.); 131 I.C. 104=1931 L. 443. The dominant owner is not entitled to the full amount of light enjoyed during the prescriptive period, but only to so much as is necessary for habitation or business according to the ordinary notions of mankind. There is no infringement of the right unless the obstruction amounts to a nuisance. 42 C. 46=27 M.L.J. 117=41 I.A. 180 (P.C.). The owner of a dominant heritage has no absolute right to the access of light and air to windows and apertures, and is not entitled to compensation by way of injunction or otherwise for the disturbance of an easement, unless he has sustained substantial damage; that substantial damage must be a diminution of the value of the dominant heritage, or of the utility thereof, material interference with the physical comfort of persons using the dominant heritage, a material interference with the use of the dominant heritage in as beneficial a manner as it had been used before such interference. An owner of ancient lights is entitled to sufficient light according

to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop or other place of business. So also, to constitute an infringement of an easement of light and air, there must be a substantial privation of light and air enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. 179 I.C. 884=1939 Sind 39. In the case of a suit relating to an easement of light and air, reference to reported cases is necessarily of little value because, whether or not the disturbance of an easement of light and air amounts to a nuisance, depends entirely on the facts and circumstances of each particular case. So also, as the law relating to easements in British India is governed very largely, if not entirely, by the Easements Act in those provinces to which it has been made applicable, it is of little practical use to refer to the provisions of the English statute and decisions in English cases, in a matter relating to easements. 179 I.C. 884=1939 Sind 39. See also 1941 Sind 211.

SEC. 28 (e).—If a grazing area is larger

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

*Illustrations.*

(a) *A*, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. *A* alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b) *A* has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. *A* extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(c) *A*, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on *B*'s land. *A* buys a field and unites it to his farm. *A* is not thereby entitled to take leaves to manure the field.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares,

but not so as to increase substantially the burden on the servient heritage : provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any)

than that required by the persons, a proprietor may use the excess for his own purposes. The persons having grazing rights cannot prevent him from developing any excess area and using it to its best purposes. 67 I.C. 306. Exclusive fishery rights do not give occupancy right, but lease of holding part of which is under water will give a right to acquisition of occupancy in the whole. 3 P.L.T. 53=1922 P. 9.

SECS. 28, 33 AND 35: ACTION FOR DAMAGES OR INJUNCTION—ELEMENTS TO BE PROVED.—In considering the question about the easement for light, secs. 28, 33 and 35 have to be read together. In such cases it is clear that damages may only be recovered if there has been substantial interference as described in Expl. 2, sec. 33 and that an injunction can only be granted when compensation might be allowed under that section, that is, that both in the case of an action for damages or for an injunction *simpliciter*, it is necessary for the plaintiff to show conclusively, that there has been substantial interference with physical comfort, etc. 55 A. 711=1933 A.L.J. 1006=1933 A. 492. See also 163 I.C. 843=1936 A.L.J. 712=1936 All. 517.

SEC. 29.—The height of the roof in the dominant tenement which had an easement of letting down rain water on another's roof, was raised from 7 feet to 21 feet and instead of allowing the dripping of water along the eaves, it was poured down through pipes: *held*, that burden on the servient tenement was increased thereby and therefore the easement was extinguished. 58 I.C. 967. Plaintiff altered the gabled roof of his house to a pucca flat roof. Formerly there was a right to sprinkle water on the whole length of the eaves on one side of the house. The right to that easement was established. After the alteration the water of the whole roof was discharged through one hole on to the defendant's land. *Held*, that change of his character completely destroyed the original easement,

and it could not be said that there was any prescriptive right for the new condition of affairs and the burden had not been increased substantially. 55 All. 711=1933 A.L.J. 1006=1933 All. 492. The imposition of an additional burden does not have the effect of extinguishing the right of easement altogether, when the additional burden is separable from the original burden. 40 P.L.R. 298=1933 Lah. 751. A right to use the water of a tank of a particular depth is not enlarged in consequence of excavation and increase in the depth of the tank made by the servient owner. When the water falls below the level of the original depth of the tank as it was before the excavation, the dominant owner cannot take water out of the tank, because that will be increasing the burden of the subservient tenement. 155 I.C. 719=60 O.L.J. 321=1935 Cal. 253. Where drain water has been passing through a drain over another's lands and from there on to the public way, from the putting up of a pipe in a well in the dominant owner's land, it could not be inferred as a matter of law that there has been so much increase in the burden of easement as to destroy the easement. 1941 A.L.J. 282=1941 All. 289. On this section, see also 6 M.H.C. 112; 20 N.L.J. 99; 13 C. 136=13 I.A. 77 (P. C.) as to what amounts to increase of easements. Prescriptive right to maintain dam across river for purpose of taking water to tank through channel—Right to enlarge dimensions of channel or to take increased quantity of water. See 1938 Mad. 180=46 L.W. 862.

SEC. 30.—If two houses were common and a certain right of way belonged to the parties, the passage being common, it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was reserved for common enjoyment. 36 B. 379=15 I.C. 818=14 Bom. L.B. 418. When a dominant heritage is divided between two or more persons the ease-

under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

*Illustrations.*

(a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to *A*, the other to *B*. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to *A*, the other to *B*. *A* and *B* are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c) *A*, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

31. In the case of excessive user of an easement the servient owner may

Obstruction in case of excessive user.

without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be

obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

*Illustration.*

*A*, having a right to the free passage over *B*'s land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. *B* cannot obstruct the excessive user.

## CHAPTER IV.

### THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

*Illustration.*

*A*, as owner of a house has a right of way over *B*'s land. *C* unlawfully enters on *B*'s land, and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation

Suit for disturbance of easement.

for the disturbance of the easement or of any right accessory thereto: provided that the disturbance has actually caused substantial damage to the plaintiff.

ment becomes annexed to each of the shares, provided that such annexation is consistent with the terms of the instrument under which the division was made. 18 L.W. 404=1923 M. 674. Where the same grantor conveys in the course of one transaction portions of his property to several grantees, each grantee is presumed in law to take his portion subject to such rights, as a right of way as are created in favour of the other grantees. 38 M. 141=24 M.L.J. 552. "Appurtenances" when used in conveyance include a right of way. 38 M. 141.

SEC. 31.—If a person cannot obstruct the new user without obstructing the old, he must submit to the new burden. See 11 M.L.J. 290; 7 C. 453; Bom.P.J. (1889) 310.

SEC. 32.—Right of co-owner to put up eaves and insert beams in a party wall. See 6 Bom. L.R. 682. The law takes no notice of an obstruction which has its origin in the caprice of sentiment of the aggrieved party. It does not concern itself with an obstruction which is trivial or immaterial. In order to amount to disturbance the act complained of must

have caused substantial damage, *i.e.*, it must materially affect the comfortable or beneficial enjoyment of the dominant tenement or lessen its selling or letting value. 133 I.C. 214=53 C.L.J. 504.

SECS. 32 AND 33: LIGHT AND AIR—ACCESS TO WINDOWS—RIGHT OF DOMINANT OWNER.—The owner of a dominant heritage has no absolute right to the access of light and air to windows and apertures. To constitute an infringement of an easement of light and air there must be a substantial privation of light and air enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. I.L.R. (1942) Kar. 225. As to light and air, see also 1943 Cal. 35; 1945 Cal. 438; 1942 Sind 17.

SEC. 33: PRINCIPLES AND ILLUSTRATIONS.—The law does not concern itself with a disturbance which is trivial or immaterial. Where the plaintiff comes into Court at once, when the disturbance is threatened and the

*Explanation I.*—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage is substantial damage within the meaning of this section and section thirty-four.

*Explanation II.*—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

*Explanation III.*—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

defendant completes his structures pending the suit, he does so at his own peril. 28 I.O. 962=13 A.L.J. 385. As to what amounts to disturbance, see also 7 Bom.L.R. 825; *Ibid.* 73; 54 M. 793=1931 M. 284=61 M.L.J. 563; 133 I.C. 214=53 O.L.J. 604; 5 A. 369; 8 B. 95; 39 C. 59; Bom.P.J. (1895) 272; 3 N.L. R. 114. Under sec. 33 any act of the defendant which affects the evidence of easement is enough to sustain an action by the plaintiff, though the plaintiff does not suffer actual damage. In other words there is a wrongful act for which an action lies. In a suit by the plaintiff for an injunction in respect of alleged obstruction to light and air, it was found that there were three windows in the plaintiff's wall which were in existence for over the statutory period and that obstruction was caused to one of them by the defendants raising a wall; but it was also found that the plaintiff was receiving sufficient light and air from other resources. *Held*, that the closing up of one of the windows of the plaintiff's did constitute an invasion of the plaintiff's easement though it did not cause actual damage to the plaintiff and therefore the plaintiff had a cause of action against the defendant. 52 L.W. 383=1940 Mad. 952=(1940) 2 M.L.J. 381. Extent of damage depends on mode of life and place of living. 97 I.C. 500=1926 A. 764. The test of interference with the right to light and air is whether the obstruction amounts to a nuisance. 23 I.C. 959; 152 I. C. 1060=1935 L. 79=37 P.L.R. 34. See also 97 I.C. 500=1926 A. 764. There is no actionable wrong unless there is a material interference with the physical comfort of the plaintiff or other substantial damage. 33 I. C. 615=9 S.L.R. 101 (33 M. 327 and *Coll's case*, 1904 A.C. 179 Foll.). If in spite of an obstruction being created by the servient owner, the same quantity of light still penetrates the ancient windows of a dominant owner the latter has no remedy in equity. 33 I.C. 615=9 S.L.R. 101. Where the plaintiff has a right to pass his rain and sewage water across the defendant's land to the public drain, the diversion of the old route taken by the water in former days and passing it by another route does not constitute an obstruction to the exercise of plaintiff's right. 30 I.O.

508=13 A.L.J. 821. Grazing rights include right to have sufficient pasturage left. 1925 L. 216=92 I.C. 403.

**PARTIES.**—As a general rule, where a person claims a right of easement on a servient tenement all the owners of the servient tenement ought to be made parties, as any decree in the absence of a necessary party declaring a right of easement would be infructuous. 1924 C. 369. But there are cases which may well be taken as exceptions to the general rule, such as where any of the co-sharers took no part in obstructing the plaintiff's right. 1924 C. 369.

**REMEDY.**—Where an easement has been disturbed, plaintiff is entitled to an injunction rather than damages. 28 I.O. 962=13 A.L.J. 385. Sec. 33 allows compensation to be recovered provided that the disturbance has actually caused a substantial damage to the plaintiff. 28 I.C. 962. In case of interference with water supply, the injured party may, under certain circumstances, have a cause of action apart from proof of actual damage and sue for injunction, if he establishes prospective probable damage. 54 M. 793=1931 M. 284=61 M.L.J. 563 (7 M.H.C.B. 60, *Rel. on*; 31 M. 171, *Ref.*). The plaintiff sued for a mandatory injunction requiring the defendant to demolish his house so as not to block the windows in his rooms. The plaintiff relied on a mutual agreement which however merely stated that the defendant was not to close the windows in question and the other circumstances indicated that the parties could not have intended that the defendant would not erect any building at all. *Held*, that the plaintiff was not entitled to the injunction as prayed for. *Held*, further, that the plaintiff would not be entitled to damages unless on proof of such diminution of light and air as would be ordinarily necessary and in this connection the Court may take into account the other sources of light and air. 15 L. 320=1934 L. 240.

**BURDEN OF PROOF.**—In an action for an injunction to restrain infringement of the right to light and air, the plaintiff, in order to succeed, must prove an invasion of his legal right to the easement, sufficient to amount to a nuisance. The easement has not to be measured

*Illustrations.*

(a) A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(b) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage is actually sustained.

When cause of action arises for removal of support.

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive) an injunction may be granted to restrain the disturbance of an easement—

by the amount of light and air that had been enjoyed. There is no infringement unless that which has been done amounts to a nuisance. A finding that the place still remained a well-lighted and well-ventilated place, in spite of the alleged infringement, would be fatal to the plaintiff's case. The quantity of light to which a right can be acquired is what is required for the ordinary purposes of habitation or business of the tenement according to ordinary notions. I.L.R. (1941) Kar. 381=1941 Sind 211. In order, to establish substantial damage under sec. 33, the plaintiff must prove material diminution in the value of his heritage or material interference with his physical comfort which can be ascribed to the interruption of the free passage of light and air. The state of the property at the time of the alleged disturbance of the easement has to be looked to, not as it was before, or as it might be at a future date. The plaintiff cannot claim that sources of light and air alleged to be liable to obstruction at a later date, should be excluded from consideration. I.L.R. (1941) Kar. 381=1941 Sind 211.

SECS. 33 AND 35.—See 55 A. 711=1933 A. 492; 152 I.C. 1060=37 P.L.R. 34=1935 L. 79. SECS. 33 and 35 make it clear that a plaintiff is not entitled to an injunction in every case of an interference with an easement of light and air. An injunction cannot be granted in the case of an actual interference unless there is an actionable interference with the easement. Under Expls. 2 and 3 of sec. 33, no interference with the free passage of light and air is actionable unless such interference is of a substantial character. 163 I.C. 843=1936 A.L.J. 712=1936 A. 517. In cases of dispute about interference of light, light acquired by grant or prescription and not light which has not yet been acquired by prescription but was only in process of being so acquired, can be taken into account. Light coming in sufficient amount from sources other than those in dispute should be taken into account. 17 L. 599=165 I.C. 291=1936 Lah. 792.

SEC. 34: RIGHT OF SUPPORT.—Every land owner has a right to the support of his land in its natural state. It is not an easement; it is a right of property. In a suit for injunction restraining the defendant from in-

terfering with plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. 59 C. 363=1932 C. 542. The right to the support of land in its natural state vertically by the subjacent strata and laterally by the adjacent soil, is a right to which the owner of the surface is of common right *prima facie* entitled. The right of an owner of land to the support from adjacent or subjacent soil is not that the substance supporting soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support. 11 R. 47=1933 R. 18. Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. [Pattison v. Gilford, (1874) 18 Eq. 259 and 24 C. 260, Rel. on. 11 R. 47=1933 R. 18. A suit for perpetual injunction restraining the defendant from removing the necessary lateral support to which the plaintiff's land is entitled is a suit in the nature of a *quia timet* action and the plaintiff, in order to succeed, must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable. Therefore, excavation and removal of the earth on his own land a defendant without leaving sufficient support to the adjoining plaintiff's land to enable it to remain in its natural state, does not *inter se* constitute an actionable invasion of the latter's right; and such an act to constitute a valid foundation for a claim by the adjoining plaintiff for damages must be coupled with actual damage or injury to his property. 11 R. 47=1933 R. 18.

SEC. 35.—[See also Notes under sec. 33.] As to the principles on which Courts will grant injunction in respect of easements, see Specific Relief Act, secs. 52-57, and notes thereunder and C.P. Code, O. 39 and notes thereunder. Court has got discretion to grant injunction or not—Different considerations govern Indian Courts and English Courts—Courts must have consideration for both parties. See 3 R. 230=87 I.C. 800=1925 R. 327. An injunction is only an alternative within



(a) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter ;

(b) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

36. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.

the discretion of the Court and is not an independent form of relief. 117 I.C. 618=1929 A. 430. It is not granted where pecuniary compensation would afford adequate relief. 165 I.C. 94=1936 N. 274. An injunction to restrain the disturbance of an easement of light can only be granted where substantial damage is proved to have been caused. 117 I.C. 618=1929 A. 430. The word “when” in sec. 35 (a) must be construed to mean “when and where” because it would be useless to prescribe that an injunction could be granted when damages can be claimed under sec. 33, if damages under sec. 33 could not be claimed. 117 I.C. 618=1929 A. 430.

**ILLUSTRATIVE CASES.—LIGHT AND AIR.**—The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. The single question in these cases is whether the obstruction complained of is a nuisance. Where in a suit for a mandatory injunction against the defendant prohibiting him from obstructing the light and air passing through certain ventilators, it was found that even if those ventilators were closed, the courtyard and the plaintiff's house would receive plenty of light and air, there is no question of any nuisance being caused by the obstruction and the plaintiff is not entitled to any injunction. 152 I.C. 1060 (2)=37 P.L.R. 34=1935 I.L. 79. The decree issuing injunction about obstruction to light and air should be given in general terms. 25 Bom.L.R. 239=1923 B. 196. The dominant owner acquires by prescription so much light as is sufficient for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind with reference to the locality and surroundings concerned; and the amount received during the period of prescription is immaterial. 57 I.C. 706. It is only substantial privation of light enough to make the occupation of the house uncomfortable, or unfit for business according to the ordinary notions of mankind which gives rise to an actionable claim. The mere fact that light received has become less, gives no right. 42 C. 46=41 I.A. 180=27 M.L.J. 117 (P. C.). See also 97 I.C. 500=1926 A. 764. (As to test of nuisance, see 96 I.C. 546=9 N.L.J. 136=1926 N. 474.) In India the right to air is more important than the right to light; damage will be awarded even when the injury is not detrimental to the existence and use of the property. 57 I.C. 706; 19 I.C. 843=

6 S.L.R. 255.

**WINDOWS AND SHUTTERS.**—The right to open and shut windows and shutters into adjoining land can be acquired as an easement. The owner of such an easement is entitled to restrain the servient owner by an injunction from interfering with his rights by erecting a wall or building close to the boundaries. 45 I.C. 435=7 L.W. 332. The Court should issue a mandatory injunction directing defendant to lower the roof of his house so as to enable plaintiff to shut and open the window freely. (*Ibid.*) As to when injunction will be granted in respect of prospective damage to water-supply, see 54 M. 793=1931 M. 284=61 M.L.J. 563.

**VENTILATORS.**—When by the closing of certain ventilators in a house a thorough draught for the house is not allowed, the injury is so serious that the house will be substantially useless. 19 I.C. 843=6 S.L.R. 255.

**RIGHT OF PRIVACY.**—To succeed in an action to restrain any interference with a right of privacy, a plaintiff must show not only that such a right of privacy exists by custom in the district in which the premises are situated but also that he has in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant. A contention that the opening of window overlooking other premises cannot be restrained if such other premises are already overlooked from any parts of adjoining or neighbouring premises such as roofs is not sound. 1935 A.L.J. 432=1935 A.W.R. 322.

**COMPOUND WALL.**—Where the raising of a compound wall makes the habitation of a neighbour's room uncomfortable, so much of the wall as produced this effect will be removed. 57 I.C. 706. See also 1926 M.W. N. 195=51 M.L.J. 804.

**RIGHT OF WAY.**—It is only the inconvenience to the public that justifies restriction of right of way. 2 L.L.J. 499.

**WATER RIGHTS.**—An occupier of abutting lands cannot be restrained in his exercise of his natural rights, simply because he becomes a lessee of other lands not abutting. 24 I.C. 685=1914 M.W.N. 481. Where the water of a stream has been used for irrigating only abutting lands, the owner of abutting lands cannot be restrained from using more than a reasonable quantity by another to whom no material diminution in supply is caused. 24 I.C. 685. The actual and not a mere threatened use of the water flowing through a natural stream to irrigate lands other than those abutting on the stream gives a right to sue. 24 I.C. 685.

**SEC. 36.**—Under this section the dominant



## CHAPTER V.

## THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

*Exception.*—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.

*Illustrations.*

(a) *A* transfers Sultanpur to *B* on condition that he does not marry *C*. *B* imposes an easement on Sultanpur. Then *B* marries *C*. *B*'s interest on Sultanpur ends, and with it the easement is extinguished.

(b) *A*, in 1860, let Sultanpur to *B* for thirty years from the date of the lease. *B*, in 1861, imposes an easement on the land in favour of *C*, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. *B*'s interest in Sultanpur then ends, and with it *C*'s easement.

(c) *A* and *B*, tenants of *C*, have permanent transferable interests in their respective holdings. *A* imposes on his holding an easement to draw water from a tank for the purpose of irrigating *B*'s land. *B* enjoys the easement for twenty years. Then *A*'s rent falls into arrear and his interest is sold. *B*'s easement is extinguished.

(d) *A* mortgages Sultanpur to *B*, and lawfully imposes an easement on the land in favour of *C* in accordance with the provisions of section ten. The land is sold to *D* in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

*Explanation I.*—An easement is impliedly released—

(a) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority :

(b) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

*Explanation II.*—Mere non-user of an easement is not an implied release within the meaning of this section.

*Illustrations.*

(a) *A*, *B* and *C* are co-owners of a house to which an easement is annexed. *A*, without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(b) *A* grants *B* an easement over *A*'s land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

owner cannot himself abate a wrongful obstruction of an easement. 138 I.C. 38=1932 N. 83. Dominant owner himself abating nuisance—If offence under Penal Code, sec. 426. See 29 Bom.L.R. 484.

Sec. 37.—Land acquired under Land Acquisition Act is taken free of easement rights over the same. See 14 C. 423; 6 B.L.R. (App.) 74.

Sec. 38.—An agreement to build a common wall with holes indicating permission to end the rafters of the next storey which may be constructed does not imply consent to close ventilators by building such next storey. 1923 L. 249. Permanent alteration in the dominant heritage must be such "as to show that the dominant owner intended to cease to enjoy" the easement in future, and unless such an intention is established, the

dominant owner cannot be disentitled to the easement on the ground of non-user. 25 I.C. 383. An agreement by one of several co-owners of a dominant tenement to effect a release of an easement is not effectual against the other co-owners. 19 I.C. 908=6 S.L.R. 265. On this section, see also 35 C. 889; 26 B. 374; 7 I.C. 813; 8 M.L.T. 292.

Sec. 38, Expl. II.—Where the proprietor of an estate comprising a tank owned an easement of storing water and inundating the lands near by, the mere fact that the predecessors of the defendant in charge of the estate did not think it profitable to repair the tank bund and store water for over 30 years would not amount to an abandonment or implied release of the easement, so as to preclude the defendant from repairing the tank and storing water. 1931 M. 561 (2)=60 M.L.J. 662.

(c) *A*, having the right to discharge his eavesdroppings into *B*'s yard, expressly authorizes *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A*'s easement is extinguished to the extent of the interference.

(d) *A*, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) *A*, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on *B*'s land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on *C*'s land. The easement is impliedly released.

39. An easement is extinguished when the servient owner in exercise of a power reserved in this behalf, revokes the easement.

Extinction by revocation.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition, that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Extinction on expiration of limited period or happening of dissolving condition.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

*Illustration.*

*A* grants *B* a field inaccessible except by passing over *A*'s adjoining land. *B* afterwards purchases a part of that land over which he can pass by his field. The right of way over *A*'s land which *B* had acquired is extinguished.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction of useless easement.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

Extinction by permanent change in dominant heritage.

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(c) the easement is an easement of necessity.

SEC. 39.—Where a person grants an easement of a right of way over his land to another and expressly reserves to himself the right to revoke it under certain conditions within a definite period and on payment of a particular amount, it is a reservation made for the beneficial enjoyment of his land. It is in the nature of covenant running with the land and is capable of assignment, and a transferee of the land could enforce it. 1939 N.L.J. 27=1939 Nag. 65.

SEC. 41.—An easement once extinguished cannot be revived by any act on the part of the dominant owner. 1930 M.W.N. 120.

SEC. 42.—*See also* notes under sec. 13 *supra*. An easement which ceases to be beneficial to the dominant owner might become extinguished. 50 I.C. 756. (33 A. 461, Ref.).

SEC. 43.—Where an additional burden alleged to have been imposed on the servient tenement could be reduced without difficulty to its original limit by the construction or alteration of a structure, the easement is not extinguished. 44 A. 343=20 A.L.J. 202=1922 A. 28. An easement of light and air for windows is not extinguished on demolition of

a wall which is re-built without delay, and practically with same dimensions. 24 Bom. L.R. 83=46 B. 448=1922 B. 3; 131 I.C. 429=1931 N. 80 (20 W.R. 185, Diss.; 7 C. 145; 33 M. 327, Ref.) *See also* 1937 Lah. 839 (Replacing of windows—Increase of burden). The owner of an easement is precluded from increasing his right on the alteration of his dominant tenement. In a case where by change of height, eaves discharge water with increased force, additional burden is put upon the plaintiff's land. 32 C.L.J. 27=58 I.C. 854=24 C.W.N. 896 (Burden of proof that no additional burden is imposed lies on dominant owner). An owner of the dominant tenement had a right to drop water from his eaves at a distance of seven feet height. He increased the height three times and allowed water to drop through pipes. *Held*, that his easement was extinguished by the increase of burden. 58 I.C. 967. Dominant owner increasing height of water spout dropping water on servient tenement by four feet—Easement is not destroyed. 102 I.C. 447=1927 L. 492. On this section, *see also* 7 C. 453.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement :

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage ; and the provisions of section fourteen apply to such way.

*Illustrations.*

(a) *A* grants to *B*, as the owner of a certain house, a right to fish in a river running through *A*'s land. The river changes its course permanently and runs through *C*'s land. *B*'s easement is extinguished.

(b) Access to a path over which *A* has a right of way is permanently cut off by an earthquake. *A*'s right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

*Illustration.*

*A* has a right of way over a road running along the foot of a seacliff. The road is washed away by a permanent encroachment of the sea. *A*'s easement is extinguished.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Extinction by unity of owner ship.

*Illustrations.*

(a) *A*, as the owner of a house, has a right of way over *B*'s field. *A* mortgages his house, and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

SEC. 45.—*See* 7 Bom.L.R. 352. Even if a door and a part of the house have collapsed, a right of easement already acquired by the plaintiff to use the adjoining lane, as a passage to the site of his house, cannot be extinguished. 27 N.L.R. 213=1931 N. 189. The plaintiff obtained a decree declaring that his sweeper was at liberty to go through the lane on the defendant's land in order to clear the latrine situated in the plaintiff's premises. The privy was subsequently removed by orders of the Municipality, to a different place on the plaintiff's land and the defendant contended that the plaintiff's easement was extinguished by the fact, that the dominant heritage had been destroyed and rebuilt on a different site. *Held*, (i) that dominant heritage was not the privy, but the plaintiff's house within which it was enclosed; (ii) so the rebuilding of the privy had not the effect of extinguishing the easement under secs. 45; (iii) the case was governed by sec. 23 and as there was no additional burden imposed on the servient heritage and the sweeper entered and left the defendant's land at the same point as before, the rebuilding of the privy did not make the prior decree incapable of execution. 33 Bom.L.R. 1114=1931 B. 490.

SEC. 46.—As to extinction of easements by merger, *see* 1926 C. 92. The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate. But unity of title will not extinguish an easement, unless the ownership of the two estates be co-exten-

sive, equal in validity, quality and other circumstances. If there has been unity of possession merely and not unity of seisin for estates in fee simple, an easement which has been thereby suspended will revive on severance of the union, but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will not revive unless they are recreated on severance of the former dominant and servient estates. 50 C. 356=36 C.L.J. 161=1923 C. 8. *See also* A.W.N. (1887) 260. Where the ownership of the two estates is not co-existent and equal in validity—the dominant tenement being held for a term of years only and the servient tenement in full right of ownership—the acquisition of a right of way is not extinguished but is only suspended by unity of possession of the dominant and servient tenements. (50 Cal. 356, Rel. on.) 1939 Rang. 421=1940 Rang.L.R. 93. *See also* 1941 Cal. 289. Right of ownership and easement are incompatible. A.W.N. (1883) 68. Before there can be any extinguishment of an easement, there must be a merger of the servient and dominant tenements so as to result in the single ownership of both. Where the owner of the dominant tenement acquires the right of a co-sharer in the servient tenement, the ownership of the two tenements does not merge into one and therefore there is no extinguishment but merely a suspension of the easement (right of way) which can revive after a partition decree. 1941 Cal. 289=199 I.C. 689.

(b) The dominant owner acquires only part of the servient heritage : the easement is not extinguished, except in the case illustrated in section forty-one.

(c) The servient owner acquires the dominant heritage in connection with a third person : the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages : the easements are not extinguished.

(e) The joint owners of the dominant heritage jointly acquire the servient heritage : the easement is extinguished.

(f) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner ; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner :

Provided that if in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877,<sup>1</sup> a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(a) where the cessation is in pursuance of contract between the dominant and servient owners ;

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period ; or

#### LEG. REF.

<sup>1</sup> See now the Indian Registration Act (XVI of 1908).

SEC. 47: PRINCIPLE OF SECTION.—See 45 B. 80=57 I.C. 143=22 Bom.L.R. 415. An easement is not extinguished where its user is suspended in pursuance of a contract between the dominant and the servient owners. A person who purchases the servient tenement in an execution sale with knowledge of the easement is bound thereby. 45 I.C. 618=34 P.L.R. 1918. A right of easement acquired by the plaintiff to use the adjoining lane as a passage to his door is not extinguished by temporary non-user not amounting to abandonment. Where the door to which he had a right of way collapsed a few years before but was re-opened before the date of obstruction by the defendant, the plaintiff has a right of action. 134 I.C. 673=1931 N. 189.

**WATER.**—Flowing of water continuously through a rill, cuttal and another water-course

may form a natural stream in which easement rights may be acquired as against Government. 31 I.C. 982. If the Government wished to claim right to water flowing through pattah land they can do it only when classifying the bed separately as poramboke; otherwise the ryot can retain it as his property. 31 I.C. 982. Whether a prescriptive right to light and air is lost through abandonment, depends on the intention of the parties to be gathered from the circumstances and the interval of non-user. 49 I.C. 752. It is not necessary for the building to enjoy the light that it should be identical with that which acquired the right either in structure or the purposes for which it is to be used. 49 I.C. 752. On this section, see also 8 M.L.T. 292; 5 M.L.T. 216; 18 I.C. 85. An easement of light and air for windows is not extinguished on demolition of a wall which is re-built without delay. 24 Bom.L.R. 83=46 B. 448=1922 B. 3.

(c) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

*Illustration.*

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

*Illustration.*

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section forty-seven. The right of way is also extinguished.

49. An easement is suspended when the dominant owner becomes entitled

Suspension of easement.

to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

50. The servient owner has no right to require that an easement be continued ,

Servient owners not entitled to require continuance.

and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the

extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Where such notice has not been given, the servient owner is entitled to

Compensation for damage caused by extinguishment or suspension.

compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

*Illustration.*

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

51. An easement extinguished under section forty-five revives (a) when the

Revival of easements.

destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion, (b) when the destroyed

heritage is a servient building and before twenty years have expired such building

SEC. 49.—Where the dominant and servient tenements become vested in the same person, the easement remains suspended for the time being; after the vesting ceases or discontinues, the easement becomes revived. 118 I.C. 225=1929 A. 862. On this section, see also 16 I.C. 365=1913 M.W.N. 95.

SEC. 50.—The owner of a servient tenement over which the dominant owner had acquired a right to discharge his water, cannot insist that the water should be continued to be so discharged. 46 I.C. 24. See also 2 O.L.R. 141. An easement exists only for the benefit of the dominant tenement and a servient owner gets no right to insist on its continuance or to sue for damages on its abandonment. 17 C.W.N. 1066=20 I.C. 815=18 C.L.J. 131. As to the natural right to collect and retain surface water, or to allow it to flow on naturally to the lower lands, see 4 P.L.T. 81=2 P. 110. The owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that

is, water not passing through a defined channel. 4 P.L.T. 81=2 P. 110. The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement. (*Ibid.*).

SEC. 51.—[See also notes under sec. 49.] When a dominant tenement is rebuilt, the dominant owner has no right to impose a greater burden on the servient tenement than the prescriptive quantity of the right enjoyed. 33 I.C. 615=9 S.L.R. 101. Blocking up an old window and building another of the same dimensions in another place is an imposition of a burden on the servient tenement, which was not existing till then. 33 I.C. 615. But the right of the dominant owner under the common law to free access of light and air through an ancient window is not lost by shifting the window backwards or forwards. 33 I.C. 615.

is rebuilt upon the same site; and (c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section forty-six revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-seven.

*Illustration.*

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

## CHAPTER VI.

### LICENSES.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.

SEC. 52.—A licensee is a person without any title and has no interest in the land. 38 A. 178=14 A.L.J. 137. *See also* 132 I.C. 799=8 O.W.N. 714. Licence and easement distinguished. 7 Bom.L.R. 352; 23 B. 397; 4 M.H.C.R. 98; 16 M. 304; 8 Bom.L.R. 310 (Permission to use land as burial ground). The nomenclature used by the parties is not conclusive as to whether a particular transaction is a licence, lease or easement. 1933 A.L.J. 749=1933 A. 735 (F.B.); 16 M. 280 (Right to put up trap for elephants).

LICENCE OR LEASE.—Agreement to occupy portion of railway land for construction of petroleum installations signed by both parties—Restrictions on mode of enjoyment and against sub-letting—Agreement terminable by short notice—Nature of agreement. *See* 1933 A. 735=1933 A.L.J. 749 (F.B.). In deciding whether a document amounts to a lease or is only a licence, the recitals therein can never be conclusive; the Court has took to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties. 1933 A.L.J. 749=1933 A. 735 (F.B.). Licence, if transferable. *See* 84 I.C. 284=1924 A. 825. Licence may be implied from circumstances. *See* 1925 A. 203. Certain property was given by a person to a local body for the purposes of a school. The body was allowed to hold possession of the land so long as it was being used for the purpose of the school. There was however no transfer of ownership nor was there any evidence showing transfer of ownership, and there was also no relationship of landlord and tenant between the parties. *Held*, that the permission granted to the local body to hold the land and use it for the purposes of the school was in the nature of a licence. 186 I.C. 890=1940 Lah. 18. The use of land as a *Shan* does not justify the making of a structure on it for the purpose of protecting cattle. Where it is not established that the use of a *Shan* was an easement of necessity

or that an easement had been acquired, it amounts to a mere licence under sec. 52. 1934 A. 836. A weighman in an old market allowed by Government to continue the same calling in the new market does not acquire any exclusive privilege and is only a licensee. 23 I.C. 922=12 A.L.J. 447. Validity of transfer by a holder of a licence to build. 1 Luck. O. 238=103 I.C. 681=1927 O. 314. A licensee having no interest in property cannot maintain a suit for possession. 103 I.C. 43=1927 A. 633. Licence to use privy as dwelling-house—If revocable. 51 B. 274=29 Bom.L.R. 78=1927 B. 115. As to whether a licence is revocable, *see also* 29 Bom.L.R. 312=100 I.C. 393=1927 B. 240.

REVOCATION—LICENCE COUPLED WITH INTEREST—LICENCE GRANTED FOR CONSIDERATION.—A mere licence is revocable at will. A licence coupled with a grant or interest is not revocable, except for sufficient cause, till the grant to which the licence is incident, is exhausted. A licence which would otherwise have been revocable is not revocable if there is a contract (which means an agreement for consideration) between the grantor and the licensee not to revoke the licence for a time or indefinitely till the period mentioned in the contract expires. The contract may either be express or may be implied. 49 O.W.N. 346=A.I.R. 1945 Cal. 413. In the case of a bare licence which is not coupled with the grant of any interest in property, the licensee will no doubt not be entitled to maintain an action for possession in his name. But this rule cannot be extended to a case where there is definitely an interest in property created by the arrangement which is sought to be described as a licence. 75 O.L.J. 236=1943 Cal. 143.

DEMISE AND NOT MERELY LICENCE—GRANT OF EXCLUSIVE RIGHT OF OCCUPATION.—The effect of a deed which gives the holder an exclusive right of occupation of a shop, although subject to certain reservations and to

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.  
Who may grant license.
54. The grant of a license may be express or implied from the conduct of the grantor and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.  
Grant may be express or implied.
55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.  
Accessory licenses annexed by law.

*Illustration.*

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.  
License when transferable.

a restriction of the purpose for which it may be used, amounts in law to a demise of the shop itself and not merely a licence. The main test in such cases is that of exclusive possession. 1933 A. 911. See also 1933 A. 785 (F.B.).

SECS. 52 AND 56.—A licence is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents. So where, on the death of the original licensee, his heirs continue in occupation, they are on no greater footing than tenants at will. They are trespassers whose possession is adverse to the owner of the property. 54 M. 554=1931 M. 216=60 M.L.J. 709. See also 1941 Oudh 172.

SEC. 53.—See 7 B. 336.

SEC. 54.—A licence to live for generations must be presumed to permit all enjoyments for life of licensee without restriction. Eating meat or beef is such a reasonable enjoyment of life and it does not *per se* injure the rights of others. *Held*, that a licensee has a right to slaughter cows at his residence. 1930 A.L.J. 875=125 I.C. 14. Two companies engaged in cotton business owned adjoining lands. For many years they had a common agent. The common agent had allowed the defendant to erect superstructures on certain lands belonging to the plaintiff. In a suit by the plaintiff company to recover possession and for an injunction, *held* that from the conduct of the parties it would be inferred that there was the grant of a valid licence in favour of the defendant company, that the licence was irrevocable and that the licensor was only entitled to a fair rental of the premises which had been actually built upon, and that the defendant company could rely upon the principle in *Ramsden v. Dyson*, L.R. 1 H.L. 129, to the effect that the plaintiff having permitted the defendant to build upon the site, he was estopped from asserting his claim to

the piece of land. 1930 B. 70=31 Bom.L. R. 1319. See also 136 I.C. 821=1932 A. 572. (Inference of grant or licence from conduct and acquiescence).

SECS. 55 AND 60 (b): LICENSEE—UNDERTAKING TO VACATE BY REMOVING STRUCTURE PUT UP—BINDING NATURE.—Where a person is permitted to occupy a site to build a shop and he makes a stipulation that he would vacate by removing the materials of the shop if he failed to pay the rent, it amounts to a licence and the licensee would be bound by the terms of the licence and cannot claim the benefit of sec. 60 (b) of the Act, even if the Act applied to the case. 1944 A.L.W. 61.

SEC. 56.—Validity of transfer by a holder of a licence to build. 1 Luck. C. 238=103 I.C. 681=1927 O. 314. As to transfer by one licensor, to his co-licensor, see 1927 A. 197. A transfer by a licensee in favour of a third person which contravenes the provisions of sec. 56 makes the transferee who is not in possession a trespasser as against his transferor, a rank trespasser as against the original grantor who will at once have a right to eject the transferee. 1940 O.W.N. 1318=1941 Oudh 172.

HOUSE IN CITY ON SITE OF LANDLORD—TENANT'S OR LICENSEE'S RIGHT TO TRANSFER—PRESUMPTION.—In cases of houses built in cities on the land belonging to landlord, there can be no presumption that the tenants or licensees have no power of transfer. If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the licence the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer or it was open to him to prove the existence of a custom prohibiting the right of transfer. So far as houses built by tenant in villages are concerned, the rights between the parties are different. A tenant building a house in a village site has only a right to occupy so long as the tenancy



*Illustrations.*

(a) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immovable property of B. The right cannot be transferred.

(b) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty to disclose defects.

Grantor's duty not to render property unsafe.

Grantor's transferee not bound by license.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

License when revocable.

60. A license may be revoked by the grantor unless—

lasts or so long as he does not abandon the village. But the same principle cannot apply to houses built in a city. 1934 A.L.J. 728 = 1934 A. 336.

SECS. 56 AND 60.—In case of *riyayas* occupying houses in cities and towns, it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject the transferee of a *riyaya* he has to prove not only his ownership but also the existence of custom or terms of the grant under which the house in dispute was built. 117 I.C. 365 = 13 R.C. 615 = 1929 A. 494. On this section, see also 54 M. 554, cited under sec. 52.

SECS. 57 AND 58.—Per *Curiam*.—It is necessary that the legislature in India especially in view of conditions prevalent in Bombay should undertake legislation on the lines of the Housing of Working Classes Act of 1890 in England. 51 B. 274 = 101 I.C. 210 = 29 Bom.L.R. 78 = 1927 B. 115.

SEC. 59.—Enjoyment under a licence for a long time does not constitute adverse possession. 44 A. 726 = 20 A.L.J. 608 = 1923 A. 140 (1). Sec. 59 has no application to a case in which one of two joint licensors transfers his interest in the property with respect to which the licence has been granted in favour of his co-licensor. The transferee contemplated by the section must be a person who was not the licensor himself. 98 I.C. 814 = 1927 A. 197. Under sec. 59 the transferee is not as such bound by the term of a licence granted by the vendor, such as, one permitting the use of the land as a wrestling ground. The transfer extinguishes the licence and the recital in the deed of transfer that the transferee should respect the licence has no legal effect. 7 O.W.N. 468 = 1930 O. 203. Sec. 59 cannot be interpreted so as to give the transferee a right of revocation of a licence which would not be exercisable by the transferor himself. 102 I.C. 26 = 1927 O. 206. The use of the words "as such in sec. 59 seems clearly to be intended to indicate that the transferee would not be in any worse position than the transferor. The result of the proviso is that if the grantor of the licence does not revoke

it, it does not mean that the transferee cannot do so, but the section cannot be construed as giving the transferee any better rights than were possessed by his transferor much less to hold that the effect of the transfer is *ipso facto* to put an end to all previous licences. The rule laid down by sec. 59 is not independent of that laid down by sec. 60. Transferee held bound by licence previously granted by transferor. 132 I.C. 536 = 1931 O. 364. The transferee of a licensor cannot revoke a licence, when the licensee has effected a work of permanent character and incurred expenses. 37 A. 91 = 26 I.C. 445 = 13 A.L.J. 1. If the licence has become irrevocable in the time of the licensor, the mere fact that he transfers his interest in the land would not extinguish the licence. 149 I.C. 389 = 1934 A.L.J. 698 = 1934 A. 517. See also 91 I.C. 1031 = 13 O.L.J. 170; 97 I.C. 337 = 1926 A. 714; 84 I.C. 264 = 1924 A. 750.

SECS. 59 AND 60.—The rule laid down by sec. 59 is not independent of that laid down by sec. 60 and does not confer upon the transferee any higher rights than those possessed by the transferor. 1931 O. 364 = 132 I.C. 536.

SEC. 60.—As the Easements Act is not in force in Bengal, decisions of the Bengal Courts are not binding authorities in provinces where the Easements Act is in force. 9 O.W.N. 986. Sec. 60 is inapplicable where the defendant's house was not built acting on the licence. 139 I.C. 365 = 1932 O. 264. The grantor of a licence is under an obligation to place the licensee in a position to enjoy the licence. 36 Q.L.J. 271 = 1923 O. 49. Where a licence coupled with a transfer of property is granted, the transferee of the licensor is not entitled to revoke such licence. 30 I.C. 581 = 13 A.L.J. 886. See also 4 M. H.C.R. 98. The principle of sec. 60 (b) is that the licensee acting upon the licence should execute work of a permanent character soon after the grant of a licence or within a reasonable time. It is a principle dictated by justice, equity and good conscience and does not require that in order to prevent revocation of the licence the work of a permanent character must be a costly one. Nor does the

- (a) it is coupled with a transfer of property and such transfer is in force :  
 (b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

section impose a duty upon the licensee who has already complied with the terms of the licence to maintain work of a permanent character up to any particular standard of repair. Where the licensee has carried out the terms of the licence for building purposes and has incurred expenses in its execution the licensee becomes irrevocable under sec. 60 (b), Easements Act, and the licensee can be evicted from the premises only when the purpose of the licence is abandoned within the meaning of cl. (f) of sec. 62, in other words the licensee has actually abandoned the house whatever the state of repair might be. 17 Luck. 472=1941 O.W.N. 1340=A.I.B. 1942 Oudh 180. An appropriation of the land licensed to any use inconsistent with the enjoyment of the licence works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. 72 I.C. 270=36 C.L.J. 271=1923 C. 49. A licence to catch elephants for consideration is not revocable, for it is a licence coupled with an interest. (*Ibid.*) Where there is a grant of an exclusive right to catch elephants within a specified area for a specified period it does not follow as a matter of course that the grantee would be entitled to exclusive occupation of the entire territory during that time. 36 C.L.J. 271=1923 C. 49. Building licence—Effect of revocation. 19 I.C. 853=19 C.L.J. 321. See also 3 A.L.J. 760; 29 A. 133; 34 I.C. 471=12 N.L.R. 75. A licensee permitted to build a house and reside therein is entitled to be indemnified if evicted by the licensor's successor. A bare licence may be revoked at the grantor's will and on reasonable notice, but a licence coupled with grant is irrevocable. 19 I.C. 853=19 C.L.J. 321; 22 N.L.R. 162. Where a site has been granted to an occupier for building a house, the case is governed in the absence of terms to the contrary by sec. 60. 132 I.C. 565=1931 A.L.J. 649. Where a licence is granted to building houses on site and the licensee erects a work of a permanent nature, the licence cannot be revoked. 106 I.C. 479=1927 A. 342. See also 1940 Lah. 509; 1937 A.L.J. 1297=1938 All. 32. Sec. 60 (b) of the Easements Act cannot be availed of by the licensee when there has been no acting on the licence in the execution of works by him; but if the licensee establishes that the conduct of the licensor has been such as to justify the legal inference that he had by plain implication contracted that the licence would be perpetual; he can rely on the equitable doctrine and call upon the Court to intervene for his protection. The contract sought to be inferred does not mean that the real consensus of mind between the two parties must be inferred to have existed, but that the conduct of the parties has been such that equity will presume the existence of such a contract as a matter of plain implication.

The onus of establishing such equity is on the licensee. 63 I.A. 140=160 I.C. 837=1936 P.C. 77=70 M.L.J. 190 (P.C.). The words "acting upon the licence" in sec. 60 (b) of the Easements Act must mean acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not "act upon a licence" if he does work and incurs expenses upon his own property. Works done by the licensee on his own land may be done without the knowledge of the licensor, and it is impossible to hold that the alleged licensor's land is bound in perpetuity (subject to sec. 62) as the result of some works done by the alleged licensee on his own property, of which the former has been unaware. Sec. 60 is not dealing with the effect of an express contract between the parties, but with the consequences to follow from a certain conduct on the part of the licensee which if done on the land of the licensor might well give the licensee rights against him. 63 I.A. 140=160 I.C. 837=1936 P.C. 77=70 M.L.J. 194 (P.C.). Where a person who has given his land to the licensee for certain purposes has given him an undertaking that he would not claim the land so long as it was required for that purpose and on acting on that promise the licensee has erected works of permanent nature, the grantor of the licence is not entitled to recover the land even on payment of compensation because sec. 60 does not recognize any such exception. 1940 Lah. 18. The principle of this section is also applicable to Berar. See 94 I.C. 923=1926 N. 376. Where a person by a registered Kiryanama executed by himself alone agrees that the landlord would have the right to get the site vacated whenever he so chose, it would disentitle him from deriving advantage conferred by sec. 60 of the Act. 1942 A.L.J. 386=A.I.R. 1942 All. 330. Section also applies to transferee of property. 97 I.C. 337=1926 A. 714. A licence cannot be revoked even when part only of a work of a permanent character has been executed by the licensee. 117 I.C. 224=1929 N. 141. If a person constructs a permanent building on a portion of the site belonging to another under an implied licence from him, the licence cannot be revoked and the licensee cannot be ejected from the building. The irrevocability of the licence in such a case applies to that portion of the site which is covered by the building and not to any other open portion of the site. 118 I.C. 676=1929 N. 269. Where a landlord permits a person wishing to settle on his land to erect a building meant for permanent residence, the fact that it was built with mud would not make it a temporary building. The words of a "permanent character" are used in sec. 60 to distinguish it from works of a temporary nature. The question whether a particular work is of a temporary

or permanent character is one of fact. 113 I. C. 757. *See also* 1930 B. 70; I.L.R. (1941) Lah. 413=43 P.L.R. 544. Whether a structure is of a permanent character has to be decided on two considerations: (1) the material used and (2) the purpose for which the building is erected. The material used may be granite stone, marble, cement, concrete, bricks, or clay or mud. There can be no absolute standard as regards the material for judging whether the structure is permanent or temporary. The mere fact that a structure has mud walls would not be conclusive to prove its temporary character. Whether a structure is of a permanent character or not is not a pure inference of fact but is partly an inference of law. 203 I.C. 540=1942 N.L.J. 145=I.L.R. (1943) Nag. 226=1943 Nag. 77. Residential house is a work of permanent character, though it has a tiled roof which has to be renewed from time to time. 9 O.W.N. 986 (28 A. 741, Foll.). So also erection of an upper wall at a cost of Rs. 25. 136 I.C. 821=1932 A. 572. Sinking a well and erecting compound wall can be considered to be works of a permanent character within the meaning of sec. 60. 186 I.C. 890=1940 Lah. 18. It cannot be said that because the building has not been completed, therefore the work already executed is not of a permanent character. 132 I.C. 536=1931 O. 364. A licence to use the land of another, unless coupled with a transfer of the property, is revocable, subject to the right of the licensee for damages if revoked contrary to the terms of any express or implied contract. A mere licence if revocable at the will of the licensor unless it is coupled with a grant and in that case it will become a lease and would require compulsory registration. 120 I.C. 673 (1). Licence to use Railway siding—Contribution for expenses of upkeep by licensee—Licensee erecting structures on his land on basis of licence—Licensor cannot be permitted to revoke licence. 31 Bom.L.R. 1331; *see also* 31 Bom.L.R. 1310. A licensor cannot be allowed to revoke the licence on condition of his making compensation to the licensee for loss incurred by the revocation of the licence. 98 I.C. 814=1927 A. 197; 9 O.W.N. 986. Where the licensee has executed work of a permanent character, the licence becomes irrevocable. To such a case sec. 64 is inapplicable, and the grantor cannot revoke the licence by paying compensation. 1933 A.L.J. 1422=1933 A. 842. Buildings of mud walls and thatched roof built for the purpose of school, which were in existence and kept under regular repair for about 30 years, were held to be a work of a permanent character. 102 I.C. 26=1927 O. 206. *See also* 97 I.C. 337=1926 A. 714; 1925 A. 208; 1934 A.L.J. 1422=1933 A. 842. Buildings of mud permanent character, it is not necessary for the defendant to show that a large sum of money had been actually spent in order to bring the case within the scope of the principle underlying sec. 60. A licensee is entitled to damages for breach of any contract or for an improper revocation of his licence in a proper case; the Court will allow revocation only

on payment. 49 I.C. 811=1918 M.W.N. 772. Under the Act a licence is of personal character not merely as regards the grantee, but also as regards the grantor. It ceases the moment the property passes to another from the grantor whether by inheritance or otherwise. 18 N.L.R. 76=1922 N. 162. The heirs of the licensor may treat that licensee as a trespasser and eject him without notice of revocation. 18 N.L.R. 76. A licence coupled with a void grant is revocable save: (1) when the licensee entered into occupation and paid rent and (2) when the licensee acting in the licence has executed a work of permanent character and incurred expense in so doing. 34 I.C. 471=12 N.L.R. 75 [21 Ch.D. 3; (1901) 2 Ch. 591; 8 A. 60, Ref. to]. A licence cannot be revoked during licensee's lifetime when the licensee had made no permanent improvements. 48 I.C. 723. When plaintiff allowed defendant to execute on plaintiff's land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages, *held*, that the agreement created a licence which could not be revoked at the instance of the plaintiff. 47 I.C. 166. A licensee in possession does not, like the tenant, by denying title of the grantor of the licence forfeit the licence and become liable to ejectment. 1923 A. 403. *See also* 1925 A. 203. A licence is revoked by the transfer of property by the licensor. (108 R.R. 942; 150 E.R. 1543, Foll.) 54 M. 554=1931 M. 216=60 M.L.J. 709.

**TREES PLANTED—IF GO WITH LAND.**—Trees planted under a licence do not go with the land and the person who planted the trees is entitled to cut and remove them; but he should restore the land in the condition in which it was before the trees were planted. The principle applicable to removal of buildings on another man's land would also apply to trees. 53 L.W. 230=1941 Mad. 379= (1941) 1 M.L.J. 161.

**LICENCE TO RESIDE IN HOUSE—REVOCATION BY LANDLORD.**—Where the tenants are more licensees occupying the house as an appurtenant to the holding, the licence to reside must be deemed to be revoked under sec. 62 where the licence is granted for a specific purpose and the purpose is abandoned or has become impracticable. 8 L. 509=10 O.W. N. 398=1933 O. 302. Where certain persons were permitted only to reside in the rooms, any additions made by them would not be governed by the grant and hence sec. 60 of the Act will not come into operation. 176 I.C. 135=1938 A.L.J. 465=1938 All. 342.

A person who has got letters of administration to the estate of the deceased must be regarded as taking the place of that deceased. Therefore any person who on his own admission has entered upon the premises originally with leave and licence of the deceased must vacate the premises if the administrator so desires. For this purpose it is enough that the administrator has given some kind of notice. 151 I.C. 971=1934 R. 291.

Revocation express or implied.

61. The revocation of a license may be express or implied.

*Illustrations.*

(a) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(b) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.

License when deemed revoked.

62. A license is deemed to be revoked—

(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license ;

(b) when the licensee releases it, expressly or impliedly to the grantor or his representative ;

(c) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled ;

(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right ;

(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license ;

(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable ;

(g) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist ;

(h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee ;

(i) in the case of an accessory license when the interest or right to which it is accessory ceases to exist.

63. Where a license is revoked, the licensee is entitled to a reasonable time

SECS. 60 AND 62: LICENSEE PUTTING UP BUILDING OF PERMANENT CHARACTER—REVOCA-  
TION OF LICENCE.—Even though the Easements Act does not expressly apply to cases of licences before the Act, the principles underlying Ch. 6 may well be applied. Hence, when an owner of land gives permission to another person to put up a building of a permanent character and he incurs expenses in the execution of such work, the licensor is by necessary implication estopped from revoking his permission so as to prejudice the licensee whose position has been comprised in consequence. It would be inequitable, unjust and unfair to allow a licensor to order that the licensee should forthwith remove the work of a permanent character which he has put up after incurring expenditure. In such an event, the transaction ceases to be a mere licence revocable at will, but may amount to a licence coupled with a transfer of interest or, at any rate a case where the licensee acting upon the licence has executed a work of a permanent character and has incurred expenses in the execution so as to make the licence irrevocable. 1934 A.L.J. 698=1934 A. 517.

Sec. 61.—Where it was with the plaintiff's permission that the defendant committee put up a thatch on the chabutra adjoining a mosque to afford accommodation for the growing needs of the school within one portion of the mosque. Held, that the position of the committee was no better than that of a licensee and that the defendant's attempt

to build on the "chabutra", the plaintiff's protest, and the denial of his right followed by the institution of the suit, were circumstances which gave rise to the inference that the plaintiff revoked the licence originally granted by him. 1934 A. 732.

Sec. 62.—See 21 A.W.N. 175.

Sec. 62 (f).—See 185 I.C. 487. Where it is not shown that the defendant was holding the house in question under any licence for a specified purpose, the plaintiff proprietor is not entitled to re-enter upon the land on the ground that he has converted the residential house into a public temple. 1942 O.W.N. 351=1942 O.A. 255=A.I.R. 1942 Oudh 427=18 Luck. 155. Where a tank ceases to exist, (by being silted up) the purpose for which a licence in respect of it was granted should be said to have been abandoned and the licence would be deemed to have been revoked. But the licensee would not lose every right by the mere abandonment of the purpose of the licence. It has to be followed up either by the licensee leaving the property or by the licensor suing the licensee for eviction on that ground. Till then the licensee being entitled to possession can also maintain an action for it. 1943 A. L.W. 404.

Sec. 62 (h).—See 1937 Nag. 338.

Sec. 63.—A licensee whose licence is revocable is entitled to reasonable notice of revocation. When the exercise of the rights conferred by the licence involves nothing beyond it may be revoked at will. But where

Licensee's rights on revocation. to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

THE INDIAN ELECTRICITY ACT (IX OF 1910).

Year.	No.	Short title.	Amendment.
1910	IX	The Indian Electricity Act, 1910.	Amended, X of 1914; XXXVIII of 1920; I of 1922; XL of 1923; XXXVII of 1925; X of 1937; XXXIV of 1937; X of 1940 and XXXII of 1940.

REPEALS AND AMENDMENTS.

Sec. 1 am., A.O., 1937.	Sec. 30 am., Act I of 1922; A.O., 1937.
Sec. 2 am., Act I of 1922.	Sec. 32 am., Act XXXVIII of 1920; A.O., 1937.
Sec. 3 am., Act XXXVIII of 1920; Act XXXVII of 1925; A.O., 1937.	Sec. 33 am., Act I of 1922; A.O., 1937.
Secs. 4, 5, 6, 7, 8 and 9 am., A.O., 1937.	Sec. 34 am., A.O., 1937.
Sec. 10 am., Act XXXVIII of 1920; A.O., 1937.	Secs. 35 and 36 am., Act I of 1922; A.O., 1937.
Secs. 11, 12, 13 and 15 am., A.O., 1937.	Sec. 36-A inserted, Act X of 1937; am., A.O., 1937.
Sec. 17 am., Act I of 1922.	Sec. 37 am., Act I of 1922; Act X of 1937.
Sec. 18 am., Act I of 1922; A.O., 1937.	Sec. 38 am., Act X of 1937.
Sec. 19-A inserted, Act I of 1922.	Sec. 44 am., Act I of 1922.
Secs. 20, 21 and 23 am., Act I of 1922; A.O., 1937.	Secs. 49, 51 and 52 am., A.O., 1937.
Sec. 24 am., Act I of 1922.	Sec. 52 am., Acts X and XXXII of 1940.
Secs. 26, 27 and 28 am., Act I of 1922; A.O., 1937.	Secs. 53 and 55 am., Act I of 1922; A.O., 1937.
Sec. 29 am., A.O., 1937.	Sec. 57 am., A.O., 1937.
Sec. 29-A inserted, Act XL of 1923.	Sch. am., Act I of 1922; A.O., 1937.

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the exercise of the rights has involved the licensee in obligations in other directions, which the immediate determination of the licence would disable him from fulfilling, the licence can only be determined after notice sufficient, in point of time, for the making of substituted arrangements. 61 M. L.J. 958 (P.O.).

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42. Penalty for illegal or defective supply or for non-compliance with order.

## SECTIONS.

43. Penalty for illegal transmission or use of energy.

44. Penalty for interference with meters or licensee's works and for improper use of energy.

45. Penalty for extinguishing public lamps.

46. Penalty for negligently wasting energy or injuring works.

47. Penalty for offences not otherwise provided for.

48. Penalties not to affect other liabilities.

49. Penalties where works belong to Government.

50. Institution of prosecutions.

*Supplementary.*

51. Exercise in certain cases of powers of telegraph-authority.

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XVII. Notice to Electric Inspector.

THE INDIAN ELECTRICITY ACT (IX OF 1910).<sup>1</sup>

[18th March, 1910.]

*N.B.*—This Act has been amended by Act X of 1937 in its application to British India, including British Baluchistan and the Sonthal Parganas but excluding Burma (*vide* S. 2 of Act X of 1937). (The said amendments are noted under the respective sections).

*An Act to amend the law relating to the supply and use of electrical energy.*

WHEREAS it is expedient to amend the law relating to the supply and use of electrical energy; It is hereby enacted as follows :—

## PART I.

## PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN ELECTRICITY ACT, 1910.

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Sonthal Parganas; and

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, direct in this behalf.

2. In this Act, expressions defined in the Indian Telegraph Act, 1885, have the meanings assigned to them in that Act, and, unless there is anything repugnant in the subject or context,—

## Definitions.

(a) “aerial line” means any electric supply-line which is placed above ground and in the open air;

(b) “area of supply” means the area within which alone a licensee is for the time being authorized by his license to supply energy;

(c) “consumer” means any person who is supplied with energy by a licensee, or whose premises are for the time being connected for the purposes of a supply of energy with the works of a licensee;

(d) “daily fine” means a fine for each day on which an offence is continued after conviction therefor;

(e) “distributing main” means the portion of any main with which a service-line is, or is intended to be, immediately connected;

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1909, Pt. V, p. 87; for Report of Select Committee, see *ibid.*, 1910, Pt. V, p. 39; and for Proceedings in Council, see *ibid.*, 1909, Pt. VI, p. 152 and *ibid.*, 1910, Pt. VI, pp. 12, 157 and 275, dated 5th February, 1910, 19th March, 1910, and 9th April, 1910, respectively. The Act was brought into force on the 1st January, 1911, see Gazette of India, 1910, Pt. I, p. 1236.

SEC. 2 (c): ‘CONSUMER’, MEANING OF.—In order to hold that a person is a “consumer” as defined by sec. 2 (c) of the Electricity Act, it would *prima facie* be enough to prove either that energy was supplied for the use of that person, or that that person was the owner or occupier of premises connected up with the licensee’s electric system. If either of these is proved that person is a consumer

under rule 106 of the rule. 172 I.C. 940=39 Or.L.J. 206=18 P.L.T. 988=A.I.R. 1938 Pat. 15. Where the registered consumer and the person supplied with the energy is the proprietor of a company, the manager of the company cannot be held to be a ‘consumer’. The premises of the company are not the premises of the manager. The fact that the manager receives the electric bills, signs them and pays the bills cannot make him a consumer. A.I.R. 1938 Pat. 248=1938 P.W.N. 182=19 P.L.T. 141. Where a consumer intended to substitute a motor of smaller horse power in the place of one with a higher horse power and wrote to the U.P. Electricity Supply Co., about it and asked them to make the necessary examination, it was held that the company was not entitled, under either Para. 9 (2) or Para. 11 of the conditions of supply to demand a testing fee for that purpose. 1939 A.W.R. (H.C.) 417=A.I.R. 1939 All. 498.



(f) "electric supply line" means a wire, conductor or other means used for conveying, transmitting or distributing energy together with any casing, coating, covering, tube, pipe or insulator enclosing, surrounding or supporting the same or any part thereof, or any apparatus connected therewith for the purpose of so conveying, transmitting or distributing, such energy :

(g) "energy" means electrical energy when generated, transmitted, supplied, or used for any purpose except the transmission of a message ;

(h) "licensee" means any person licensed under Part II to supply energy ;

(i) "main" means any electric supply-line through which energy is, or is intended to be, supplied by a licensee to the public ;

(j) "prescribed" means prescribed by rules made under this Act ;

(k) "public lamp" means an electric lamp used for the lighting of any street ;

1[(l) "service-line" means any electric supply-line through which energy is, or is intended to be, supplied by a licensee—

(i) to a single consumer either from a distributing main or immediately from the licensee's premises, or

(ii) from a distributing main to a group of consumers on the same premises or on adjoining premises supplied from the same point of the distributing main.]

(m) "street" includes any way, road, lane, square, court, alley, passage or open space, whether a thoroughfare or not, over which the public have a right of way, and also the roadway and footway over any public bridge or causeway ; and

(n) "works" includes electric supply-lines and any buildings, machinery or apparatus required to supply energy and to carry into effect the objects of a license granted under Part II.

## PART II.

### SUPPLY OF ENERGY.

#### *Licenses.*

3. (1) The Provincial Government may, on application made in the prescribed form and on payment of the prescribed fee (if any), grant to any person a license to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy,—

(a) where the energy to be supplied is to be generated outside such area,

#### LEG. REF.

<sup>1</sup> This clause was substituted by sec. 2 of the Indian Electricity (Amendment) Act (I of 1922).

Sec. 2 (n).—"Works" include electric supply lines. I.L.R. (1939) Bom. 496=41 Bom.L.R. 878=A.I.R. 1939 Bom. 480.

Sec. 3.—An assignment of a licence can be made by word of mouth and form part performance and acting on and an inference may be raised of the assignment. A formal document of assignment need not necessarily exist. I.L.R. (1943) All. 907=1944 A.L.J. 48=A.I.R. 1944 All. 66.

Secs. 3, 21, 22 AND 23.—A licence given by the Local Government to a person under this Act confers the right on the licensee to supply electric energy in a specified area. Certain statutory powers and duties are conferred and imposed on the licensee. These powers are given for the purpose of enabling licensee, who undertakes a public undertaking, to construct his work, his plant, service mains, etc., and to maintain them, and cer-

tain duties are also imposed on him for the safety of the public or individuals. 63 Cal. 1047=40 C.W.N. 789=A.I.R. 1936 Cal. 265. The undertaking being for public benefit, a duty is imposed on the licensee to supply energy to any person who wants to take a supply of energy subject to certain conditions laid down either in the Act or in the schedule which is incorporated in the licence, and subject to any addition or modification which the Local Government may make. (*Ibid.*) The licensee cannot show undue preference to any particular consumer in the matter of rates; subject to this he is empowered to regulate his relations by agreement with his consumers, but even here there are restrictions imposed. He cannot in his agreement with his consumers insert any condition whatever, but only such conditions as are consistent with the Act or his licence and to which previous sanction of the Local Government had been obtained. Subject to these restrictions, the Legislature has intended the rights between a licensee and a consumer to be regulated by contract. (*Ibid.*)

from a generating station situated outside such area to the boundary of such area, or

(b) where energy is to be conveyed or transmitted from any place in such area to any other place therein, across an intervening area not included therein, across such area.

(2) In respect of every such license and the grant thereof the following provisions shall have effect, namely :—

(a) any person applying for a license under this Part shall publish a notice of his application in the prescribed manner and with the prescribed particulars, and the license shall not be granted—

(i) until all objections received by the Provincial Government with reference thereto have been considered by it :

Provided that no objection shall be so considered unless it is received before the expiration of three months from the date of the first publication of such notice as aforesaid ; and

(ii) until, in the case of an application for a license for an area including the whole or any part of any cantonment, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Government for naval or military purposes, the Provincial Government has ascertained that there is no objection to the grant of the license on the part of the <sup>1</sup>[Engineer in-Chief, Army Headquarters, India.] ;

(b) where an objection is received from any local authority concerned, the Provincial Government shall, if in its opinion the objection is insufficient, record in writing and communicate to such local authority its reasons for such opinion ;

(c) no application for a license under this Part shall be made by any local authority except in pursuance of a resolution passed at a meeting of such authority held after one month's previous notice of the same and of the purpose thereof has been given in the manner in which notices of meetings of such local authority are usually given :

(d) a license under this Part—

(i) may prescribe such terms as to the limits within which, and the conditions under which, the supply of energy is to be compulsory or permissive, and as to the limits of price to be charged in respect of the supply of energy, and generally as to such matters as the Provincial Government may think fit ; and

(ii) save in cases in which under section 10, clause (b) the provisions of sections 5 and 7, or either of them, have been declared not to apply, every such license shall declare whether any generating station to be used in connection with the undertaking shall or shall not form part of the undertaking for the purpose of purchase under section 5 or section 7 ;

(e) the grant of a license under this Part for any purpose shall not in any way hinder or restrict the grant of a license to another person within the same area of supply for a like purpose ;

(f) the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every license granted under this Part, save in so far as they are expressly added to, varied or excepted by the license, and shall, subject to any such additions, variations or exceptions which the Provincial Government is hereby empowered to make, apply to the undertaking authorised by the license :

Provided that, where a license is granted in accordance with the provisions of clause IX of the Schedule for the supply of energy to other licensees for distribution by them, then, in so far as such license relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the Schedule shall not be deemed to be incorporated with the license.

\* [ \* \* \* \* \* ]

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Director of Military Works" by sec. 2 and Sch. I of the Repealing and Amending

Act (XXXVII of 1925).

<sup>2</sup> Sub-sec. (8) was omitted by sec. 2 and Sch. I of the Devolution Act (XXXVIII of 1920).

Revocation or amendment of licenses. 4. (1) The Provincial Government may, in its opinion the public interest so requires, revoke a license, in any of the following cases, namely :—

(a) where the licensee, in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act ;

(b) where the licensee breaks any of the terms or conditions of his license the breach of which is expressly declared by such license to render it liable to revocation ;

(c) where the licensee fails, within the period fixed in this behalf by his license or any longer period which the Provincial Government may substitute therefor by order under sub-section (3), clause (b) and before exercising any of the powers conferred on him thereby in relation to the execution of works,—

(i) to show, to the satisfaction of the Provincial Government that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his license, or

(ii) to make the deposit or furnish the security required by his license ;

(d) where the licensee is, in the opinion of the Provincial Government, unable by reason of his insolvency, fully and efficiently to discharge the duties and obligations imposed on him by his license.

(2) Where the Provincial Government might, under sub-section (1), revoke a license, it may, instead of revoking the license, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose, and any further terms or conditions so imposed shall be binding upon and be observed by, the licensee, and shall be of like force and effect as if they were contained in the license.

(3) Where in its opinion the public interest so permits, the Provincial Government may, on the application or with the consent of the licensee, and if the licensee is not a local authority, after consulting the local authority (if any) concerned,—

SEC. 4 (1) (c): POWER OF GOVERNMENT TO REVOKE LICENCE—TIME LIMIT.—The conditions about satisfying the Government as to qualification and furnishing security in sec. 4 (1) (c) are subject to identical limitations; namely, that they have to be within a specified time and before the exercise of any of the powers conferred by the licence. It is manifest that the licensee would be entitled to deposit his security up to the last hour of the last day fixed in the licence and if the licence is to be revoked on the ground of failure of deposit of the security, the revocation of necessity shall have to be made after the time for depositing the security had run out. It follows, therefore, that the time limit with regard to security operates only in favour of the licensee and against the licensee and it does not apply to Government which can make the revocation after time had run out. For a similar reason, the condition that satisfaction as to his qualification by the licensee shall be given before any powers are exercised and within the time fixed in the licence also operates in favour of and against the licensee and they do not apply to Government and it is open to Government to revoke the licence even after powers had been exercised by the licensee and time fixed in the licence had run out. 1944 A. L.J. 43=1944 All. 66.

The Act nowhere prescribes the manner in which the Government would be satisfied and the evidence which is required for this satisfaction. It is also obvious that if once the

Government has finally come to the conclusion that the licensee was qualified to discharge his duties it cannot change its mind subsequently and act under sec. 4 (1) (c) of the Act. Ordinarily, it will be in the interest of all parties that this decision should be reached before any powers under the licence are exercised. And after the supply had begun, or when the works had considerably advanced or when the power was exercised long after the time fixed for satisfaction in the licence, a presumption might arise that satisfaction in fact was given by the licensee and it might not be open to Government to revoke the licence on that ground. But it is also open under the Act to the Government to fix any period for the satisfaction and to make the period of completion of works and of satisfaction as to qualification synchronise and to judge the qualification of the licensee with reference to the progress of his work. In such a case no presumption can arise by the mere exercise of powers under the licence that the Government had, in fact, received satisfaction as to qualification of the licensee and it is for the licensee if he wants not to exercise the powers under the licence before giving satisfaction to Government to insist on a condition in the licence that the work shall not begin till the satisfaction is accepted and to insist on a short term for satisfaction of qualification and a long term for the completion of works. I.L.R. (1943) All. 907=1944 All. 66=1944 A. L.J. 43.

(a) revoke a license as to the whole or any part of the area of supply upon such terms and conditions as it thinks fit, or

(b) make such alterations or amendments in the terms and conditions of a license, including the provisions specified in section 3, sub-section (2), clause (f) as it thinks fit.

5. Where the Provincial Government revokes, under section 4, sub-section (1), the license of a licensee, not being a local authority, the following provisions shall have effect, namely:—

(a) the Provincial Government shall serve a notice of the revocation upon the licensee, and, where the whole of the area of supply is included in the area for which a single local authority is constituted, upon that local authority also, and shall in the notice fix a date on which the revocation shall take effect; and on and with effect from that date all the powers and liabilities of the licensee under this Act shall absolutely cease and determine;

(b) where a notice has been served on a local authority under clause (a), the local authority may, within three months after the service of the notice, and with the written consent of the Provincial Government by notice in writing, require the licensee to sell, and thereupon the licensee shall sell, the undertaking to the local authority on payment of the value of all lands, buildings, works, materials and plant of the licensee suitable to, and used by him for, the purposes of the undertaking, other than a generating station declared by the licensee not to form part of the undertaking for the purpose of purchase, such value to be, in case of difference or dispute, determined by arbitration:

Provided that the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market-value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, works, materials and plant, and to the state of repair thereof, and to the circumstances that they are in such a position as to be ready for immediate working, and to the suitability of the same for the purposes of the undertaking, but without any addition in respect of compulsory purchase or of goodwill or of any profits which may be or might have been made from the undertaking, or of any similar considerations;

SEC. 5: ORDER OF SALE OF UNDERTAKING—LICENSEE WRONGFULLY REFUSING TO COMPLETE SALE—PURCHASER'S RIGHT OF SUIT.—If after an order of sale of an undertaking under sec. 5 of the Act and determination of the sale price under sec. 5 read with sec. 52 of that Act and its tender by the purchaser, the licensee wrongfully refuses to complete the sale and to execute a conveyance or to give possession of the undertaking an action for declaration of title, for possession of the undertaking and for injunction restraining the defendant from interference will certainly lie. The relief of the execution of the sale cannot be refused if such a relief is also claimed in addition to or in substitution of the above reliefs simply because such a relief cannot be brought in within the four corners of Chap. II of the Act. The Specific Relief Act was enacted not to consolidate but only "to define and amend the law relating to certain kinds of specific relief" and though the Act may be exhaustive with regard to those matters which are specifically dealt with by it, there is no reason to hold that the entire law in relation to sec. 5 (b) of the Act was codified in Chap. II, and the relief for specific performance should be confined to contractual obligations or those arising under

sec. 30 of the Act, and cannot be granted in relation to statutory obligations. Nor is there any valid reason for not following the English Law in this matter that the direction of sale followed by an award by which the sale price has been determined brings into existence an obligation which though ordinarily statutory, becomes also contractual and may be specifically enforced. I.L.R. (1943) All. 907=1944 A.L.J. 43=A.I.R. 1944 All. 66.

SEC. 5 (b): LANDS, BUILDINGS, WORKS MATERIALS AND PLANTS—IF MUST BE ALL ACQUIRED TOGETHER.—One possible construction of sec. 5 (b) of the Electricity Act is that lands, buildings, works, materials and plants must all co-exist and must all be acquired together. If so, the clause implies that an incomplete undertaking which has not substantially reached the stage of supplying electrical energy and comprises only of one or two or more of these things cannot be compulsorily ordered to be sold. But even if the other construction be accepted and it is possible to acquire one or more of them, provided it or they comprise the entire undertaking at the time there must be evidence to show that the property which is sought to be ordered to be sold

(c) where no purchase has been effected by the local authority under clause (b), and any other person is willing to purchase the undertaking, the Provincial Government may, if it thinks fit, with the consent of the licensee or without the consent of the licensee in case the price is not less than that for which the local authority might have purchased the same, require the licensee to sell, and thereupon the licensee shall sell, the undertaking to such other person ;

(d) where no purchase has been effected under clause (b) or clause (c) within such time as the Provincial Government may consider reasonable, or where the whole of the area of supply is not included in the area for which a single local authority is constituted, the Provincial Government shall have the option of purchasing the undertaking and, if the Provincial Government elects to purchase, the licensee shall sell the undertaking to the Provincial Government upon terms and conditions similar to those set forth in clause (b) ;

(e) where a purchase has been effected under any of the preceding clauses,—

(i) the undertaking shall vest in the purchasers free from any debts, mortgages or similar obligations of the licensee or attaching to the undertaking :

Provided that any such debts, mortgages or similar obligations shall attach to the purchase-money in substitution for the undertaking ; and

(ii) the revocation of the license shall extend only to the revocation of the rights, powers, authorities, duties and obligations of the licensee from whom the undertaking is purchased, and, save as aforesaid, the license shall remain in full force, and the purchaser shall be deemed to be the licensee :

Provided that where the Provincial Government elects to purchase under clause (d), the license shall, after purchase, in so far as the Provincial Government is concerned, cease to have any further operation ;

(f) where no purchase has been effected under any of the foregoing clauses, the licensee shall have the option of disposing of all lands, buildings, works, materials, and plant belonging to the undertaking in such manner as he may think fit :

Provided that, if the licensee does not exercise such option within a period of six months from the date on which the same became exercisable, the Provincial Government may forthwith cause the works of the licensee in, under, over, along

is suitable to, and is used for, the purpose of the undertaking. It is a question of fact in each case whether the particular property sought to be sold answers the description. I.L.R. (1943) All. 907=1944 A.L.J. 43 =A.I.R. 1944 All. 66.

SEC. 5 (b) AND (c) : UNDERTAKING AS IT EXISTS ON DATE OF SALE.—If can be ordered to be sold.—Under sec. 5 (b) and (c) of the Act, the undertaking which can be compulsorily ordered to be sold is the undertaking which existed on the date when the revocation of the licence took effect and not the undertaking which existed on the date of the order of sale. I.L.R. (1943) All. 907=1944 A.L.J. 43=A.I.R. 1944 All. 66.

SEC. 5 (c) : POWER OF GOVERNMENT.—Under sec. 5 (c), the Government has power to order the licensee to sell his undertaking to a particular person after the revocation of his licence takes effect and his liabilities under the Act have ceased. 1944 A.L.J. 43=A.I.R. 1944 All. 66. Under sec. 5(c), the Government can order the licensee to sell the undertaking to a third person although no price was fixed by mutual agreement or arbitration between the licensee and the local authority. Under this clause the Government can order an arbitration in case of difference or dispute as to price between the licensee and the purchaser. 1944 All. 66=(1943) All. 907=1944 A.L.J. 43.

SEC. 5 (d) authorises the Government to purchase the undertaking "upon terms and conditions similar to those set forth in cl. (b)". These words are wide enough to bring in the arbitration clause which is to be found in cl. (b). I.L.R. (1943) All. 907=1943 A.L.J. 43=A.I.R. 1944 All. 66.

SEC. 5 (f) : ATTACHMENT OF PROPERTY OF LICENSEE WHOSE LICENSE HAS BEEN REVOKED.—Where the judgment-debtor is a licensee whose licence under the Electricity Act has been revoked, the Court when it has to consider whether under sec. 60, C.P. Code, his property is or is not liable to attachment and sale in execution of the decree, has to bear in mind sec. 4, C.P. Code. As the Electricity Act is a special law, the provisions under the C.P. Code, are subject to any conditions regulating that procedure by the provisions of the Electricity Act. When a licence is revoked certain provisions laid down by sec. 5 of the Act have an imperative effect and under those provisions the licensee has the option of disposing the property of the undertaking in such manner as he thinks fit under cl. (f) only. That clause is more or less residuary and comes into operation only when the preceding provisions in the earlier clauses have been complied with. I.L.R. (1939) All. 901=1939 A.L.J. 983=1939 A.W.R. (H.C.) 848=A.I.R. 1940 All. 24.

or across any street to be removed and every such street to be reinstated, and recover the cost of such removal and reinstatement from the licensee ;

(g) if the licensee has been required to sell the undertaking, and if the sale has not been completed by the date fixed in the notice issued under clause (a), the purchaser may, with the previous sanction of the Provincial Government, work the undertaking pending the completion of the sale.

6. (1) Where the Provincial Government revokes the license of a local authority under section 4, sub-section (1), and any person is

Provisions where license of local authority is revoked. willing to purchase the undertaking, the Provincial Government may, if it thinks fit, require the local authority to sell, and thereupon the local authority shall sell, the undertaking to such person on such terms as the Provincial Government thinks just.

(2) Where no purchase has been effected under sub-section (1), the licensee shall have the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit :

Provided that, if the licensee does not exercise such option within a period of six months from the date on which the same became exercisable, the Provincial Government may forthwith cause the works of the licensee in, under, over, along or across any street to be removed and every such street to be reinstated, and recover the cost of such removal and reinstatement from the licensee.

7. (1) Where a license has been granted to any person not being a local authority, and the whole of the area of supply is included

Purchase of undertaking. in the area for which a single local authority is constituted, the local authority shall, on the expiration of such period, not exceeding fifty years, and of every such subsequent period not exceeding twenty years, as shall be specified in this behalf in the license, have the option of purchasing the undertaking, and, if the local authority, with the previous sanction of the Provincial Government, elects to purchase, the licensee shall sell the undertaking to the local authority on payment of the value of all lands, buildings, works, materials and plant of the licensee suitable to, and used by him for, the purposes of the undertaking, other than a generating station declared by the license not to form part of the undertaking for the purpose of purchase, such value to be, in case of difference or dispute determined by arbitration :

Provided that the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market-value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, works, materials and plant, and to the state of repair thereof, and to the circumstance that they are in such a position as to be ready for immediate working and to the suitability of the same for the purposes of the undertaking :

Provided also that there shall be added to such value as aforesaid such percentage, if any, not exceeding twenty per centum on that value as may be specified in the license, on account of compulsory purchase.

(2) Where—

(a) the local authority does not elect to purchase under sub-section (1), or

(b) the whole of the area of supply is not included in the area for which a single local authority is constituted, or

(c) a licensee supplies energy from the same generating station to two or more areas of supply, each controlled by its own local authority, and has been granted a license in respect of each area of supply, the Provincial Government shall have the like option upon the like terms and conditions.

(3) Where a purchase has been effected under sub-section (1) or sub-section (2),—

(a) the undertaking shall vest in the purchasers free from any debts, mortgages or similar obligations of the licensee or attaching to the undertaking :

Sec. 5 (g) entitles the prospective transferee to take over charge at once and to 'work' the concern pending the completion of the sale as

fully and completely as if the sale had been completed within the time fixed. 1943 N.L. J. 551=1944 Nag. 66.

Provided that any such debts, mortgages or similar obligations shall attach to the purchase-money in substitution for the undertaking; and

(b) save as aforesaid, the license shall remain in full force, and the purchaser shall be deemed to be the licensee:

Provided that where the Provincial Government elects to purchase under sub-section (2) the license shall, after purchase, in so far as the Provincial Government is concerned, cease to have any further operation.

(4) Not less than two years' notice in writing of any election to purchase under this section shall be served upon the licensee by the local authority or the Provincial Government as the case may be.

(5) Notwithstanding anything hereinbefore contained, a local authority may, with the previous sanction of the Provincial Government waive its option to purchase and enter into an agreement with the licensee for the working by him of the undertaking until the expiration of the next subsequent period referred to in sub-section (1), upon such terms and conditions as may be stated in such agreement.

8. Where, on the expiration of any of the periods referred to in section 7, sub-section (1) neither a local authority nor the Provincial Government purchases the undertaking and

Provisions where no purchase and license revoked with consent of licensee.

the licensee is, on the application or with the consent of the licensee, revoked, the licensee shall have the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit.

Provided that, if the licensee does not exercise such option within a period of six months, the Provincial Government may proceed to take action as provided in section 5, clause (f), proviso.

9. (1) The licensee shall not, at any time without the previous consent in writing of the Provincial Government, acquire by

Licensee not to purchase, or associate himself with, other licensed undertakings or transfer his undertaking.

purchase or otherwise, the license or the undertaking of, or associate himself so far as the business of supplying energy is concerned with, any person supplying, or intending to supply, energy under any other license, and, before applying for such consent, the licensee shall give not less than one month's notice of the application to every local authority, both in the licensee's area of supply, and also in the area or district in which such other person supplies, or intends to supply, energy:

Provided that nothing in this sub-section shall be construed to require the consent of the Provincial Government for the supply of energy by one licensee to another in accordance with the provisions of clause IX of the Schedule.

(2) The licensee shall not at any time assign his license or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the Provincial Government.

(3) Any agreement relating to any transaction of the nature described in sub-section (1) or sub-section (2), unless made with, or subject to, such consent as aforesaid, shall be void.

SEC. 9 (2): 'TRANSFER'—CREATION OF CHARGE.—A charge is a 'transfer' within the meaning of sub-sec. (2) of sec. 9 of the Indian Electricity Act. Even though a 'charge' may not be a 'transfer' within the meaning of the Transfer of Property Act, there is no adequate reason to give a restricted meaning to the word 'transfer' in the Electricity Act, the more so as the last mentioned Act is not in *pari materia* with the Transfer of Property Act. The word 'transfer' is used in sec. 9 (2) in a wide sense as embracing the transactions which either in present or in future may lead to the passing of the undertaking from one person to

another. 196 I.C. 425=1941 A.L.J. 518 =A.I.R. 1941 All. 345 (F.B.).

SEC. 9 (2) & (3).—Where a licensee company for supply of electricity executed without the consent of Government, a debenture trust deed whereby the whole undertaking was transferred to trustees for debenture-holders and also purported to create a mortgage and a charge over the property in favour of the debenture-holders it was held that the deed so far as it intended to operate as a transfer of the properties to the trustees was void in view of the provisions of sec. 9 (2) of the Act and that it was similarly void in so far as it purported to create a mortgage but that it was



General power for Government to vary terms of purchase.

10. Notwithstanding anything in sections 5, 7 and 8, the Provincial Government may, <sup>1[\* \* \*]</sup> in any license to be granted under this Act,—

(a) vary the terms and conditions upon which, and the periods on the expiration of which, the licensee shall be bound to sell his undertaking, or

(b) direct that, subject to such conditions and restrictions (if any) as it may think fit to impose, the provisions of the said sections or any of them shall not apply.

11. (1) Every licensee shall, unless expressly exempted from the liability by his license, or by order in writing of the Provincial Government, prepare and render to the Provincial

Annual accounts of licensee. Government or to such authority as the Provincial Government may appoint in this behalf on or before the prescribed date in each year, an annual statement of accounts of his undertaking made up to such date, in such form and containing such particulars, as may be prescribed in this behalf.

(2) The licensee shall keep copies of such annual statement at his office and sell the same to any applicant at a price not exceeding five rupees per copy.

#### Works.

12. (1) Any licensee may, from time to time but subject always to the terms and conditions of the license, within the area of supply,

Provisions as to the opening and breaking up of streets, railways and tramways.

or, when permitted by the terms of his license to lay down or place electric supply-lines without the area of supply without that area—

(a) open and break up the soil and pavement of any street, railway or tramway;

(b) open and break up any sewer, drain or tunnel in or under any street, railway or tramway;

(c) lay down and place electric supply lines and other works;

(d) repair, alter or remove the same; and

(e) do all other acts necessary for the due supply of energy.

#### LEG. REF.

1 The words "with the previous sanction of the Governor-General in Council" were omitted by sec. 2 and Sch. I of the Devolution Act (XXXVIII of 1920).

valid in so far as it purported to create a charge which entitled the debenture-holders to rank as secured creditors in the winding up of the company. A charge could not be regarded as a transfer either *in presenti* or *in futuro*. I.L.R. (1940) All. 568=1940 A.L.J. 449=1940 A.W.R. (H.C.) 412=A.I.R. 1940 All. 458. See also I.L.R. (1941) All. 691. Words 'transfer' and 'undertaking' are used in widest sense in this section. Where a licensee took in partners and the partnership-deed vested the buildings, machinery, books, papers and the licence of electricity in the partners, *held*, that it amounted to 'transfer of undertaking' under this section. 167 I.C. 707=A.I.R. 1937 Rang. 47.

SEC. 12.—The Act does not authorise a licensee to place any work on any private lands without the consent of the owner or occupier, except in the case provided for by the first proviso to sec. 12 (1). But in the case of lands dedicated to public use, the licensee would be able to place its works without the consent of the authorities in charge of such lands and

without paying any compensation for the same. The Local Government might while granting the licence insert a term in it regarding rent or compensation for the use of such lands and in such cases undoubtedly a duty to pay rent or compensation will arise. I.L.R. (1937) 2 Cal. 746=41 C.W.N. 1045=A.I.R. 1937 Cal. 521. The ordinary rule of law is that whoever owns the site is the owner of everything up to the sky and down to the centre of the earth, and such owner can, therefore, object to the laying of electric wire on his land although the line may be laid, more than 30 feet above land. There is no law authorising the District Magistrate to grant permission to an electric company to erect a post over the land of a person. 114 I.C. 692=1929 L. 226. A post was erected on the land of a person. Permission from the District Magistrate for erecting it was obtained not before erecting but after institution of suit by the owner of land. Lower Court dismissed the suit. *Held*, that High Court could not interfere with the decision. 114 I.C. 692=1929 L. 226. The Civil Courts have no jurisdiction to decide as to whether a bracket should be fixed on a particular private wall or not by a licensee under the Electricity Act and whether the person whose wall is being used should be given any compensation for it. It is entirely for the District Magistrate to decide these questions. 196 I.C. 547=A.I.R. 1941 Pesh. 72.

(2) Nothing contained in sub-section (1) shall be deemed to authorise or empower a licensee, without the consent of the local authority or of the owner and occupier, concerned, as the case may be, to lay down or place any electric supply-line, or other work in, through or against any building, or on, over or under any land not dedicated to public use whereon, wherever or whereunder any electric supply-line or work has not already been lawfully laid down or placed by such licensee :

Provided that any support of an aerial line or any stay or strut required for the sole purpose of securing in position any support of an aerial line may be fixed on any building or land or, having been so fixed, may be altered, notwithstanding the objection of the owner or occupier of such building or land, if the District Magistrate or, in a Presidency-town <sup>1</sup>[\* \*] the Commissioner of Police by order in writing so directs :

Provided, also, that, if at any time the owner or occupier of any building or land on which any such support, stay or strut has been fixed shows sufficient cause, the District Magistrate or, in a Presidency-town <sup>1</sup>[\* \*] the Commissioner of Police may by order in writing direct any such support, stay or strut to be removed or altered.

(3) When making an order under sub-section (2), the District Magistrate or the Commissioner of Police, as the case may be, shall fix the amount of compensation or of annual rent, or of both, which should in his opinion be paid by the licensee to the owner or occupier.

(4) Every order made by a District Magistrate or a Commissioner of Police under sub-section (2) shall be subject to revision by the Provincial Government.

(5) Nothing contained in sub-section (1) shall be deemed to authorise or empower any licensee to open or break up any street not repairable by <sup>2</sup>[the Central Government or the Provincial Government] or a local authority, or any railway or tramway, except such streets, railways or tramways (if any), or such parts thereof, as he is specially authorised to break up by his license, without the written consent of the person by whom the street is repairable or of the person for the time being entitled to work the railway or tramway, unless with the written consent of the Provincial Government :

Provided that the Provincial Government shall not give any such consent as aforesaid, until the licensee has given notice by advertisement or otherwise as the Provincial Government may direct, and within such period as the Provincial Government may fix in this behalf, to the person above referred to, and until all representations or objections received in accordance with the notice have been considered by the Provincial Government.

13. (1) Where the exercise of any of the powers of a licensee in relation to the execution of any works involves the placing of any works in, under, over, along or across any street, part of a street, railway, tramway, canal or waterway, the following provisions shall have effect, namely :—

(a) not less than one month before commencing the execution of the works (not being a service-line immediately attached, or intended to be immediately attached, to a distributing main, or the repair, renewal or amendment of existing works of which the character or position is not to be altered), the licensee shall serve upon the person responsible for the repair of the street or part of a street (hereinafter in this section referred to as "the repairing authority") or upon the person for the time being entitled to work the railway, tramway, canal or waterway (hereinafter in this section referred to as "the owner"), as the case may be, a notice in writing describing the proposed works, together with a section and plan thereof on a scale sufficiently large to show clearly the details of the pro-

LEG. REF.

<sup>1</sup> The words "or Bangoan" omitted by A.O., 1937.<sup>2</sup> Substituted for the 'Government' by *ibid.*

posed works, and not in any case smaller than one inch to eight feet vertically and sixteen inches to the mile horizontally, and intimating the manner in which, and the time at which, it is proposed to interfere with or alter any existing works, and shall upon being required to do so by the repairing authority or owner, as the case may be, from time to time give such further information in relation thereto as may be desired ;

(b) if the repairing authority intimates to the licensee that it disapproves of such works, section or plan, or approves thereof subject to amendment, the licensee may, within one week of receiving such intimation, appeal to the Provincial Government whose decision, after considering the reasons given by the repairing authority for its action, shall be final ;

(c) if the repairing authority fails to give notice in writing of its approval or disapproval to the licensee within one month, it shall be deemed to have approved of the works, section and plan, and the licensee, after giving not less than forty-eight hours' notice in writing to the repairing authority, may proceed to carry out the works in accordance with the notice and the section and plan served under clause (a) ;

(d) if the owner disapproves of such works, section or plan, or approves thereof subject to amendment, he may, within three weeks after the service of the notice under clause (a) serve a requisition upon the licensee demanding that any question in relation to the works or to compensation, or to the obligations of the owner to others in respect thereof, shall be determined by arbitration, and thereupon the matter shall, unless settled by agreement, be determined by arbitration ;

(e) where no requisition has been served by the owner upon the licensee under clause (d), within the time named, the owner shall be deemed to have approved of the works, section and plan, and in that case, or where after a requisition for arbitration the matter has been determined by arbitration, the works may, upon payment or securing of compensation, be executed according to the notice and the section and plan, subject to such modifications as may have been determined by arbitration or agreed upon between the parties.

(f) where the works to be executed consist of the laying of any underground service-line immediately attached, or intended to be immediately attached, to a distributing main, the licensee shall give to the repairing authority or the owner, as the case may be, not less than forty-eight hours' notice in writing of his intention to execute such works ;

(g) where the works to be executed consist of the repair, renewal or amendment of existing works of which the character or position is not to be altered, the licensee shall, except in cases of emergency, give to the repairing authority, or to the owner, as the case may be, not less than forty-eight hours' notice in writing of his intention to execute such works, and, on the expiry of such notice, such works shall be commenced forthwith and shall be carried on with all reasonable despatch, and, if possible, both by day and by night until completed.

(2) Where the licensee makes default in complying with any of these provisions, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.

(3) Notwithstanding anything in this section, the licensee may, in case of emergency due to the breakdown of an underground of electric supply-line, after giving notice in writing to the repairing authority or the owner, as the case may be, of his intention to do so, place an aerial line without complying with the provisions of sub-section (1) :

Provided that such aerial line shall be used only until the defect in the underground electric supply-line can be made good, and in no case (unless with the written consent of the Provincial Government) for a period exceeding six weeks, and shall be removed as soon as may be after such defect is removed.

14. (1) Any licensee may alter the position of any pipe (not forming, in a case where the licensee is not a local authority, part of a local authority's main sewer), or of any wire under Alteration of pipes or wires. or over any place which he is authorised to open or break up, if such pipe or wire is likely to interfere with the exercise of his powers under this Act; and any person may alter the position of any electric supply-lines or works of a licensee under or over any such place as aforesaid, if such electric supply-lines or works are likely to interfere with the lawful exercise of any powers vested in him.

(2) In any such case as aforesaid the following provisions shall, in the absence of an agreement to the contrary between the parties concerned, apply, namely:—

(a) not less than one month before commencing any alteration, the licensee or other person desiring to make the same (hereinafter in this section referred to as "the operator") shall serve upon the person for the time being entitled to the pipe, wire, electric supply-lines or works, as the case may be (hereinafter in this section referred to as "the owner"), a notice in writing, describing the proposed alteration, together with a section and plan thereof on a scale sufficiently large to show clearly the details of the proposed works, and not in any case smaller than one inch to eight feet vertically and sixteen inches to the mile horizontally, and intimating the time when it is to be commenced, and shall subsequently give such further information in relation thereto as the owner may desire;

(b) within fourteen days after the service of the notice, section and plan upon the owner, the owner may serve upon the operator a requisition to the effect that any question arising upon the notice, section or plan shall be determined by arbitration, and thereupon the matter shall, unless settled by agreement, be determined by arbitration;

(c) every arbitrator to whom a reference is made under clause (b) shall have regard to any duties or obligations which the owner is under, and may require the operator to execute any temporary or other works so as to avoid as far as possible interference therewith;

(d) where no requisition is served upon the operator under clause (b) within the time named, or where such a requisition has been served and the matter has been settled by agreement or determined by arbitration, the alteration may, upon payment or securing of any compensation accepted or determined by arbitration, be executed in accordance with the notice, section and plan and subject to such modifications as may have been determined by arbitration or agreed upon between the parties;

(e) the owner may, at any time before the operator is entitled to commence the alteration, serve upon the operator a statement in writing to the effect that he desires to execute the alteration himself and requires the operator to give such security for the repayment of any expenses as may be agreed upon or, in default of agreement, determined by arbitration;

(f) where a statement is served upon the operator under clause (e), he shall, not less than forty-eight hours before the execution of the alteration is required to be commenced, furnish such security and serve upon the owner a notice in writing intimating the time when the alteration is required to be commenced, and

SEC. 14.—The defendants had obtained a licence under the Act and had put up an aerial line, etc., on a certain street within the Municipal district of the Municipality of Karachi, the plaintiffs. The Municipality having arranged with the N.-W. Railway Company, that the latter should erect an overbridge, the aerial line and poles had to be shifted from their position. The plaintiffs' suit was for a declaration that the cost of removal should be borne by defendants. *Held*, that sec. 14 of the Act applied and not the Bombay District Municipal Act and that plaintiffs must bear the cost of removal. 95 I.C. 226=A.I.R. 1926

Sind 115.

SECS. 14 AND 19.—An operator cannot claim damages for acts of his own or done on his behalf and at his expense by the owner. Where a gas company was cut off from reasonable access to its own property by acts done in the exercise of its powers by the Electric Supply Company and those acts caused damage, detriment and inconvenience, *held*, that the damage claimed to have been suffered could be compensated under sec. 19, and sec. 14 did not apply and the gas company could not be deprived of its remedies. 16 Bom.L.R. 964=26 I.C. 892=A.I.R. 1939 Bom. 124.

the manner in which it is required to be made ; and thereupon the owner may proceed to execute the alteration as required by the operator ;

(g) where the owner declines to comply, or does not, within the time and in the manner prescribed by a notice served upon him under clause (f), comply with the notice, the operator may himself execute the alteration ;

(h) all expenses properly incurred by the owner in complying with a notice served upon him by the operator under clause (f) may be recovered by him from the operator.

(3) Where the licensee or other person desiring to make the alteration makes default in complying with any of these provisions, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.

Laying of electric supply-lines or other works near sewers, pipes or other electric supply-lines or works.

#### 15. (1) Where—

(a) the licensee requires to dig or sink any trench for laying down any new electric supply-lines or other works, near to which any sewer, drain, watercourse or work under the control of the Provincial Government or of any local authority, or any pipe, syphon, electric supply-line or other work belonging to any duly authorized person, has been lawfully placed, or

(b) any duly authorized person requires to dig or sink any trench for laying down or constructing any new pipes or other works, near to which any electric supply-lines or works of a licensee have been lawfully placed, the licensee or such duly authorised person, as the case may be (hereinafter in this section referred to as "the operator") shall, unless it is otherwise agreed upon between the parties interested or in case of sudden emergency, give to the Provincial Government or local authority, or to such duly authorised person, or to the licensee, as the case may be (hereinafter in this section referred to as "the owner"), not less than forty-eight hours' notice in writing before commencing to dig or sink the trench and the owner shall have the right to be present during the execution of the work, which shall be executed to the reasonable satisfaction of the owner.

(2) Where the operator finds it necessary to undermine, but not to alter, the position of any pipe, electric supply-line or work, he shall support it in position during the execution of the work, and before completion shall provide a suitable and proper foundation for it where so undermined.

(3) Where the operator (being the licensee) lays any electric supply-lines across, or so as to liable to touch, any pipes, lines or service-pipes or service-lines belonging to any duly authorised person or to any person supplying, transmitting or using energy under this Act, he shall not, except with the written consent of such person and in accordance with section 34, sub-section (1), lay his electric supply-lines so as to come into contact with any such pipes, lines or service-pipes or service-lines.

(4) Where the operator makes default in complying with any of the provisions of this section, he shall make full compensation for any loss or damage incurred by reason thereof.

(5) Where any difference or dispute arises under this section, the matter shall be determined by arbitration.

(6) Where the licensee is a local authority, the references in this section to the local authority and to sewers, drains, water-courses or works under its control shall not apply.

Streets, railways, tramways, sewers, drains or tunnels broken up to be reinstated without delay.

16. (1) Where any person, in exercise of any of the powers conferred by or under this Act, opens or breaks up the soil or pavement of any street, railway or tramway, or any sewer, drain or tunnel, he shall—

(a) immediately cause the part opened or broken up to be fenced and guarded ;

(b) before sun-set cause a light or lights, sufficient for the warning of passengers to be set up and maintained until sunrise against or near the part opened or broken up ;

(c) with all reasonable speed fill in the ground and reinstate and make good the soil or pavement, or the sewer, drain or tunnel, opened or broken up, and carry away the rubbish occasioned by such opening or breaking up ; and,

(d) after reinstating and making good the soil or pavement, or the sewer, drain or tunnel, broken or opened up, keep the same in good rapir for three months and for any further period, not exceeding nine months, during which subsidence continues.

(2) Where any person fails to comply with any of the provisions of sub-section (1), the person having the control or management of the street, railway, tramway, sewer, drain or tunnel in respect of which the default has occurred, may cause to be executed the work which the defaulter has delayed or omitted to execute, and may recover from him the expenses incurred in such execution.

(3) Where any difference or dispute arises as to the amount of the expenses incurred under sub-section (2), the matter shall be determined by arbitration.

17. (1) A licensee shall, before laying down or placing, within ten yards of any part of any telegraph-line, any electric supply-line or other words <sup>1</sup>[(not being either service lines) or electric-supply lines for the repair, renewal or amendment of existing works of which the character or position is not to be altered], give not less than ten days' notice in writing to the telegraph-authority, specifying—

(a) the course of the works or alterations proposed,

(b) the manner in which the works are to be utilized,

(c) the amount and nature of the energy to be transmitted, and

(d) the extend to, and manner in, which (if at all) earth returns are to be used ;

and the licensee shall conform with such reasonable requirements, either general or special, as may be laid down by the telegraph-authority within that period for preventing any telegraph-line from being injuriously affected by such works or alterations :

Provided that, in case of emergency (which shall be stated by the licensee in writing to the telegraph-authority) arising from defects in any of the electric supply-lines or other works of the licensee, the licensee shall be required to give only such notice as may be possible after the necessity for the proposed new works or alterations has arisen.

(2) Where the works to be executed consist of the laying <sup>2</sup>[or placing] of any <sup>3</sup>[\*] service line <sup>4</sup>[\* \* \*] the licensee shall not less than forty-eight hours before commencing the work, serve upon the telegraph-authority a notice in writing of his intention to execute such works.

18. (1) Save as provided in section 13, sub-section (3), nothing in this Part shall be deemed to authorize or empower a licensee to place any aerial line along or across any street, railway, tramway, canal or waterway unless and until the Provincial Government has communicated to him a general approval in writing of the methods of construction which he proposes to adopt :

Provided that the communication of such approval shall in no way relieve the licensee of his obligations with respect to any other consent required by or under this Act.

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "not being service-lines immediately attached or intended to be immediately attached to a distributing main" by sec. 4 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> These words were inserted by *ibid.*

<sup>3</sup> The word "underground" was omitted by *ibid.*

<sup>4</sup> The words "immediately attached or intended to be immediately attached, to a distributing main" were omitted by *ibid.*

(2) Where any aerial line has been placed or maintained by a licensee in breach of the provisions of sub-section (1), the Provincial Government may require the licensee forthwith to remove the same, or may cause the same to be removed and recover from the licensee the expenses incurred in such removal.

<sup>1</sup>[(3) Where any tree standing or lying near an aerial line, or where any structure or other object which has been placed or has fallen near an aerial line subsequently to the placing of such line, interrupts or interferes with, or is likely to interrupt or interfere with, the conveyance or transmission of energy or the accessibility of any works, a Magistrate of the first class or, in a Presidency-town <sup>2</sup>[\* \*], the Commissioner of Police may, on the application of the licensee, cause the tree, structure or object to be removed or otherwise dealt with as he thinks fit];

(4) When disposing of an application under sub-section (3), the Magistrate or Commissioner of Police, as the case may be, shall, in the case of any tree in existence before the placing of the aerial line, award to the person interested in the tree such compensation as he thinks reasonable, and such person may recover the same from the licensee.

<sup>3</sup>[*Explanation.*—For the purposes of this section, the expression “tree” shall be deemed to include any shrub, hedge, jungle-growth or other plant.]

19. (1) A licensee shall, in exercise of any of the powers conferred by or under this Act, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him.

(2) Save in the case provided for in section 12, sub-section (3), where any difference or dispute arises as to the amount or the application of such compensation, the matter shall be determined by arbitration.

#### *Supply.*

<sup>4</sup>[19-A. For the purposes of this Act, the point at which the supply of energy by a licensee to a consumer shall be deemed to commence shall be determined in such manner as may be prescribed.]

20. (1) A licensee or any person duly authorised by a licensee may, at any reasonable time, and on informing the occupier of his intention, enter any premises to which energy is or has been supplied by him, for the purpose of—

Point where supply is delivered.

Power for licensee to enter premises and to remove fittings or other apparatus of licensee.

#### LEG. REF.

<sup>1</sup> This sub-section was substituted by sec. 5 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> Words “or Rangoon” omitted by A.O., 1937.

<sup>3</sup> This explanation was added by sec. 5 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>4</sup> This section was inserted by sec. 6 of *ibid.*

SEC. 19.—*See* 16 Bom.L.R. 964=26 I.O. 892=39 B. 124 cited under sec. 14. Sec. 19 of the Act primarily prohibits the licensee from doing anything which may amount to a nuisance in the exercise of the powers given by the Act and by the licensee. Any infringement of any private right could only be justified on proof of the fact that without infringing those rights, the duties imposed by the licensee could not be carried out. Considerations of public welfare do not warrant an

infringement of private rights, unless it is expressly or by necessary implication authorised by statute. The duty cast on the licensee by sec. 19 is enforceable at law. There is nothing in the Electricity Act to relieve the licensee from the liability to an action for injunction restraining him from infringing the rights of others. 1939 A.L.J. 19=I.L.R. (1939) All. 237=A.L.R. 1939 All. 280. The right of the Shia Mahomedans to carry tazias in a procession during moharrum is a normal user of the highway and does not originate in custom. Such a right is no more and no less than the right of any member of the public to take part in religious processions in the streets and can, therefore, be abridged where public rights may lawfully be abridged. Therefore, where an Electric Supply Company has been authorised under the Electricity Act to place wires across the streets in a certain place town at a height of 20 feet, the right of the Shia Mahomedans to carry through those streets tazias of a greater height is lawfully abridged. They cannot invoke sec. 19 of the Act to restrain



(a) inspecting and testing the electric supply-lines, meters, fittings, works and apparatus for the supply of energy belonging to the licensee; or

(b) ascertaining the amount of energy supplied or the electrical quantity contained in the supply; or

(c) removing, where a supply of energy is no longer required, or where the licensee is authorised to take away and cut off such supply, any electric supply-lines, <sup>1</sup>[meters,] fittings, works or apparatus belonging to the licensee.

(2) A licensee or any person authorized as aforesaid may also, in pursuance of a special order in this behalf made by the District Magistrate, or, in a Presidency-town <sup>2</sup>[\* \*] by the Commissioner of Police, and after giving not less than twenty-four hours' notice in writing to the occupier, enter any premises to which energy is or has been supplied, or is to be supplied, by him, for the purpose of examining and testing the electric wires, fittings, works, and apparatus for the use of energy belonging to the consumer.

<sup>3</sup>[(3) Where a consumer refuses to allow a licensee or any person authorised as aforesaid to enter his premises in pursuance of the provisions of sub-section (1) or sub-section (2), or, when such licensee or person has so entered, refuses to allow him to perform any act which he is authorised by those sub-sections to perform, or fails to give reasonable facilities for such entry or performance, the licensee may after the expiry of twenty-four hours from the service of a notice in writing on the consumer, cut off the supply to the consumer for so long as such refusal or failure continues, but for no longer.]

21. (1) A licensee shall not be entitled to prescribe any special form of appliance for utilising energy supplied by him, or save as provided by section 23, sub-section (2), or by section 26, sub-section (7), in any way to control or interfere with the use of such energy:

Provided that no person may adopt any form of appliance, or use the energy supplied to him so as unduly or improperly to interfere with the supply by the licensee of energy to any other person.

<sup>4</sup>[(2) Subject to the provisions of sub-section (1), a licensee may, with the previous sanction of the Provincial Government given after consulting the local authority where the licensee is not the local authority, make conditions not inconsistent with this Act or with his license or with any rules made under this Act, to regulate his relations with persons who are or intend to become consumers,

#### LEG. REF.

<sup>1</sup> This word was inserted by sec. 7 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> Words 'or Rangoon' omitted by A.O., 1937.

<sup>3</sup> This sub-section was added by sec. 7 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>4</sup> Inserted by sec. 8, *ibid.*

the lawful exercise of power by the company even if it necessarily causes inconvenience, as that section has no application to the case. 48 C.W.N. 307 (P.C.).

Sec. 21: SCOPE.—Sec. 21 which speaks of regulating the relations with consumers has nothing to do with the charges to be made for energy supplied. The section which deals with the matter is sec. 23. 35 C.W.N. 933.

Sec. 21 (2).—The rule made by Khattar Electric Engineering and General Supply Co., Ltd., Dera Ismail Khan, providing that every consumer shall pay a minimum charge of Rs. 25 per annum, had not been made with the approval of the Government. The fact

that in 1936 the company had addressed a letter to the Chief Engineer on the subject and had received the reply that in the case of each consumer the recovery of the minimum charge was lawful from the date of the contract entered into by that consumer with the company is no approval of the rule and the rule is *ultra vires*. 181 I.C. 345 = A.I.R. 1939 Pesh. 8.

SECS. 21 AND 24.—Sec. 24 of the Electricity Act authorises the licensee to cut off supply only of that premises the charge of which is in arrear. It does not authorise the discontinuation of supply to premises the charge of which has been paid off. A clause in the agreement between the licensee and the consumer, empowering the licensee to discontinue the supply to certain premises for non-payment of charges of other premises of the consumer is inconsistent with sec. 24 and is *ultra vires* and unenforceable under sec. 21 (2). The previous sanction of the Local Government for the insertion of such a condition, under sec. 21 (2) of the Act, is *invalid* and unenforceable. 39 C.W.N. 526 = 61 C. L.J. 111 = A.I.R. 1935 Cal. 298.

and may with the like sanction given after the like consultation add to or alter or amend any such conditions ; and any conditions made by a licensee without such sanction shall be null and void :

Provided that any such conditions made before the 23rd day of January, 1922, shall, if sanctioned by the Provincial Government on application made by the licensee before such date as the Provincial Government may, by general or special order, fix in this behalf, be deemed to have been made in accordance with the provisions of this sub-section.

<sup>1</sup>[(3) The Provincial Government may, after the like consultation, cancel any condition or part of a condition previously sanctioned under sub-section (2) after giving to the licensee not less than one month's notice in writing of its intention so to do.

<sup>2</sup>[(4) ] Where any difference or dispute arises as to whether a licensee has prescribed any appliance or controlled or interfered with the use of energy in contravention of sub-section (1), the matter shall be either referred to an Electric Inspector and decided by him, or, if the licensee or consumer so desires, determined by arbitration.

22. Where energy is supplied by a licensee, every person within the area of supply shall, except in so far as is otherwise provided by the terms and conditions of the license, be entitled, on application, to a supply on the same terms as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply :—

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration.

23. (1) A licensee shall not, in making any agreement for the supply of energy, show undue preference to any person, but may, save as aforesaid, make such charges for the supply of energy as may be agreed upon, not exceeding the limits imposed by his license.

Charges for energy to be made without undue preference.

#### LEG. REF.

<sup>1</sup> This sub-section was inserted by sec. 8 of the Indian Electricity (Amendment) Act (I of 1922.

<sup>2</sup> This sub-section, which was originally numbered "(2)", was renumbered "(4)", by *ibid.*

Sec. 22.—See 63 Cal. 1047 noted under sec. 3, *supra*. There is nothing in the Act which bars a suit for damages against licensee for failure to supply energy on proper requisition. 97 I.C. 537=1926 Lah. 349. Before a consumer can be supplied electric power from a new connection in substitution of an old one he must put in a fresh requisition in writing under paras. 4 and 5 of cl. (6) of the Schedule to the Act. 49 Bom. 182=26 Bom. L.R. 1206=1925 Bom. 120. A person entitled to supply of energy under sec. 22 of the Act, has a cause of action for a suit for damages on account of licensee's failure to supply energy according to sec. 22 and para. 6 to the schedule. A Civil Court including the Judge, Small Cause Court has jurisdiction to entertain such C.C.M.—282

suit. From the general scheme of the Act it is clear that most of the disputes are to be decided by arbitration. If the intention was to bar the civil remedy a similar provision would have been inserted for the breach of sec. 22 also. 1941 A.L.W. 450=1941 O.W.N. 606=I.L.R. (1941) All. 425=1941 All. 301.

Sec. 23.—See 63 Cal. 1047 noted under sec. 3, *supra*. A consumer of electricity employing electrical machinery is entitled with his own premises to use all reasonable tests which might be necessary to discover a defect. It is not obligatory on anyone, whatever machinery he may happen to use to call in an expert on every occasion when something goes wrong. A man is entitled, if he is able, to remedy defects himself in his own plant. If, in the case of electric supply, it is a reasonable test for a consumer to use an electric lamp and if he *bona fide* uses a lamp for this purpose without permission, sec. 23 has no application nor is he guilty under sec. 39 as his action does not amount to dishonest abstraction of the company's electric energy. 151 I. C. 19=35 Or.L.J. 1274=1934 A. 320. Per Suhrawardy, J.—The words "such other" in

(2) No consumer shall, except with the consent in writing of the licensee, use energy supplied to him under one method of charging in a manner for which a higher method of charging is in force.

<sup>1</sup>[(3) in the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer—

(a) by the actual amount of energy so supplied, or

(b) by the electrical quantity contained in the supply, or

(c) by such other method as may be approved by the Provincial Government.]

<sup>1</sup>[(4) Any charges made by a licensee under clause (c) of sub-section (3) may be based upon, and vary in accordance with, any one or more of the following considerations, namely :—

(a) the consumer's load factor, or

(b) the power factor of his load, or

(c) his total consumption of energy during any stated period, or

(d) the hours at which the supply of energy is required.]

24. <sup>2</sup>[(1) Where any person neglects to pay any charge for energy or any

<sup>3</sup>[sum other than a charge for energy,] due from him

Discontinuance of supply to consumer neglecting to pay charge.

to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge or other

sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and re-connecting the supply, are paid, but no longer.

#### LEG. REF.

<sup>1</sup> These sub-sections were added by sec. 9 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> This paragraph was numbered as sub-section "(1)" by sec. 10 of *ibid.*

<sup>3</sup> These words were substituted for the words "other sum" by *ibid.*

cl. (c) of sec. 23 (3) cannot be interpreted as preventing the Government from utilising either method with such modifications as they think fit. 35 C.W.N. 933. Per Graham, J.—Sec. 23 (3) seems to give the licensee the option of adopting any one of the three methods mentioned. (*Ibid.*) The consumer and the supplier may enter into any agreement as to the charge for supply of energy subject to the limitation mentioned in sec. 23. Where the rate agreed and sanctioned by Government was 7 as. per unit plus Rs. 5 per month per kilowatt of the rated capacity of the consuming devices installed provided the combined charges shall not exceed the flat rate of 8 as. per unit, *held*, that the charges for actual consumption and kilowatt were two parts of the same method of charging and that even if they were different it was *intra vires* of the Government to fix them under sec. 23 (3) (c). The system adopted cannot be said to amount to a double system of charge and the consumer is bound to pay the charges as agreed. (*Ibid.*)

Sec. 23 (3) (c).—Sec. 23 (3) (c) contemplates charges made on the basis of consumption. It does not authorise a licensee to levy minimum charges without any agreement with

the consumer. Nor can the licensee invoke cl. (c) of sec. 23 (3) to support its claim for minimum charges when the Local Government has not exercised their powers under that clause by a notification under it. 63 Cal. 1047=40 C.W.N. 789=A.I.R. 1936 Cal. 265.

SEC. 24: POWERS UNDER—CONDITIONS OF EXERCISE.—The power to discontinue supply to a premises is power given in addition to the rights to realise the arrears by a suit; and this statutory power should be exercised in good faith and reasonably, and only as a last resort after all the formalities laid down in the Act had been complied with. 62 Cal. resort after all the formalities laid down in 886=39 C.W.N. 526=61 C.L.J. 111=1935 C. 298.

NOTICE.—The notice under this section is purely for the protection of the consumer, and no question of public policy is involved in it. So, it is open to the consumer to waive the notice if he so desires. 20 N.L.J. 200=171 I.C. 640=A.I.R. 1937 Nag. 379.

SEC. 24 AND SCH. II, CL. (vi).—The licensee must bear the charge of the service line whether the consumer has paid the initial expenditure or not. The licensee can discontinue the supply of energy if the consumer's installation is defective. In case of any alleged defect, the licensee can refer the matter to an Electric Inspector and he is to decide the matter. If energy is supplied to the consumer knowing that the installation is defective the consumer will not pay for a new fuse or cut-out if the old melts on account of defective installation. 45 I.C. 171.

1[(2)] \*\* \* Where any difference or dispute has been referred under this Act to an Electric Inspector before notice as aforesaid has been given by the licensee, the licensee shall not exercise the powers conferred by this section until the Inspector has given his decision :

3[Provided that the prohibition contained in this sub-section shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Electric Inspector of the amount of the licensee's charges or other sums in dispute or for the deposit of the licensee's further charges for energy as they accrue, and the consumer has failed to comply with such request.]

25. Where any electric supply-lines, meters, fittings, works or apparatus belonging to a licensee are placed in or upon any premises, not being in the possession of the licensee, for the purpose of supplying energy, such electric supply-lines, meters, fittings, works and apparatus shall not be liable to be taken in execution under any process of any Civil Court or in any proceedings, in insolvency against the person in whose possession the same may be.

Exemption of electric supply lines or other apparatus from attachment in certain cases.

26. (1) In the absence of an agreement to the contrary, the amount of energy, supplied to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a correct meter, and the licensee shall, if required by the consumer, cause the consumer to be supplied with such a meter :

Meters.

Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter.

(2) Where the consumer so enters into an agreement for the hire of a meter, the licensee shall keep the meter correct, and, in default of his doing so, the consumer shall, for so long as the default continues, cease to be liable to pay for the hire of the meter.

(3) Where the meter is the property of the consumer, he shall keep the meter correct, and, in default, of his doing so, the licensee may, after giving him seven days' notice, for so long as the default continues, cease to supply energy through the meter.

(4) The licensee or any person duly authorised by the licensee shall, at any reasonable time and on informing the consumer of his intention, have access to, and be at liberty to inspect and test, and for that purpose, if he thinks fit, take off and remove, any meter referred to in sub-section (1) ; and, except where the meter is so hired as aforesaid, all reasonable expenses of, and incidental to, such inspecting, testing, taking off and removing shall, if the meter is found to be otherwise than correct, be recovered from the consumer; and, where any difference or dispute arises as to the amount of such reasonable expenses, the matter shall be referred to an Electric Inspector, and the decision of such Inspector shall be final :

Provided that the licensee shall not be at liberty to take off or remove, any such meter if any difference or dispute of the nature described in sub-section (6) has arisen until the matter has been determined as therein provided.

(5) A consumer shall not connect any meter referred to in sub-section (1) with any electric supply-line through which energy is supplied by a licensee, or disconnect the same from any such electric supply-line, without giving to the licensee not less than forty-eight hours' notice in writing of his intention.

#### LEG. REF.

1 This paragraph was originally a proviso and was numbered sub-sec. "(2)" by sec. 10 of the Indian Electricity (Amendment) Act (I of 1922).

2 The words "Provided that" were omitted by *ibid.*

3 This proviso was added by *ibid.*

a new meter with the licensee's supply-line. Rule 31 (1) of the Electricity Rules on the other hand does not deal with cases which sec. 26 (5) contemplates. Rule 31 (1) deals with the tampering of seals placed on a meter which is already working. There is therefore no conflict between sec. 26 (5) and Rule 31 (1). I.L.R. (1939) Bom. 496=41 Bom.L.J. R. 878=A.I.R. 1939 Bom. 480.

Sec. 26 (5) deals with a case of connecting

(6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electric Inspector, or by a competent person specially appointed by the Provincial Government in this behalf; and, where the meter has, in the opinion of such Inspector or person, ceased to be correct, such Inspector or person shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time as the meter shall not, in the opinion of such Inspector or person, have been correct, \* \* \* \* \*; and where the matter has been decided by any person other than the Electric Inspector, an appeal shall lie to the Inspector, whose decision shall in every case be final: but, save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:

<sup>2</sup>[Provided that, before either a licensee or a consumer applies to the Electric Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do.]

(7) In addition to any meter which may be placed upon the premises of a consumer in pursuance of the provisions of sub-section (1), the licensee may place upon such premises such meter, maximum demand indicator or other apparatus as he may think fit for the purpose of ascertaining or regulating either the amount of energy supplied to the consumer, or the number of hours during which the supply is given, or the rate per unit of time at which energy is supplied to the consumer, or any other quantity or time connected with the supply:

Provided that the meter, indicator or apparatus shall not, in the absence of an agreement to the contrary, be placed otherwise than between the distributing mains of the licensee and any meter referred to in sub-section (1):

Provided also, that, where the charges for the supply of energy depend wholly or partly upon the reading or indication of any such meter, indicator or apparatus as aforesaid, the licensee shall, in the absence of an agreement to the contrary, keep the meter, indicator, or apparatus correct; and the provisions of sub-sections (4), (5) and (6) shall in that case apply as though the meter, indicator or apparatus were a meter referred to in sub-section (1).

*Explanation.*—A meter shall be deemed to be "correct" if it registers the amount of energy supplied, or the electrical quantity contained in the supply, within the prescribed limits of error, and a maximum demand indicator or other apparatus referred to in sub-section (7) shall be deemed to be "correct" if it complies with such conditions as may be prescribed in the case of any such indicator or other apparatus.

27. Notwithstanding anything in this Act, the Provincial Government may by order in writing, and subject to such conditions and restrictions, if any, as it thinks fit to impose, authorise any licensee to supply energy to any person outside the area of supply, and to lay down and place electric supply lines for that purpose:

Provided, first, that no such authority shall be conferred on the licensee within the area of supply of another licensee without that licensee's consent, unless the Provincial Government considers that his consent has been unreasonably withheld:

Provided, secondly, that such authority shall not be conferred unless the person to whom the supply is to be given has entered into a specific agreement with the licensee for the taking of such supply:

Provided, thirdly, that a licensee on whom such authority has been conferred shall not be deemed to be empowered outside the area of supply to open or break up any street, or any sewer, drain or tunnel in or under any street, railway or tramway, or to interfere with any telegraph-line, without the written consent of the local authority or person by whom such street, sewer, drain or tunnel is repairable.

LEG. REF.

<sup>1</sup> The words "on the basis of the previous supply" were omitted by sec. 11 of the Indian

Electricity (Amendment) Act (I of 1922).

<sup>2</sup> This proviso was added by *ibid.*

or of the telegraph-authority, as the case may be, <sup>1</sup>[unless the Provincial Government, after such inquiry as it thinks fit, considers that such consent has been unreasonably withheld :

Provided, fourthly, that, save as aforesaid, the provisions of this Act shall apply in the case of any supply authorised under this section as if the said supply were made within the area of supply.

### PART III.

#### SUPPLY, TRANSMISSION AND USE OF ENERGY BY NON-LICENSEES.

28. (1) No person, other than a licensee, shall engage in the business of supplying energy with the previous sanction of the Provincial Government and in accordance with such conditions as the Provincial Government may fix in this behalf, and any agreement to the contrary shall be void :

\* \* \* \* \*

Provided <sup>3</sup> [\*] that such sanction shall not be given within the area for which a local authority is constituted, without that local authority's consent, or within the area of supply of any licensee, without that licensee's consent, unless the Provincial Government considers that consent has been unreasonably withheld.

(2) Where any difference or dispute arises as to whether any person is or is not engaging, or about to engage, in the business of supplying energy within the meaning of sub-section (1), the matter shall be referred to the Provincial Government and the decision of the Provincial Government thereon shall be final.

29. (1) The local authority may, by order in writing, confer and impose upon any person, who has obtained the sanction of the Provincial Government under section 28 to engage in the business of supplying energy, all or any of the powers and liabilities of a licensee under sections 12 to 19 both inclusive, and the provisions of the said sections shall thereupon apply as if such person were a licensee under Part II.

(2) A local authority, not being a licensee, shall, for the purpose of lighting any street, have the powers and be subject to the liabilities respectively conferred and imposed by sections 12 to 19, both inclusive, so far as applicable, as if it were a licensee under Part II.

(3) In cases other than those for which provision is made by sub-section (1), the person responsible for the repair of any street may, by order in writing, confer and impose upon any person who proposes to transmit energy in such street all or any of the powers and liabilities of a licensee under sections 12 to 19 (both inclusive), in so far as the same relate to—

(a) opening or breaking up of the soil or pavement of such street, or  
(b) laying down or placing electric supply-lines in, under, along or across such street, or

(c) repairing, altering or removing such electric supply-lines, and thereupon the provisions of the said sections shall, so far as aforesaid, apply to such person as if he were a licensee under Part II.

(4) If no order is made within fourteen days after the receipt of an application for the same under sub-section (1) or sub-section (3), the order so applied for shall be deemed to have been refused, and every order, and every refusal to make an order, under sub-section (1) or sub-section (3), shall be subject to revision by the Provincial Government.

<sup>4</sup>[29-A. The provisions of sub-sections (3) and (4) of section 18 and of the

#### LEG. REF.

<sup>1</sup> These words were added by sec. 12 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> The first proviso was omitted by sec. 13

of *ibid.*

<sup>3</sup> The word "also" was omitted by *ibid.*

<sup>4</sup> This section was inserted by sec. 2 of the Indian Electricity (Amendment) Act (XL of 1923).

Application of section 18 to aerial lines maintained by railways.

railway administration.]

Control of transmission and use of energy.

*Explanation* thereto shall apply in the case of any aerial line placed by any railway administration as defined in section 3 of the Indian Railways Act, 1890, as if references therein to the licensee were references to the

30. (1) No person, other than a licensee duly authorized under the terms of his license, shall transmit or use energy at a rate exceeding two hundred and fifty watts,—

(a) in any street, or

(b) in any place,

(i) in which one hundred or more persons are likely ordinarily to be assembled, or

(ii) which is a factory within the meaning of the Indian Factories Act, 1911,<sup>1</sup> or,

(iii) which is a mine within the meaning of the Indian Mines Act, 1901,<sup>2</sup> or

(iv) to which the Provincial Government, by general or special order, declares the provisions of this sub-section to apply], without giving not less than seven clear days' notice in writing of his intention to the District Magistrate or, in a Presidency town, <sup>3</sup> \* to the Commissioner of Police, and complying with such of the provisions of Part IV, and of the rules made thereunder, as may be applicable :

Provided that nothing in this section shall apply to energy used for the public carriage of passengers, animals or goods on, or for the lighting or ventilation of the rolling-stock of, any railway or tramway subject to the provisions of the Indian Railways Act, 1890 :

Provided, also, that the Provincial Government may, by general or special order and subject to such conditions and restrictions as may be specified therein, exempt from the application of this section or of any such provision or rule as aforesaid any person or class of persons using energy on premises upon or in connection with which it is generated, or using energy supplied under Part II in any place specified in clause (b).

(2) Where any difference or dispute arises as to whether a place is or is not one in which one hundred or more persons are likely ordinarily to be assembled the matter shall be referred to the Provincial Government and the decision of the Provincial Government thereon shall be final.

(3) The provisions of this section shall be binding on the Crown.

#### PART IV.

##### GENERAL.

##### *Protective Clauses.*

31. No person shall, in the generation, transmission, supply or use of energy, in any way injure any railway, tramway, canal or water-way or any dock, wharf or pier vested in or controlled by a local authority, or obstruct or interfere with the traffic on any railway, tramway, canal or water-way.

32. (1) Every person generating, transmitting, supplying or using energy (hereinafter in this section referred to as the "operator") shall take all reasonable precautions in constructing, laying down and placing his electric supply-lines and otherworks and in working his system so as not injuriously to affect, whether by induction or otherwise, the working of any wire

##### LEG. REF.

<sup>1</sup> These figures were substituted for the figures "1881" by sec. 14 of the Indian Electricity (Amendment) Act (I of 1932). See now the Factories Act (XXV of 1934).

<sup>2</sup> The word "or" and sub-cl. (iv) were inserted by the Indian Electricity (Amendment) Act (I of 1932), sec. 14.

<sup>3</sup> The words "or Rangoon" omitted by A.O., 1937.



or line used for the purpose of telegraphic, telephonic or electric-signalling communication, or the currents in such wire or line.

(2) Where any difference or dispute arises between the operator and the telegraph-authority as to whether the operator has constructed, laid down or placed his electric supply-lines or other works, or worked his system, in contravention of sub-section (1), or as to whether the working of any wire, line or current is or is not injuriously affected thereby, the matter shall be referred to the <sup>1</sup>[Central Government]; and the <sup>1</sup>[Central Government], unless <sup>2</sup>[it] is of opinion that the wire or line has been placed in unreasonable proximity to the electric supply-lines or works of the operator after the construction of such lines or works, may direct the operator to make such alterations in, or additions to, his system as may be necessary in order to comply with the provisions of this section, and the operator shall make such alterations or additions accordingly :

Provided that nothing in this sub-section shall apply to the repair, renewal or amendment of any electric supply-line so long as the course of the electric supply-line and the amount and nature of the energy transmitted thereby are not altered.

(3) Where the operator makes default in complying with the requirements of this section, he shall make full compensation for any loss or damage incurred by reason thereof, and, where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration.

*Explanation.*—For the purposes of this section, a telegraph-line shall be deemed to be injuriously affected if telegraphic, telephonic or electric-signalling communication by means of such line is, whether through induction or otherwise, prejudicially interfered with by an electric supply-line or work or by any use made thereof.

33. <sup>3</sup>[(1) If any accident occurs in connection with the generation, transmission, supply or use of energy in, or in connection with, any part of the electric supply-lines or other works of any person, and the accident results or is likely to have resulted in loss of life or personal injury, such person shall give notice of the occurrence, and of any loss of life or personal injury, actually occasioned by the accident, in such form and within such time and to such authorities as the Provincial Government may, by general or special order, direct.]

(2) The Provincial Government may, if it thinks fit, require any Electric Inspector, or any other competent person appointed by it in this behalf, to inquire and report—

(a) as to the cause of any accident affecting the safety of the public, which may have been occasioned by or in connection with the generation, transmission, supply or use of energy, or

#### LEG. REF.

<sup>1</sup> The words "Local Government" were substituted for the words "Governor-General in Council" by sec. 2 and Sch. I of the Devolution Act (XXXVIII of 1920); and word 'Local' was changed to 'Central' by A.O., 1937.

<sup>2</sup> This word was substituted for the word 'he' by sec. 2 and Sch. I of the Devolution Act (XXXVIII of 1920).

<sup>3</sup> This sub-section was substituted by sec. 15 of the Indian Electricity (Amendment) Act (I of 1922).

SEC. 33.—It was held under the old section that its applicability was not confined to the accidents occurring in connection with the works of persons licensed under Parts II and III of the Act, nor to cases in which the accident actually resulted in personal injury or death. *See* 39 M. 686=18 M.L.J. 150=30 I.C. 444.

CONTINUANCE IN FORCE OF RULES AND REGULATIONS MADE UNDER ACT IX OF 1910 AND ACT V OF 1923.—Rules made before the 31st day of March, 1937, under sec. 37 of the Indian Electricity Act, 1910, and regulations made before the 28th day of March, 1937, under sec. 28 of the Indian Boilers Act, 1923, by the Governor-General in Council shall, on and from the said dates respectively, be deemed to have been made under the said sections of the said Acts by the authority substituted for the Governor-General in Council by the Indian Electricity (Amendment) Act, 1937, and the Indian Boilers (Amendment) Act, 1937, respectively, and shall continue to be in force until superseded by rules or regulations made under the said sections of the said Acts by the Central Electricity Board or the Central Boilers Board, as the case may be. (*Vide* sec. 2 of Act XXIV of 1937).

(b) as to the manner in, and extent to, which the provisions of this Act or of any license or rules thereunder, so far as those provisions affect the safety of any person, have been complied with.

34. (1) No person shall, in the generation, transmission, supply or use of energy, permit any part of his electric supply-lines to be connected with earth except so far as may be prescribed in this behalf or may be specially sanctioned by the Provincial Government.

(2) If at any time it is established to the satisfaction of the Provincial Government—

(a) that any part of an electric supply-line is connected with earth contrary to the provisions of sub-section (1), or

(b) that any electric supply-lines or other works for the generation, transmission, supply or use of energy are attended with danger to the public safety or to human life or injuriously affect any telegraph-line, or

(c) that any electric supply-lines or other works are defective so as not to be in accordance with the provisions of this Act or of any rule thereunder, the Provincial Government may, by order in writing, specify the matter complained of and require the owner or user of such electric supply-lines or other works to remedy it in such manner as shall be specified in the order, and may also in like manner forbid the use of any electric supply-line or works until the order is complied with or for such time as is specified in the order.

#### *Administration and rules.*

35. (1) The Central Government may, for the whole or any part of British India, and each Provincial Government may for the whole or any part of the province, by notification in the official Gazette, <sup>1</sup>\* \* \* constitute an Advisory Board.

(2) Every such Board shall consist of a chairman and not less than two other members.

<sup>2</sup>\* \* \* \* \*

<sup>3</sup>[(3)] The Central Government or the Provincial Government, as the case may be, may, by general or special order,—

<sup>4</sup>[(a) determine the number of members of which any such Board shall be constituted and the manner in which such members shall be appointed.]

<sup>5</sup>[(b) ] define the duties and regulate the procedure of any such Board,

<sup>5</sup>[(c) ] determine the tenure of office of the members of any such Board, and

<sup>5</sup>[(d) ] give directions as to the payment of fees to, and the travelling expenses incurred by, any member of any such Board in the performance of his duty.

36. (1) The Central Government may, by notification in the official Gazette, appoint duly qualified persons to be Electric Inspectors, and every Electric Inspector so appointed shall <sup>6</sup>[in relation to mines, oil-fields and railways] exercise the powers and perform the functions of an Electric Inspector under this Act within such areas and subject to such restrictions as the Central Government may direct.

(2) The Provincial Government may, by notification in the official Gazette, appoint duly qualified persons to be Electric Inspectors within such areas as may be assigned to them respectively ; and every Inspector so appointed shall <sup>6</sup>[except in relation to mines, oil-fields and railways] exercise the powers and perform the

#### LEG. REF.

<sup>1</sup> Words "or the Local Official Gazette, as the case may be", were omitted by A.O., 1937.

<sup>2</sup> Sub-sec. (8) was omitted by sec. 16 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>3</sup> This sub-section which was originally numbered "(4)", was re-numbered "(3)",

by sec. 16 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>4</sup> This clause was inserted by *ibid.*

<sup>5</sup> The clauses "(b)", "(c)" and "(d)", which were originally lettered "(a)", "(b)" and "(c)" were re-lettered by sec. 16 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>6</sup> Inserted by A.O., 1937.

functions of an Electric Inspector under this Act subject to such restrictions as the Provincial Government may direct.

(3) In the absence of express provision to the contrary in this Act or any rule thereunder, an appeal shall lie from the decision of an Electric Inspector, to the Central Government or the Provincial Government, as the case may be <sup>1</sup>[or, if the Central Government or the Provincial Government, as the case may be, by general or special order, so directs, to an Advisory Board.]

<sup>2</sup>[36-A. (1) A Board to be called the Central Electricity Board shall be constituted to exercise the powers conferred by section 37.

(2) The Central Electricity Board shall consist of fifteen members, namely :—

(a) a chairman to be nominated by the Central Government ;

(b) one member to be nominated by each of the Provincial Governments of Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces <sup>3</sup>[and Berar], Assam, the North-West Frontier Province, Sind and Orissa ;

(c) one member, holding office for a period of three years, to be nominated alternatively by the Provincial Government of Delhi and the Provincial Government of Ajmer-Merwara ;

(d) one member to be nominated by the Chief Commissioner of Railways ; and

(e) one member to be nominated by the Chief Inspector of Mines.

(3) Any vacancy occurring in the Board, otherwise than by the expiry of the term of office of the member referred to in clause (e) of sub-section (2), shall be filled as soon as may be by a nomination made by the authority by whom the member vacating office was nominated.

(4) The Board shall have full power to regulate by by-laws or otherwise its own procedure and the conduct of all business to be transacted by it.

(5) The powers of the Central Electricity Board may be exercised notwithstanding any vacancy in the Board.]

37. (1) The <sup>4</sup>[Central Electricity Board] may make <sup>5</sup>rules, <sup>6</sup>[ \* \* \*

Power of Board to make transmission, supply and use of energy; and, generally, rules, to carry out the purposes and objects of this Act.

#### LEG. REF.

<sup>1</sup> These words were added by sec. 17 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> Sec. 36-A inserted by Act X of 1937, sec. 3.

<sup>3</sup> Inserted by A.O., 1937.

<sup>4</sup> Substituted for 'Governor-General in Council' by Act X of 1937.

<sup>5</sup> See the Indian Electricity Rules, 1937, published with the Notification of the Government of India (Industries and Labour Department) No. F-601, dated the 27th March, 1937. These rules though made by the Governor-General in Council, are to be deemed to have been made by the Central Electricity Board: see the Rules and Regulations Continuance Act, 1937 (XXIV of 1937).

<sup>6</sup> The words "for the whole or any part of British India" were omitted by A.O., 1937.

SEC. 37.—The power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary. Because in their licence the electric company are empowered to have a generating station somewhere within the limits of Madras, they are not free from the

ordinary control of the local authority in respect of the steam boiler which they use to provide motive power for generation. [(1881) 6 A.C. 193, Ref.] Nor does the fact that it is a company of public utility with compulsory obligations to the public confer on it immunity from the control of the local authority. [(1899) 2 Q.B. 664; (1909) 2 K.B. 744; (1900) 82 L.T. 562; (1909) 2 K.B. 138; (1903) 88 L.T. 772, Ref.] 54 Mad. 364=A. I.R. 1931 Mad. 152=60 M.L.J. 551.

"COMMERCIAL PREMISES"—MEANING OF—COFFEE-HOTEL.—"Commercial premises" in the context of the classification rules for electric supply by an electric licensee means nothing more than "premises used for purposes of business". The words cannot be read as being in contradiction to trade premises. Premises used for running a coffee-hotel must be regarded as "Commercial premises" for the purpose of fixing rates for the supply of electric energy. 53 L.W. 359=A.I.R. 1941 Mad. 439=(1941) 1 M.L.J. 411.

RULES 31 AND 37.—The provisions of r. 31 deal with the point of commencement of supply of energy by the licensee to the consumer and not with the question of control over an electric line as a matter of fact. R. 31 is one of the rules relating to the conditions of

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the form of applications for licenses and the payments to be made in respect thereof;

(b) regulate the publication of notices;

(c) prescribe the manner in which objections with reference to any application under Part II are to be made;

(d) provide for the preparation and submission of accounts by licensees in a specified form;

(e) provide for the securing of a regular, constant and sufficient supply of energy by licensees to consumers and for the testing at various parts of the system of the regularity and sufficiency of such supply, and for the examination of the records of such tests by consumers;

supply which is a matter of concern between the licensee and the consumer rather than a matter affecting the public; whereas r. 37 is one of the rules of precaution for the safety of the public. A.I.R. 1933 R. 70=11 Rang. 162=34 Cr.L.J. 1040. R. 37 applies to all electric supply lines, and in considering whether the case is governed by r. 37 or not; it is unnecessary to determine whether the line in question is a service-line or not. Under r. 37 the licensee is responsible that all electric supply lines under his control, even if they are on a consumer's premises, are maintained in a safe condition. In truth and in fact the consumer gets the use of the control of the electric current only when it reaches his switch and not as soon as it passes through the meter. (*Ibid.*) See also 41 Bom.L.R. 878. Where a consumer elects to take a supply of energy from the licensee's distributing main at any point outside his premises, and receives the supply through the licensee's meter, and has it conveyed through a line constructed by himself, it cannot be said the obligation to keep in a safe condition the line and works from the point of commencement of supply (i.e., the meter) to the consumer's premises and also the line and works on the consumer's premises, is cast upon the consumer and not on the licensee; such a contention runs counter to the object and effect of the Electricity Act. The licensee is not entitled by agreement with the consumer to release himself from the obligation to see that the line, apparatus and works by which electricity is transmitted, so long as he retains control of them, are maintained in a safe condition because this obligation is cast upon him not merely for the benefit of the consumer and the licensee, but also for the protection and in the interest of the public generally. Where therefore the licensee allows the stay wire in the road to be in an unsafe condition the licensee fails to perform an obligation imposed upon him under the Act and is guilty of a breach of r. 37 and can be convicted under r. 107. But a conviction in the alternative under r. 107 and sec. 47 however is not in accordance with law, for, the case falls neither under sec. 236 nor sec. 367 (3), Cr.P. Code. 1933 Cr. C. 477=1933 R. 70. The evidence for the prosecution showed that when the officials of a licensee company visited the premises of the accused the seals which the company had affixed to the meter had been removed. *Held*,

that the accused must be held responsible for removing these seals and that his conviction under r. 106 read with r. 37 (4) was justified. 116 I.C. 889=1929 L. 867.

R. 40-A: BOMBAY GOVERNMENT NOTIFICATION DATED 15-11-1934—"THEIR OWN WORKS"—INTERPRETATION OF.—The words "their own works" in the notification dated 15-11-1934, issued by the Government of Bombay under r. 40-A of the Electricity Rules, 1922, cannot be interpreted as being limited to works carried out on the premises of the various bodies referred to there. The words mean works carried out by the exempted bodies themselves or perhaps works belonging to them; and by "works" is meant the kind of works referred to in the rule and not the kind of works referred to in the definition in the Electricity Act. 43 Bom.L.R. 99=1941 Bom. 100; see also I.L.R. (1939) Bom. 496.

R. 48 of the Indian Electricity Rules, 1937, introduced by the Notification dated 27-3-1937, did not come into force until 22-3-1938; and r. 48 cannot therefore apply to any installation works carried out before 22-3-1938, and after March, 1937. Nor would the old r. 40-A of the Electricity Rules, 1922, apply, because under the Notification of 23-3-1937 the old r. 40-A was superseded when the new rules were made applicable on 27-3-1937. Sec. 24 of the General Clauses Act of 1897 is of no avail in such a case and r. 40-A of the old cannot be regarded as superseded only when the new rule 48, came into force because the Notification of March, 1937 expressly superseded the rules of 1922. 43 Bom.L.R. 99=1941 Bom. 100.

"Commercial premises" in the context of the classification rules for electric supply by an electric licensee means nothing more than "premises used for purposes of business". The words cannot be read as being in contradiction to trade premises. Premises used for running a coffee-hotel, must be regarded as "Commercial premises" for the purpose of fixing rates for the supply of electric energy. 1941 M.W.N. 253=53 L.W. 359=(1941) 1 M.L.J. 411.

RE. 49, 57, 120 AND 124.—The principal of a college who is also the Secretary of the governing body of the Society which conducts the College, is liable to be punished for failure to keep the electric installation within

(f) provide for the protection of persons and property from injury by reason of contact with, or the proximity of, or by reason of the defective or dangerous condition of, any appliance or apparatus used in the generation, transmission, supply or use of energy ;

(g) for the purposes of electric traction regulate the employment of insulated returns, or of uninsulated metallic returns of low resistance, in order to prevent fusion or injurious electrolytic action of or on metallic pipes, structures or substances, and to minimise, as far as is reasonably practicable, injurious interference with the electric wires, supply-lines and apparatus of parties other than the owners of the electric traction system, or with the currents therein, whether the earth is used as a return or not ;

(h) provide for preventing telegraph-lines and magnetic observatories or laboratories from being injuriously affected by the generation, transmission, supply or use of energy ;

(i) prescribe the qualifications to be required of Electric Inspectors ;

(j) authorize any Electric Inspector or other officer of a specified rank and class to enter, inspect and examine any place, carriage or vessel in which he has reason to believe any appliance or apparatus used in the generation, transmission, supply or use of energy to be, and to carry out tests therein, and to prescribe the facilities to be given to such Inspectors or officers for the purposes of such examinations and tests :<sup>1\*</sup>

(k) authorize and regulate the levy of fees for any such testing or inspection and, generally for the services of Electric Inspectors under this Act ; <sup>2</sup>[and

(l) provide for any matter which is to be or may be prescribed ;]

#### LEG. REF.

<sup>1</sup> The word "and" was omitted by sec. 18 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> The word "and" and cl. (l) were inserted by sec. 18 of the Indian Electricity (Amendment) Act (I of 1922).

the college premises in proper order so as to avoid danger to persons coming into contact with it. I.L.R. (1944) Nag. 692=1944 N.L.J. 475=1944 Nag. 380.

R. 106: *Quære*.—Whether r. 106 of the rules framed under the Electricity Act is *ultra vires* of the rule making power conferred by sec. 37 (4). 172 I.C. 940=39 Cr.L.J. 206=18 P.L.T. 968=A.I.R. 1938 Pat. 15. The definition of 'consumer' includes any person who is supplied with energy by a licensee, any person whose premises are for the time being connected for the purposes of a supply of energy with the works of the licensee. Therefore in a prosecution for offences under sec. 44 and r. 106, *prima facie* it should be enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. 172 I.C. 940=18 P.L.T. 986=A.I.R. 1938 Pat. 15. It is clear from the provisions of sec. 37 of the Electricity Act that r. 106 was one which the Government of India had power to make and the necessity of a rule fixing responsibility for the integrity of the seals of the meter fixed on the consumer's premises is obvious. It is equally obvious that in case of a conviction under r. 106, although the breaking of a seal on a meter fixed on a consumer's premises is sufficient to render the consumer liable to a fine, the fine would be adapted to the circumstances of the case. 151

I.C. 1039=1934 N. 245. Rule 106 is unreasonable and repugnant to the general principles of law, and is in excess of the powers conferred by s. 37 (4). It is also inconsistent with the provisions of s. 44 of the Act. Consequently this rule is *ultra vires* of the Governor-General in Council and is therefore invalid. 12 r. 515=35 Cr.L.J. 1364=A.I.R. 1934 r. 178.

R. 107.—R. 107 framed under sec. 37 of the Act imposes penalties only on licensees and owners (*i.e.*, experts). It is not applicable to consumers, who are not experts. The only rules which any non-expert can observe are rr. 29 and 40-A which are provided for by rr. 106 and 106-A. 60 Bom. 770=37 Cr.L.J. 1124=38 Bom.L.R. 484=A.I.R. 1936 Bom. 327.

Under r. 123 it is not the workman who actually carries out the installation that is guilty of any offence; it is only the person under whose immediate supervision the work is carried out that is liable to punishment under the rule. I.L.R. (1940) All. 67=1939 A. W.R. (H.C.) 789=A.I.R. 1940 All. 5=1939 A.L.J. 1082.

R. 62 (3) (a): LIABILITY UNDER—CIVIL RIGHTS.—The civil rights of a person would not in any way protect him against criminal liability for his acts and omissions under r. 62 (3) (a) of the Indian Electricity Rules. He has every right to move against the Electric Supply Co., to have the wire removed from over his land, but the wire being where it is he is not justified in law in effecting additions and alterations in his house making the aerial line running over land accessible otherwise than by the aid of a ladder or other special appliance. 15 Pat.L.T. 761=1934 P. 523.

SECS. 37 AND 38: RULES UNDER.—Validity of rules made and duly published by the Governor-General can be canvassed in a Court

<sup>1</sup>[(3) Any rules made in pursuance of clause (f) or clause (h) of sub-section (2) shall be binding on the Crown].

<sup>2</sup>[(4)] In making any rule under this Act, the <sup>3</sup>[Central Electricity Board] may direct that every breach thereof shall be punishable with fine which may extend to three hundred rupees, and, in the case of a continuing breach, with a further daily fine which may extend to fifty rupees.

Further provisions respecting rules. 38. (1) The power to make rules under section 37 shall be subject to the condition of the rules being made after previous publication.

(2) The date to be specified in accordance with clause (3) of section 23 of the General Clauses Act, 1897, as that after which a draft of rules proposed to be made under section 37 will be taken into consideration shall not be less than three months from the date on which the draft of the proposed rules was published for general information.

\* \* \* \* \*

<sup>4</sup>[(3)] All rules made under section 37 shall be published in the <sup>5</sup>[Gazette of India], and on such publication shall have effect as if enacted in this Act.

<sup>6</sup>[38-A. The provisions of sections 37 and 38 shall, in relation to rules affecting mines, oilfields and railways, have effect as if the references to the Provincial Government and the Province were references to the Central Government and British India respectively.]

#### CRIMINAL OFFENCES AND PROCEDURE.

39. Whoever dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code; and the existence of artificial means for such abstraction shall be *prima facie* evidence of such dishonest abstraction.

#### LEG. REF.

<sup>1</sup> This sub-section was inserted by sec. 18 of Act I of 1922.

<sup>2</sup> This sub-section, which was originally numbered "(3)", was re-numbered "(4)" by *ibid.*

<sup>3</sup> Substituted for "Governor-General in Council" by Act X of 1937.

<sup>4</sup> Old sub-sec. (3) was omitted and sub-sec. (4) was re-numbered as the present sub-sec. (3) by Act X of 1937.

<sup>5</sup> See Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.

<sup>6</sup> Sec. 38-A was inserted by A.O., 1937.

of law. 12 R. 515=35 Cr.L.J. 1364=1934 R. 178. The definite policy underlying the penal rules framed under sec. 37 is to make licensees and owners who are experts, having or supposed to have some knowledge of the technical matters relating to electricity liable for breaches of the rules. An owner as defined under the rules is a sort of quasi-licensee; a person who is not a licensee, but authorised by Government under Part III of the Act to supply energy. The rules however, clearly are not part of the Act, and the provision in sec. 38 (4) giving them the same force as if they had been enacted by the Act does not make them so. 60 Bom. 770=38 Bom.L.R. 434=37 Cr.L.J. 1124=A.I.R. 1936 Bom. 327.

Sec. 39.—The word "dishonestly" is a legal expression having the same sense as that in which it is used in the Penal Code. 27 I.C. 591.

BURDEN OF PROOF.—CIRCUMSTANTIAL EVIDENCE.—Sec. 39 does not remove from prosecution the burden of proving an offence

against an individual. Such proof must naturally be circumstantial in character. Where the person charged is the lessee or owner of the house and the consumer of the electricity (that is, the person who is officially on the company's books as the consumer in the particular house) and where there is a large and obvious erection on the roof of the house or in any part the house, where it could not possibly escape the notice of the consumer and where in addition the person charged is the only person who would gain advantage from the theft of the electricity, the charge under s. 39 is made out. 146 I.C. 814=1933 A. L.J. 1175. S. 39 does not say that dishonest abstraction or consumption or use of energy is theft. S. 39 means no more than that the offender is to be tried in the same way as if he had committed the offence of theft. A.I.R. 1936 Cal. 753. Abstraction is not always a necessary ingredient for an offence under s. 39. The consuming of electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered, amounts to a dishonest user within the meaning of sec. 39, and the persons causing or allowing the alteration of the figures on the dial must be deemed to have committed theft within the meaning of sec. 379, Penal Code. (*Ibid.*)

OFFENCE UNDER SECTION.—CONSUMER USING ELECTRICAL MACHINERY.—*Bona fide* CONDUCT.—A consumer employing electrical machinery is entitled within his own premises to use all reasonable tests which might be necessary to discover a defect. It is not obligatory on any one, whatever machinery he may happen to use, to call in an expert on every occasion

40. Whoever maliciously causes energy to be wasted or diverted, or, with intent to cut off the supply of energy, cuts or injures, or attempts to cut or injure, any electric supply-line or works, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

41. Whoever, in contravention of the provisions of section 28, engages in the business of supplying energy shall be punishable with fine which may extend to three thousand rupees, and, in the case of a continuing contravention, with a daily fine which may extend to three hundred rupees.

Penalty for illegal or defective supply or for non-compliance with order.

42. Whoever—

(a) being a licensee, save as permitted under section 27 or section 51 or by his license, supplies energy or lays down or places any electric supply-line or works outside the area of supply; or,

(b) being a licensee, in contravention of the provisions of this Act or of the rules thereunder or in breach of the conditions of his license and without reasonable excuse, the burden of proving which shall lie on him, discontinues the supply of energy or fails to supply energy; or

(c) makes default in complying with any order issued to him under section 34, sub-section (2); shall be punishable with fine which may extend to one thousand rupees, and, in the case of a continuing offence or default, with a daily fine which may extend to one hundred rupees.

43. Whoever in contravention of the provisions of section 30, transmits or uses energy without giving the notice required thereby, shall be punishable with fine which may extend to five hundred rupees, and, in the case of a continuing offence, with a daily fine which may extend to fifty rupees.

Penalty for interference with meters or licensee's works and for improper use of energy.

44. Whoever—

when something goes wrong. A man is entitled, if he is able, to remedy defects himself in his own plant. If, in the electric supply, it is reasonable for a consumer to use an electric lamp and he *bona fide* uses a lamp for this purpose without permission, sec. 23 has no application nor is he guilty under s. 39 as his action does not amount to dishonest abstraction of the company's electric energy. 151 I. C. 19=35 Cr. L.J. 1274=1934 A. 320.

SECS. 39 AND 44 (c).—Sec. 39 dispenses with direct proof of abstraction by the accused person, but does not indicate the person who is to be held liable for the constructive abstraction. Sec. 44 (c) also enables a presumption to be raised, under certain circumstances, that the prevention of a meter from duly registering itself has been knowingly and wilfully caused by the consumer in whose custody or control the meter is proved to be. But the prosecution cannot avail itself of this statutory presumption as against an accused person unless that person is shown to be a consumer within the meaning of sec. 2 (c). 1938 P.W.N. 182=19 P.L.T. 141=A.I.R. 1938 Pat. 243. Where an offence falls under both secs. 39 and 44 (c) the mere fact that a charge could have been made under sec. 44 (c) does not prevent a charge made under sec. 39 from being properly made especially where the

offence under sec. 39 is clearly established. Sec. 39 is in fact the major offence. 65 I.A. 158=42 C.W.N. 621=1938 A.L.J. 382=174 I.C. 1=A.I.R. 1938 P.C. 130=(1938) 1 M. L.J. 647 (P.C.). Secs. 39 and 44, Electricity Act, are to be considered as separate enactments for purposes of sec. 26, General Clauses Act. A.I.R. 1936 Cal. 753.

SECS. 39 AND 50: THEFT OF ELECTRIC ENERGY.—PERSONS AUTHORISED TO PROSECUTE.—S. 39 creates an offence, and prosecution for the theft of electric energy can be instituted only by one of the persons mentioned in sec. 50. Where the prosecution is not instituted at the instance of the Government or an Electric Inspector but by the Executive Officer of a Cantonment Board who are licensees for distribution of electric energy, the proceedings are liable to be quashed in the absence of evidence to show that the Executive Officer has authority from the Board to institute the proceedings, as he cannot be deemed to be an aggrieved person within the meaning of sec. 50. 37 P.L.R. 758.

Sec. 44.—The latter part of sec. 44 of the Act does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the



(a) connects any meter referred to in section 26, sub-section (1), or any meter, indicator or apparatus referred to in section 26, sub-section (7) with any electric supply-line through which energy is supplied by a licensee, or disconnects the same from any such electric supply-line, without giving to the licensee forty-eight hours' notice in writing of his intention ; or

(b) lays, or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee, without such licensee's consent ; or

(c) maliciously injures any meter referred to in section 26, sub-section (1) or any meter, indicator or apparatus referred to in section 26, sub-section (7), or wilfully or fraudulently alters the index of any such meter, indicator, or apparatus, or prevents any such meter, indicator or apparatus from duly registering ; or

(d) improperly uses the energy of a licensee ;  
shall be punishable with fine which may extend to <sup>1</sup>[five hundred] rupees, and, in the case of a continuing offence, with a daily fine which may extend to <sup>2</sup>[fifty] rupees ; and <sup>3</sup>[if it is proved that any artificial means exist] for making such connection as is referred to in clause (a) or such communication as is referred to in clause (b) or for causing such alteration or prevention as is referred to in clause (c) or for facilitating such improper use as is referred to in clause (d) <sup>4</sup>[and that] the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, <sup>5</sup>[it shall be presumed, until the contrary is proved,] that such connection, communication, alteration, prevention or improper use, as the case may be, has been knowingly and wilfully caused by such consumer.

45. Whoever maliciously extinguishes any public lamp shall be punishable

with imprisonment for a term which may extend to six months, or with fine which may extend to three hundred rupees, or with both.

46. Whoever negligently causes energy to be wasted or diverted, or negli-

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "three hundred" by sec. 19 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> This word was substituted for the word "thirty", by *ibid*.

<sup>3</sup> These words were substituted for the words "the existence of artificial means," by *ibid*.

<sup>4</sup> These words were substituted for the words "shall, where" by *ibid*.

<sup>5</sup> These words were substituted for the words "be *prima facie* evidence," by *ibid*.

consumer himself will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. I.L.R. (1940) 2 Cal. 571. Presumption under—When to be raised—Not available against a person not proved to be consumer. 1938 P. W.N. 182=19 P.L.T. 141=1938 Pat. 243. See also I.L.R. (1940) 2 Cal. 571. In prosecution for offences under this section *prima facie* it is enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. A.I.R. 1938 Pat. 15=18 P.L.T. 986.

SEC. 44 (b) OF THE ACT does not require that the "works" laid or connected up with any other works belonging to the licensee must also be works belonging to the licensee. I.L.R. 1939 Bom. 496=41 Bom.L.R. 878=A.I.R. 1939 Bom. 480. "Works" as defined

by sec. 2 (n) of the Electricity Act, include electricity supply lines. The point at which the supply of energy by a licensee to a consumer shall be deemed to commence, where the amount supplied is ascertained by meter, is the point at which the conductor enters the meter, in view of sec. 35 read with sec. 19-A of the Act. The supply line up to the point at which it enters the meter constitutes "works" within the meaning of sec. 2 (n). Where a person therefore removes the meter board to a new position, after breaking open the seals which had been placed by the licensee upon the meter, laying additional lines from the former position of the meter up to its new position, his act amounts to an offence under sec. 44 (b) of the Electricity Act as well as an offence under r. 31 (1) read with r. 122 (a) of the Electricity Rules, I.L.R. (1939) Bom. 496=41 Bom.L.R. 878=A.I.R. 1939 Bom. 480. The words "connects up" in s. 44 (b) of the Act cannot be construed as extending only to the workman or man who actually does the physical work. The words embrace the whole process of connecting the wires in an installation with other wires for the purpose of communicating with the works of the licensee. There is no doubt that the words "connects up" include the house-holder who gives instructions to connect up, the contractor, if any, through whom those instructions are transmitted to the workman and the workman who actually does the work. 1942 Bom. 76=44 Bom.L.R. 800.

SEC. 44 (d): PROSECUTION UNDER—ONUS OF PROOF.—The latter part of sec. 44 of the

Penalty for negligently wasting energy or injuring works.

with fine which may extend to two hundred rupees.

47. Whoever in any case not already provided for by sections 39 to 46 (both inclusive), makes default in complying with any of the

Penalty for offences not otherwise provided for.

provisions of this Act, or with any order issued under it, or, in the case of a licensee, with any of the conditions of his license, shall be punishable with fine which may extend to one hundred rupees, and, in the case of a continuing default, with a daily fine which may extend to twenty rupees :

Provided that, where a person has made default in complying with any of the provisions of sections 13, 14, 15, 17 and 32, as the case may be, he shall not be so punishable if the Court is of opinion that the case was one of emergency and that the offender complied with the said provisions as far as was reasonable in the circumstances.

48. The penalties imposed by sections 39 to 47 (both inclusive) shall be in

Penalties not to affect other liabilities.

offender may have incurred.

49. The provisions of sections 39, 40, 44, 45, and 46 shall, so far as they are

Penalties where works belong to Government.

Government in British India].

50. No prosecution shall be instituted against any person for any offence

Institution of prosecutions.

same.

#### *Supplementary.*

51. Notwithstanding anything in sections 12 to 16 (both inclusive) and

Exercise in certain cases of powers of telegraph-authority.

sections 18 and 19, the Provincial Government may, by order in writing, for the placing of appliances and apparatus for the transmission of energy, confer upon any public officer or licensee, subject to such condition

#### LEG. REF.

<sup>1</sup> Substituted for "the Government" by A. O., 1937.

Act does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. I.L.R. (1940) 2 Cal. 571=42 Cr.L.J. 472=A.I.R. 1941 Cal. 87.

Sec. 47.—A conviction in the alternative under B. 107 and sec. 47 is not in accordance with law. See 1933 Cr.C. 477=A.I.R. 1933 R. 70 cited under sec. 37. Sec. 47 deals in terms with default in complying with any of the provisions of the Act, or with any order issued under it, or in the case of a licensee with any of the conditions of his license; but it does not deal with a breach of any of the rules made under the Act. Section cannot be held by implication to provide a penalty for

breach of the rules also. 69 Bom. 770=37 Cr.L.J. 1124=38 Bom. L. R. 434=A.I.R. 1936 Bom. 327.

Sec. 50.—Sec. 50 of the Act applies to a prosecution under sec. 379, I.P. Code, read with sec. 89 of the Act for the theft of electricity. An offence of this nature is an offence against the Electricity Act as it would not have been an offence under s. 379, I.P. Code, if it had not been for the provisions of sec. 39 of that Act. It is an offence which is created by that section and the Legislature intended sec. 50 to apply to an offence of this nature. 165 I.C. 689=1936 A.L.J. 955=A.I.R. 1936 All. 742. The phrase "at the instance of" in sec. 50 means merely at the solicitation of or at the request of. Where a prosecution under the Act is instituted by the police on report from the Electric Company whose officers come into Court and give evidence, the prosecution is really at the instance of the Electric Company who is a 'person aggrieved', although they may not make the immediate complaint on which the Magistrate takes cognizance of the offence. 1936

and restrictions (if any) as the Provincial Government may think fit to impose, and to the provisions of the Indian Telegraph Act, 1885, any of the powers which the telegraph-authority possesses under that Act, with respect to the placing of telegraph-lines and posts for the purposes of a telegraph established or maintained by the Government or to be so established or maintained.

52. Where any matter is, by or under this Act, directed to be determined

by arbitration, the matter shall, unless it is otherwise expressly provided in the license of a licensee, be determined by such person or persons as the Provincial Government may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the <sup>1</sup>[\* \*] Arbitration Act, <sup>2</sup>[1940].

Service of notices, orders or documents. 53. (1) Every notice, order or document by or under this Act required or authorised to be addressed to any person may be served by post or left,—

(a) where <sup>3</sup>[the Central Government or the Provincial Government] is the addressee, at the office of <sup>4</sup>[such officer as the Central Government or the Provincial Government, as the case may be, may designate in this behalf;]

<sup>5</sup>[(aa) where the Federal Railway Authority is the addressee, at the office of the Authority;]

(b) where a local authority is the addressee, at the office of the local authority;

(c) where a company is the addressee, at the registered office of the Company, or, in the event of the registered office of the Company not being in India, at the head office of the Company in India;

(d) where any other person is the addressee, at the usual or last known place of abode or business of the person.

(2) Every notice, order or document by or under this Act required or authorized to be addressed to the owner or occupier of any premises shall be deemed to be properly addressed if addressed by the description of the "owner" or "occupier" of the premises (naming the premises), and may be served by delivering it, or a true copy thereof, to some person on the premises, or, if there is no person on the premises to whom the same can with reasonable diligence be delivered, by affixing it on some conspicuous part of the premises.

54. Every sum declared to be recoverable by section 5, clause (f), section 6, sub-section (2), section 14, sub-section (2), clause (h), section 16, sub-section (2), section 18, sub-section (2) or sub-section (4), or section 26, sub-section (4) and every fee leviable under this Act, may be recovered, on application to a Magistrate having jurisdiction where the person liable to pay the same is for the time being resident, by the distress and sale of any movable property belonging to such person.

55. The Provincial Government may, by general or special order, authorise the discharge of any of its functions under section 13 or section 18, <sup>6</sup>[or section 34, sub-section (2)] or clause V, sub-clause (2), or clause XIII of the Schedule by an Electric Inspector.

Delegation of certain functions of Provincial Government to Electric Inspectors.

#### LEG. REF.

<sup>1</sup> In sec. 52 the word "Indian" omitted by Act XXXII of 1940.

<sup>2</sup> Substituted by Act X of 1940.

<sup>3</sup> Substituted for "the Government" by A. O., 1937.

<sup>4</sup> These words were substituted for the words "the Secretary in the Public Works Department" by s. 21 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>5</sup> Cl. (aa) inserted by A.O., 1937.

<sup>6</sup> These words, figures and brackets were inserted by sec. 22 of the Indian Electricity (Amendment) Act (I of 1922).

pector to Government, is legal. The expression "at the instance of" occurring in sec. 50 of the Electricity Act does not mean "on the complaint of" or "with the sanction of" but only means "at the asking" or "the suggestion of." I.L.R. (1944) Nag. 692=1944 N.L.J. 475=A.I.R. 1944 Nag. 380.

A licensee company is a "person aggrieved" within the meaning of sec. 50. 116 I.C. 889=1929 L. 867. So also a person who is directly in charge of an Electric Company such as its Chief Residential Engineer. A.I.R. 1938 Pat. 15=18 P.L.T. 986=172 I.C. 940. See also 35 P.L.R. 753 cited under sec. 39, *supra*.

SEC. 52.—With regard to an award under this Act, the procedure laid down in the Arbitration Act has to be followed. I.L.R. (1943) All. 907=1944 A.L.J. 43=1944 All. 66.

A. 742. A prosecution originated with the complaint of the District Magistrate who acted on the recommendation of the Electric Ins-

56. No suit, prosecution or other proceeding shall lie against any public officer, or any servant of a local authority, for anything done, or in good faith purporting to be done, under this Act.

Protection for acts done in good faith.

57. (1) In section 40, sub-section (1), clause (b), and section 41, sub-section (5), of the Land Acquisition Act, 1894, the term "work" shall be deemed to include electrical energy supplied, or to be supplied, by means of the work to be constructed.

Amendment of the Land Acquisition Act, 1894.

(2) The Provincial Government may, if it thinks fit, on the application of any person, not being a company, desirous of obtaining any land for the purposes of his undertaking, direct that he may acquire such land under the provisions of the Land Acquisition Act, 1894, in the same manner and on the same conditions as it might be acquired if the person were a company.

Repeals and savings.

58. (1) The Indian Electricity Act, 1903, is hereby repealed :

Provided that every application for a license made and every license granted under the said Act shall be deemed to have been made and granted under this Act.

(2) Nothing in this Act shall be deemed to affect the terms of any license which was granted, or of any agreement which was made, by or with the sanction of the Government for the supply or use of electricity before the commencement of this Act.

### THE SCHEDULE.

PROVISIONS TO BE DEEMED TO BE INCORPORATED WITH, AND TO FORM PART OF, EVERY LICENSE GRANTED UNDER PART II, SO FAR AS NOT ADDED TO, VARIED OR EXCEPTED BY THE LICENSE.

[See section 3, sub-section (2), clause (f).]  
*Security and Accounts.*

Security for execution of works of licensee not being local authority.

1. Where the licensee is not a local authority, the following provisions as to giving security shall apply, namely :—

(a) The licensee shall within the period fixed in that behalf by his license, or any longer period which the Provincial Government may substitute therefor by order under section 4, sub-section (3), clause (b), of the Indian Electricity Act, 1910, before exercising any of the powers by the license conferred on him in relation to the execution of works show, to the satisfaction of the Provincial Government, that he is in a position fully and efficiently to discharge the duties and obligations imposed upon him by the license throughout the area of supply.

(b) The licensee shall also within the period fixed in that behalf by his license, or any longer period which the Provincial Government may substitute therefor by order under section 4, sub-section (3), clause (b), of the Indian Electricity Act, 1910, and before exercising any of the powers conferred on him in relation to the execution of works, deposit or secure to the satisfaction of the Provincial Government such sum (if any) as may be fixed by the license or, if not so fixed, by the Provincial Government.

(c) The said sum deposited or secured by the licensee under the provisions of this clause shall be repaid or released to him on the completion of the works or at such earlier date or dates and by such instalments, as may be approved by the Provincial Government.

Audit of accounts of licensee not being a local authority.

2. Where the licensee is not a local authority, the following provisions as to the audit of accounts shall apply, namely :—

(a) The annual statement of accounts of the undertaking shall, before being rendered under section 11 of the Indian Electricity Act, 1910 be examined and audited by such person as the Provincial Government may appoint or approve in this behalf, and the remuneration of the auditor shall be such as the Provincial Government may direct, and his remuneration and all expenses incurred by him in or about the execution of his duties to such an amount as the Provincial Government shall approve, shall be paid by the licensee on demand.

(b) The licensee shall afford to the auditor, his clerks and assistants, access to all such books and documents relating to the undertaking as are necessary for the purposes of the audit, and shall, when required, furnish to him and them all vouchers and information requisite for that purpose, and afford to him and them all facilities for the proper execution of his and their duty.

(c) The audit shall be made and conducted in such manner as the Provincial Government may direct.

(d) Any report made by the auditor, or such portion thereof as the Provincial Government may direct, shall be appended to the annual statement of accounts of the licensee, and shall thenceforth form part thereof.

(e) Notwithstanding the foregoing provisions of this clause, the Provincial Government may, if it thinks fit, accept the examination and audit of an auditor appointed by the licensee.

3. The licensee shall, unless the Provincial Government otherwise directs, at all times keep the accounts of the capital employed for the purposes of the undertaking distinct from the accounts kept by him of any other undertaking or business.

Separate accounts.

*Compulsory works and Supply.*

4. The licensee shall, within a period of three years after the commencement of the license, execute to the satisfaction of the Provincial Government all such works as may be specified in the license in this behalf or, if not so specified, as the Provincial Government may, by order in writing issued within six months of the date of the commencement of

Execution of work after commencement of license.

the license, direct.

5. (1) Where, after the expiration of two years and six months from the commencement of the license, a requisition is made by six or more owners or occupiers of premises in or upon any street or part of a street within the area of supply or by the Provincial Government or a local authority charged with the public lighting thereof, requiring the licensee to provide distributing mains throughout such street or part thereof, the licensee shall comply within six months with the requisition, unless—

(a) where it is made by such owners or occupiers as aforesaid, the owners or occupiers making it do not, within fourteen clear days after the service on them by the licensee of a notice in writing in this behalf, tender to the licensee a written contract duly executed and with sufficient security binding themselves to take, or guaranteeing that there shall be taken a supply of energy for not less than two years to such amount as will in the aggregate produce annually, at the current rates charged by the licensee, a reasonable return to the licensee; or

(b) where it is made by the Provincial Government or a local authority, the Provincial Government or local authority, as the case may be, does not, within the like period, tender a like contract binding itself to take a supply of energy for not less than seven years for the public lamps in such street or part thereof.

(2) Where any difference or dispute arises between the licensee and such owners or occupiers as to the sufficiency of the security offered under this clause, or as to the amount of energy to be taken or guaranteed as aforesaid, the matter shall be referred to the Provincial Government and either decided by it or, if it so directs, determined by arbitration.

(3) Every requisition under this clause shall be signed by the maker or makers thereof and shall be served on the licensee.

(4) Every requisition under this clause shall be in a form to be prescribed by rules under the Indian Electricity Act, 1910; and copies of the form shall be kept at the office of the licensee and supplied free of charge to any applicant.

6. (1) Where [after distributing mains have been laid down under the provisions of clause 4 or clause 5 and the supply of energy through those mains or any of them has commenced,] a requisition is made by the owner or owners or occupiers in vicinity. occupier of any premises situate within [the area of supply] requiring the licensee to supply energy for such premises, the licensee shall, within one month from the making of the requisition, [or within such longer period as the Electric Inspector may allow] supply, and, save in so far as he is prevented from doing so by cyclones, floods, storms or other occurrences beyond his control, continue to supply energy in accordance with the requisition:

Provided first, that the licensee shall not be bound to comply with any such requisition unless and until the person making it—

(a) within fourteen days after the service on him by the licensee of a notice in writing in this behalf, tenders to the licensee a written contract, in a form approved by the Provincial Government duly executed and with sufficient security binding himself to take a supply of energy for not

**LEG. REF.**

<sup>1</sup> These words were inserted by sec. 23 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> These words were substituted for the words "one hundred yards from any distributing main," by *ibid.*

<sup>3</sup> These words were inserted by *ibid.*

CLs. 5, 6 AND 10.—Clauses 6 and 5 cast the obligation on the licensee to supply electric energy to an applicant or a group of applicants for supply of electric energy only when the applicant or group of applicants enter into a written contract with the licensee. The only power reserved to the licensee by the Act in the matter of rates which may be exercised by him apart from contract is that he can charge on any one of the three alternative modes specified in Cls. (a), (b) and (c) of sub-sec. (3) of sec. 23 of the Act; and even when the licensee intends to prefer to go upon the basis of sec. 23 (3) (c) the consumer can by following the procedure laid down in cl. 10 of the Schedule, compel the licensee to

adopt either of the modes mentioned in cls. (a) and (b). 63 Cal. 1047=162 I.C. 811=40 C.W.N. 789=A.I.R. 1936. Cal. 265.

CL. 6.—The licensee must bear the charge of the service line whether the consumer has paid the initial expenditure or not. 45 I.C. 171. As to discontinuance to supply of energy if the consumer's installation is defective, see *ibid.*

CL. 6, PROV. (2).—A part of the electric apparatus, namely, the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy. *Held*, such a state of things must certainly be deemed to be "likely to affect injuriously the useful energy by the licensee or by other persons," and accordingly, the electric company were entitled upon discovering this condition of things to discontinue the electric supply. Where a main fuse was burnt out, in other words, where the cut-out became defective, *held*, the Company was entitled to discontinue the supply of energy to the consumer. 75 I.C. 456=4 L. 182=1924 L. 142.

less than two years to such amount as will produce, at current rates charged by the licensee, a reasonable return to the licensee, and,

(b) if required by the licensee so to do, pays to the licensee the cost of so much of any service-line as may be laid down or placed for the purposes of the supply upon the property in respect of which the requisition is made, and of so much of any service-line as it may be necessary for the said purposes to lay down or place beyond one hundred feet from the licensee's distributing main, although not on that property :

Provided secondly, that the licensee shall be entitled to discontinue such supply—

(a) if the owner or occupier of the property to which the supply is made has not already given security, or if any security given by him has become invalid or insufficient, and such owner or occupier fails to furnish security or to make up the original security to a sufficient amount as the case may be, within seven days, after the service upon him of notice from the licensee requiring him so to do, or

(b) if the owner or occupier of the property to which the supply is made adopts, any appliance, or uses the energy supplied to him by the licensee for any purposes, or deals with it in any manner so as unduly or improperly to interfere with the efficient supply of energy to any other person by the licensee, or

(c) if the electric wires, fittings, works and apparatus in such property are not in good order and conditions, and are consequently likely to affect injuriously the use of energy by the licensee, or by other persons, or

(d) if the owner or occupier makes any alterations of, or additions to, any electric wires, fittings, works or apparatus within such property as aforesaid, and does not notify the same to the licensee before the same are connected to the source of supply, with a view to their being examined and tested : <sup>1</sup>[but the licensee shall re-connect the supply with all reasonable speed on the cessation of the act or default or both, as the case may be, which entitled him to discontinue it.]

Provided, thirdly, that the maximum rate per unit of time at which the owner or occupier shall be entitled to be supplied with energy shall not exceed what is necessary for the maximum consumption on his premises, and, where the owner or occupier has required a licensee to supply him at a specified maximum rate, he shall not be entitled to alter that maximum, except after one month's notice in writing to the licensee, and the licensee may recover from the owner or occupier any expenses incurred by him by reason of such alteration in respect of the service-lines by which energy is supplied to the property beyond one hundred feet from the licensee's distributing main, or in respect of any fittings or apparatus of the licensee upon that property : and

Provided, fourthly, that, <sup>2</sup>[if any requisition is made for a supply of energy and] the licensee can prove to the satisfaction of an Electric Inspector,—

(a) that <sup>3</sup>[the nearest distributing main] is already loaded up to its full current carrying capacity, or

(b) that, in case of a larger amount of current being transmitted by it, the loss of pressure will seriously affect the efficiency of the supply to other consumers in the vicinity, the licensee may refuse to accede to the requisition for such reasonable period, not exceeding six months, as such Inspector may think sufficient for the purpose of amending the distributing main or laying down or placing a further distributing main.

(2) Any service-line laid for the purpose of supply in pursuance of a requisition under sub-clause (1) shall, notwithstanding that a portion of it may have been paid for by the person making the requisition, be maintained by the licensee.

(3) Where any difference or dispute arises as to the amount of energy to be taken or guaranteed as aforesaid, or as to the cost of any service-line or as to the sufficiency of the security offered by any owner or occupier, or as to the improper use of energy, or as to any alleged defect in any wires, fittings, works or apparatus, or as to the amount of the expenses incurred under the third proviso to sub-clause (1), the matter shall be referred to an Electric Inspector and decided by him.

(4) Every requisition under this clause shall be signed by the maker or makers thereof and shall be served on the licensee.

(5) Every requisition under this clause shall be in a form to be prescribed by rules under the Indian Electricity Act, 1910 ; and copies of the form shall be kept at the office of the licensee and supplied free of charge to any applicant.

<sup>4</sup>[7. The licensee shall, before commencing to lay down or place a service-line, in any street

Further provisions as to laying of service-lines.

in which a distributing main has not already been laid down or placed, serve upon the local authority (if any) and upon the owner or occupier of all premises abutting on so much of the street as lies between the points of origin and termination of the service-line so to be laid down or placed, twenty-one days' notice stating that the licensee intends to lay down or place a service-line, and intimating that, if within the said period the local authority or any five or more of such owners or occupiers require, in accordance with the provisions of the license, that a supply shall be given for any public lamps or to their premises, as the case may be, the necessary distributing main will be laid down or placed by the licensee at the same time as the service-line.]

8. (1) Where <sup>5</sup>[after distributing mains have been laid down under the provisions of clause 4

buting main of which," by *ibid.*

<sup>3</sup> These words were substituted for the word "it" by *ibid.*

<sup>4</sup> This clause was substituted by sec. 24, Indian Electricity (Amendment) Act (I of 1922).

<sup>5</sup> These words were inserted by sec. 25 of *ibid.*

<sup>1</sup> These words were inserted by sec. 23 of the Indian Electricity (Amendment) Act (I of 1922).

<sup>2</sup> These words were substituted for the words "in the event of any requisition being made for a supply of energy from any distri-



## Supply of public lamps.

or clause 5 and the supply of energy through those mains or any of them has commenced] a requisition is made by the Provincial Government or by a local authority requiring the licensee to supply for a period of not less than seven years energy for any public lamps within the [area of supply] the licensee shall supply, and save in so far as he is prevented from doing so, by cyclones, floods, storms or other occurrences beyond his control, continue to supply energy for such lamps in such quantities as the Provincial Government or the local authority, as the case may be, may require.

(2) The provisions of sub-clause (b) of the first proviso, of sub-clauses (c) and (d) of the second proviso, and of the third and fourth provisos to sub-clause (1) and the provisions of sub-clauses (2) and (3) of clause 6 shall, so far as may be, apply to every case in which a requisition for the supply of energy is made under this clause as if the Provincial Government or local authority were an owner or occupier within the meaning of those provisions.

*Supply by bulk-licensees.*

- g. (1) Where, and in so far as, the licensee (hereinafter in this clause referred to as "the bulk-licensee") is authorized by his license to supply energy to other licensees for distribution by them (hereinafter in this clause referred to as "distributing licensees") the following provisions shall apply, namely:—

Special provisions applying to supply by bulk-licensees.

(a) any distributing licensee within the bulk-licensee's area of supply may make a requisition on the bulk-licensee, requiring him to give a supply of energy and specifying the point, and the maximum rate per unit of time, at which such supply is required, and the date upon which the supply is to commence, such date being fixed after the date of receipt of the requisition so as to allow an interval that is reasonable with regard to the locality and to the length of the electric supply-line and the amount of the plant required;

(b) such distributing-licensee shall, if required by the bulk-licensee so to do, enter into a written agreement to receive and pay for a supply of energy for a period of not less than seven years of such an amount that the payment to be made for the same at the rate of charge for the time being charged for such supply shall not be less than such an amount as will produce a reasonable return to the bulk-licensee on the outlay (excluding expenditure on generating plant then existing and any electric supply-line then laid down or placed) incurred by him in making provision for such supply;

(c) the maximum rate per unit of time at which a distributing licensee shall be entitled to be supplied with energy shall not exceed what is necessary for the purposes for which the supply is required by him, and need not be increased except upon a fresh requisition made in accordance with the foregoing provisions;

(d) if any difference or dispute arises under this clause, it shall be determined by arbitration, and, in the event of such arbitration, the arbitrator shall have regard to the following amongst other considerations, namely:—

(i) the period for which the distributing-licensee is prepared to bind himself to take energy; (ii) the amount of energy required and the hours during which the bulk-licensee is to supply it;

(iii) the capital expenditure incurred or to be incurred by the bulk-licensee in connection with the aforesaid supply of energy; and

(iv) the extent to which the capital expended or to be expended by the bulk-licensee in connection with such supply may become unproductive upon the discontinuance thereof.

(2) Notwithstanding anything in sub-clause (1) the bulk-licensee shall give a supply of energy to any distributing-licensee within his area of supply applying therefor, even although the distributing licensee desires to be supplied with only a portion of the energy required for distribution by him:

Provided that the distributing licensee shall, if so required by the bulk-licensee, enter into an agreement to take such energy upon special terms (including a minimum annual sum to be paid to the bulk-licensee) to be determined, if necessary, by arbitration in the manner laid down in sub-clause (1) (d).

(3) The maximum price fixed by a license for energy supplied to a distributing licensee shall not apply to any partial supply given under sub-clause (2).

(4) Every distributing licensee, who is supplied with energy by a bulk-licensee and intends to discontinue to receive such supply, shall give not less than twelve months' notice in writing of such intention to the bulk-licensee:

Provided that, where the distributing-licensee has entered into a written agreement with the bulk-licensee to receive and pay for a supply of energy for a certain period, such notice shall be given so as not to expire before the end of that period.

*Charges.*

\*\*  
\*[10. (1)]

\*  
\*\*

\* \* \* \* \*  
\* Where the licensee charges by any method [approved by the Provincial Government, in accordance with section 23, sub-section (3), clause (c), of the Indian Electricity Act, 1910] any consumer who objects to that method may, by not less than one

Methods of charging.

## LEG. REF.

<sup>1</sup> These words were substituted for the words "distance of one hundred yards from any distributing main," by Act I of 1922.

<sup>2</sup> The first part of Clause 10 up to and including sub-clause (c) was omitted by sec. 26 of the Indian Electricity (Amendment) Act

(I of 1922).

<sup>3</sup> The first proviso was re-numbered as sub-clause "(1)" and the words "Provided first, that," were omitted, by *Ibid.*

<sup>4</sup> These words, figures and brackets were substituted for the words "so approved by the Local Government," by *ibid.*



month's notice in writing, require the licensee to charge him, at the licensee's option, either by the actual amount of energy supplied to him or by the electrical quantity contained in the supply and thereafter the licensee shall not, except with the consent of the consumer, charge him by another method.

<sup>1</sup>[(2)] <sup>1\*</sup> \* \* \* Before commencing to supply energy through any distributing main, the licensee shall give notice, by public advertisement, of the method by which he proposes to charge for energy so supplied; and, where the licensee has given such notice, he shall not be entitled to change that method of charging without giving not less than one month's notice in writing of such change to the Provincial Government to the local authority (if any), concerned, and to every consumer of energy who is supplied by him from such distributing main.

<sup>2</sup>[(3)] <sup>2\*</sup> \* \* \* If the consumer is provided with a meter in pursuance of the provisions of section 26, sub-section (1), of the Indian Electricity Act, 1910, and the licensee changes the method of charging for the energy supplied by him from the distributing main, the licensee shall bear the expense of providing a new meter, or such other apparatus, as may be necessary by reason of the new method of charging.

11. Save as provided by clause 9, sub-clause (3), the prices charged by the licensee for energy supplied by him shall not exceed the maxima fixed by his license,

Maximum charges.

or in the case of a method of charge approved by the Provincial

Government, such maxima as the Provincial Government shall fix on approving the method:

Provided that, if at any time after the expiration of seven years from the commencement of the license, the Provincial Government considers <sup>3</sup>[\* \* \*] that the maxima so fixed or approved as aforesaid should be altered, it <sup>4</sup>[shall refer the matter to an advisory Board and, if the Board recommends any alteration, may make an order in accordance with such recommendation], which shall have effect from such date as may be mentioned therein:

Provided also, that, where an order in pursuance of the foregoing proviso has been made, no further order altering the maxima fixed thereby shall be made until the expiration of another period of five years.

<sup>5</sup>[11-A. A licensee may charge a consumer a minimum charge for energy of such amount and determined in such manner as may be specified by his license,

Minimum charges.

and such minimum charge shall be payable notwithstanding that no energy has been used by the consumer during the period for

which such minimum charge is made.]

12. The price to be charged by the licensee and to be paid to him for energy supplied for

Charge for supply for public lamps.

the public lamps, and the mode in which those charges are to be ascertained, shall be settled by agreement between the licensee and the Provincial Government or the local authority, as the case may be, and, where any difference or dispute arises, the matter

shall be determined by arbitration.

*Testing and Inspection.*

13. The licensee shall establish at his own cost and keep in proper condition such number

Licensee to establish testing stations and keep instruments for testing.

of testing stations, situated at such places within reasonable distance from any distributing main, as the Provincial Government may direct for the purpose of testing the pressure or periodically of the supply of energy in the distributing main, and shall supply and keep in proper condition thereat, and on all premises from which he supplies energy, such instruments for testing as an Electric Inspector may approve, and shall supply energy to each testing station for the purpose of testing.

14. The licensee shall afford all facilities for inspection and testing of his works and for the

Facilities for testing.

reading, testing and inspection of his instruments, and may, on

inspection of any instruments, be represented by an agent, who may be present, but shall not interfere with the reading, testing or inspection.

15. On the occasion of the testing of any works of the licensee by an Electric Inspector reason-

Testing of works.

able notice thereof shall be given to the licensee; and the testing shall be carried out at such suitable hours as in the opinion of the Electric Inspector, will least interfere with the supply of energy by

LEG. REF.

*ibid.*

1 The second proviso was re-numbered as sub-clause (2) and the words "Provided, secondly, that" were omitted by sec. 26 of the Indian Electricity (Amendment) Act (I of 1922).

2 The third proviso was re-numbered as sub-clause (3) and the words "Provided, thirdly, that" were omitted by *ibid.*

3 The words "or is satisfied" were omitted by sec. 27 of the Indian Electricity (Amendment) Act (I of 1922).

4 These words were substituted for the words "may, after such inquiry (if any) as it thinks fit, make an order accordingly," by *ibid.*

5 This clause was inserted by sec. 28 of

CL 11-A.—CL 11-A is the only provision which empowers or authorises the licensee to levy minimum charges. But such power can only be exercised by a licensee through a contract entered into with the consumer. When there is no such contract with an intending consumer, the licensee cannot claim or sue for minimum charges. 57 Cal. 1047=40 C.W.N. 789=A.I.R. 1936 Cal. 265.

CL 12 only applies to the preliminary negotiations leading up to an agreement for the supply of electricity. It does not apply to a dispute arising as to the amount due for electricity supplied for any particular year 46 P.L.R. 218=1944 Lah. 441.

the licensee, and in such manner as the Electric Inspector may think fit; but, except under the provisions of an order made in each case in that behalf by the Provincial Government, the Electric Inspector shall not be entitled to have access to, or interfere with, the works of the licensee at any points other than those at which the licensee himself has access to the same;

Provided that the licensee shall not be held responsible for any interruption or irregularity in the supply of energy which may be occasioned by, or required by the Electric Inspector for the purpose of, any such testing as aforesaid:

Provided, also, that the testing shall not be made in regard to any particular portion of the works oftener than once in any three months, unless in pursuance of an order made in each case in that behalf by the Provincial Government.

#### Plans.

16. (1) The licensee shall, after commencing to supply energy forthwith cause a plan to be made of the area of supply, and shall cause to be marked thereon

Plan of area of supply to be made and kept open for inspection.

the alignment <sup>1</sup>[and, in the case of underground works, the approximate depth] below the surface of all his then existing electric supply-lines, street-distributing boxes and other works, and shall once in every year cause that plan to be duly corrected, so as to show the electric supply-lines, street-distributing boxes and other works for the time being in position. The licensee shall also, if so required by an Electric Inspector, cause to be made sections showing the approximate level of all his existing underground works other than service-lines.

<sup>2</sup>[(2) Every such plan shall be drawn to such scale as the Provincial Government may require: provided that no scale shall be required unless maps of the locality on that scale are for the time being available to the public.]

<sup>3</sup>[(3) Every such section shall be drawn to horizontal and vertical scales which shall be such as the Provincial Government may require.]

(4) Every plan and section so made or corrected, or a copy thereof marked with the date when it was so made or corrected, shall be kept by the licensee at his principal office or place of business within the area of supply, and shall at all reasonable times, be open to the inspection of all applicants, and copies thereof shall be supplied on such terms and conditions as may be prescribed by rules under the Indian Electricity Act, 1910.

(5) The licensee shall, if required by an Electric Inspector and, where the licensee is not a local authority, by the local authority (if any) concerned, supply free of charge to such Electric Inspector or local authority a copy of every such plan or section duly corrected so as to agree with the original kept at the principal office or place of business of the licensee.

#### Additional notice of certain works.

17. On the day next preceding the commencement of any such works as are referred to in section 13 of the Indian Electricity Act, 1910, the licensee shall, in

Notice to Electric Inspector.

addition to any other notices which he may be required to give, serve upon the Electric Inspector, or such officer as the Provincial Government may appoint in this behalf for the area of supply, a notice in writing stating that he is about to commence the works, and the nature and position of the same.

### THE EMPLOYERS' LIABILITY ACT (XXIV OF 1938).

[24th September, 1938.]

*An Act to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen.*

WHEREAS it is expedient to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE EMPLOYERS' LIABILITY ACT, 1938.

- (2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "workmen" means any person who has entered into, or works under a contract of, service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, oral or in writing, and

(b) "employer" includes any body of persons whether incorporated or not, and any managing agent of an employer, and the legal representatives of a deceased employer, and, where the services, of a workman are temporarily lent

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "and the approximate height above or depth" by sec. 29 of the Indian Electricity

Act I of 1922.

<sup>2</sup> These sub-clauses were substituted by sec. 29 of *ibid.*

or let on hire to another person by the person with whom the workman has entered, into a contract of service or apprenticeship, means such other person while the workman is working for him.

Defence of common employment barred in certain cases. 3. Where personal injury is caused to a workman—

(a) by reason of the omission of the employer to maintain in good and safe condition any way, works, machinery or plant connected with or used in his trade or business, or by reason of any like omission on the part of any person in the service of the employer who has been entrusted by the employer with the duty of seeing that such way, works, machinery or plant are in good and safe condition ; or

(b) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence ; or

(c) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed ; or

(d) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved by any authority and which has been so approved) or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties ; a suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer.

4. In any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same.

Risk not to be deemed to have been assumed without full knowledge.

5. Nothing in this Act shall affect the validity of any decree or order of a Civil Court passed before the commencement of this Act in any such suit for damages.

Saving.

## THE EMPLOYMENT OF CHILDREN ACT (XXVI OF 1938).

[Amended by Act XV of 1939. Rep. in parts by Act XXV of 1942.]

[1st December, 1938.

*An Act to regulate the admission of children to certain industrial employments.*

WHEREAS it is expedient to regulate the admission of children to certain industrial employments ; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called THE EMPLOYMENT OF CHILDREN ACT, 1938.

SEC. 3: ASSESSMENT OF DAMAGES—UNDERLYING PRINCIPLE.—In determining the amount of damages under the Employers' Liability Act in a case where the workman dies as a result of personal injuries caused to him, the underlying principle is that his dependants must be awarded damages equivalent to the pecuniary loss that they have sustained by his death. The damages should be calculated in such a manner as to place the dependants in such pecuniary circumstances as if the deceased workman were still alive. When the workman at the time of the accident is 20 to 26 years of age his dependants should receive compensation amounting approximately to his earnings for a period of twenty years after certain deductions have been made. 221

I.C. 655.

SEC. 3 (d): APPLICABILITY—PERSONAL INJURY CAUSED TO WORKMAN BY NEGLIGENCE OF CO-EMPLOYEE.—The words "or in the normal performance of his duties" in sec. 3 (d) of the Employers' Liability Act, relate to the workman whose negligence has led to the accident which has resulted in personal injury to another workman. This clause, therefore, applies where personal injury resulting in death is caused to a fireman working on an engine as a result of an accident due to the negligence of a co-employee who was driving the engine in the normal performance of his duties. The defence of common employment is not available to the employer in such a case. 221 I.C. 655.

(2) It extends to the whole of British India.

2. In this Act—

(a) “competent authority”, in respect of a major port, as defined in the Indian Ports Act, 1908, and in respect of a federal railway, as defined in the Indian Railways Act, 1890,

Definitions.

means the Central Government, and in any other case means the Provincial Government;

<sup>1</sup>[(b) ‘occupier’ of a workshop means the person who has ultimate control over the affairs of the workshop;

(c) ‘prescribed’ means prescribed by rules made under this Act;

(d) ‘workshop’ means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of section 50 of the Factories Act, 1934, for the time being apply.]

3. (1) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation connected with the transport of passengers, goods or mails by railway.

(2) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation involving the handling of goods within the limits of any port to which for the time being any of the provisions of the Indian Ports Act, 1908, are applicable.

<sup>1</sup>[(3) No child who has not completed his twelfth year shall be employed, or permitted to work, in any workshop wherein any of the processes set forth in the Schedule is carried on:

Provided that nothing in this sub-section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family only and without employing hired labour or to any school established by, or receiving assistance or recognition from, a Provincial Government.]

<sup>2</sup>[3-A. The Provincial Government, after giving, by notification in the official Gazette, not less than three months’ notice of its intention so to do, may, by like notification, add any description of process to the Schedule, and thereupon the Schedule shall have force in the Province as if it has been enacted accordingly.

3-B. Before work in any of the processes set forth in the Schedule is carried on in any workshop after the 1st day of October, 1939, the occupier shall send to the inspector, within whose local limits the workshop is situated, a written notice containing—

(a) the name and situation of the workshop,

(b) the name of the person in actual management of the workshop,

(c) the address to which communications relating to the workshop should be sent, and

(d) the nature of the processes to be carried on in the workshop.

3-C. If any question arises between an inspector and an employer as to

whether any child has or has not completed his twelfth or fifteenth year, as the case may be, the question shall, in the absence of a certificate as to the age of such child, granted by a prescribed medical authority, be referred by the inspector for decision to the prescribed medical authority.]

4. Whoever employs any child or permits any child to work in contravention of the provisions of section 3 <sup>1</sup>[or fails to give notice as required by section 3-B] shall be punishable with

fine which may extend to five hundred rupees.

5. (1) No prosecution under this Act shall be instituted except by or with the previous sanction of an inspector appointed under section 6.

1[(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.]

(3) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

6. The competent authority may appoint persons to be inspectors for the purpose of securing compliance with the provisions of this Act, and any inspector so appointed shall be deemed to be a public servant within the meaning of the Indian Penal Code.

7. (1) The competent authority may by notification in the official Gazette and subject to the condition of previous publication make rules for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) regulate the procedure of inspectors appointed under section 6, and  
(b) make provision for the grant of certificates of age in respect of young persons in employment or seeking employment, <sup>2</sup>[the medical authorities] which may issue such certificates, the form of such certificate, the charges which may be made therefor, and the manner in which such certificates may be issued :

Provided that no charge shall be made for the issue of any such certificate if the application is accompanied by evidence of age deemed satisfactory by the authority concerned.

8. [Amendment of section 6, Act XV of 1908.] (*Repealed by Act XXV of 1942.*)

### <sup>3</sup>THE SCHEDULE.

(See Sections 3, 3-A and 3-B.)

#### *List of processes.*

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2. Carpet weaving.
3. Cement manufacture, including bagging of cement.
4. Clothing-printing, dyeing and weaving.
5. Manufacture of matches, explosives and fire works.
6. Mica-cutting and splitting.
8. Shellac manufacture.
9. Soap manufacture.
9. Tanning.
10. Wool cleaning.

### THE INDIAN EVIDENCE ACT (I OF 1872).

Year.	No.	Short title.	Amendments.
1872	I	The Indian Evidence Act, 1872.	Repealed in part 44 and 45, Vict., c. 58. sec. 127, X of 1897; XII of 1927. Repealed in part and amended, X of 1914. Amended, XVIII of 1872; III of 1887; III of 1891, ss. 1 to 8; V of 1899; XVIII of 1919; XXXI of 1926; X of 1927; XXXV of 1924; I of 1938. See Act XXX of 1939.

For *Statement of Objects and Reasons*, see *Gazette of India*, 1868, p. 1574; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, see *ibid.*, 1871, Pt. V, p. 273, and for the second Report, of the Select Committee, dated 30th January, 1872, see *ibid.*, 1872, Pt. V, p. 34; for discussions in Council, see *ibid.*, 1868, Supplement pp. 1060 and 1209, *ibid.*, 1871, Extra Supplement p. 42, and Supplement, p. 1641 and *ibid.*, 18-2, pp. 136 and 230.

LEG. REF.

<sup>1</sup>Sec. 5, cl. (2) substituted by Act XV of 1939.

<sup>2</sup>Substituted by Act XV of 1939.

<sup>3</sup>Schedule added by Act XV of 1939.

Act declared in force—in the Sonthal Parganas, Reg. 3 of 1872, S. 3 as amended by Reg. 6 of 1899; S. 3; in the Angul District, Reg. 3 of 1913, S. 3; in the Chittagong Hill tracts, Reg. I of 1900, S. 4; in the Arakan Hill District, Reg. I of 1916, S. 2; in Kachin Hill tracts, as regards Hill tribes, Reg. I of 1895, S. 3; in certain tracts in the Chin Hills, Reg. 5 of 1896, S. 3; in Upper Burma except the Shan States (with an addition) Act 13 of 1898, S. 4; in British Baluchistan, (with a modification), Reg. 2 of 1913, S. 3.

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## THE INDIAN EVIDENCE ACT (I OF 1872).

[15th March, 1872.

## Preamble.

WHEREAS it is expedient to consolidate, define, and amend the law of evidence; It is hereby enacted as follows :—

## PART I.

## RELEVANCY OF FACTS.

## CHAPTER I.

## PRELIMINARY.

## Short title.

1. (1) This Act may be called THE INDIAN EVIDENCE ACT, 1872.

Sec. 1.—Rules in this Act are rules of logic. 1914 M.W.N. 931. Act is not exhaustive. 39 O. 164=15 C.W.N. 1053=14 C.L.J. 375; 14 C. 721. Act not exhaustive of the rules of evidence and the Courts can invoke the aid of the principles of jurisprudence of English law as supplementing and explaining the rules given in the Act. 39 M. 449=28 M.L.J. 329. In construing a statute like the Evidence Act which is exhaustive where any fact intended to be established has to be, in accordance with the scheme of the Act, found to be relevant under a provision contained in the Act before it can be allowed to be proved, any argument based on plausibility can have no effect. The Court must therefore ignore any other consideration and confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the provisions of the Act regardless of the fact whether the conclusion ultimately arrived at is in accordance with commonsense view of things or not. A.I.R. 1945 Lah. 23=46 Or. L.J. 296 (F.B.). In questions relating to matters expressly provided for in the Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Act is no doubt mainly based upon the English Law; but it is by no means an exact reproduction of it. The English Law of evidence also has never been codified (and judicial decisions may well have developed or expanded some of its principles since 1872. Caution is therefore necessary in the application of English authorities on the subject in an Indian Court. I.L.R. (1942) Kar. (F.C.) 56=46 C.W.N. (F.R.) 9=5 Fed.L.J. 47=A.I.R. 1942 F.C. 22. The Act is, as it was intended to be a complete Code of the law of evidence in British Burma. 1938 R.L.R. 190=175 I.C. 465=1938 B. 177 (F.B.) See also 65 C.L.J. 520=41 C.W.N. 1103. The provisions of the Act are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope, un-

less clearly repealed or altered by another statute. 7 L. 84=94 I.C. 901=1926 L. 88. The records of the German Court authenticated in the manner prescribed by secs. 14 and 15 of the English Extradition Act are admissible in evidence. 39 O. 164=15 C.W.N. 1053=12 I.C. 273. Evidence properly admitted for one purpose must be admissible for all purposes in the cause. 37 B. 122=40 I.A. 1=24 M.L.J. 176=17 C.W.N. 388 (P.C.) (On appeal from 12 Bom.L.R. 316=5 I.C. 457). See also 11 Bom.L.R. 926=4 I.C. 652. Where a party having once denied on a reconsideration subsequently admits the genuineness of a document, a Court could not be precluded from taking such document into consideration. 1941 O. 189=1910 O.W.N. 1344=192 I.C. 259. No Court has a right to look at any document or any papers other than those on the record unless the Judge gives to the parties to the suit an opportunity of being heard and making their submission with regard to what is contained in such documents. 1928 C. 194. The mere summoning of a record does not constitute it a part of the evidence in the case in which it is summoned. The contents in those documents, if sought to be relied upon, must be formally proved. 1940 A.W.R. (B.R.) 153=1940 B. D. 242. A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution; but it can treat it as sufficient proof thereof. 1940 N.L.J. 487=1940 Nag. 2. Statements made at the local inspection are inadmissible and a judge should not bring such statements into the case as evidence. No statement by any person is evidence unless given on oath in the witness-box. 1935 N. 60. See also 24 Pat. 379=1945 Pat. 453. Conjecture should not be the basis of a judgment. 1924 N. 363. Statement which are not admissible in evidence cannot be rendered admissible by consent of parties. 1923 L. 630. See also 1924 P. 283; 36 I.C. 900. Unless a party can be found to have been

estopped from objecting to the admissibility of particular pieces of evidence. A.I.R. 1942 Mad. 528=(1942) 1 M.L.J. 485. Omission to object to the reception of evidence does not make irrelevant evidence relevant; and the objection can be taken on second appeal. 44 B. 192=55 I.O. 316=22 Bom.L.R. 57. See also 47 M.L.J. 640; 1924 N. 358; 79 I.O. 1029=1924 A. 918; 40 I.O. 553; 135 I.O. 572=1931 M. 601. No doubt the proper time to take an objection as to the admissibility of a document is when the document is tendered in evidence, but the omission to object to a document which is not in itself admissible will not constitute such document evidence. It is the duty of the Court to exclude all irrelevant evidence, even if no objection is taken to its admissibility by the parties. The question of relevancy of a document is a question of law and can be raised at any stage. 49 C.W.N. 791=1945 Cal. 492. Where a piece of evidence not proved in the proper manner has been admitted without objections, the opposite party cannot challenge it at a later stage. But this principle, does not apply where evidence has been received without objection in direct contravention of an imperative provision of law. 27 C.W.N. 134=1922 C. 160. See also 1939 A. 61=1939 A.L.J. 128. There can be no conditional admissibility of a document. There cannot be an order that while a document is inadmissible as lease, it is admissible as a receipt. If it is held to be not a lease, it can be admitted unconditionally. But if it is held to be a lease, it cannot be admitted as a receipt. 1941 A.W.R. (Rev.) 979=1941 R.D. 932. An objection as to the mode of proof not taken in the Courts below cannot be taken for the first time in second appeal. 64 I.C. 266=36 C.L.J. 186. An erroneous omission to object to evidence irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But the Court will not entertain for first time in appeal an objection that a document not admissible has been improperly admitted in evidence. 45 C. 159=21 C.W.N. 996; 3 Lah. 59=1922 L. 281; I.L.R. (1937) N. 68=1937 N. 13. If a party to a suit consents to the recitals in prior judgment being taken as proof of a will, he cannot object in appeal. 43 M.L.J. 448. A Court refusing to admit a piece of evidence in the first instance has no jurisdiction to take the same into consideration at a subsequent stage, unless some good explanation or reason is shown by the party producing the same. Once a document is admitted at a late stage by a dodge or trick, there is an end of the matter. 182 I.C. 407=1939 Pat. 530. Documentary evidence relevant to the case and admitted without objection in the first Court cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used. 40 I.O. 553; 32 P.L.R. 470=134 I.C. 770. See also 167 I.C. 190=I.L.R. (1937) N. 68=1937 N. 13; 45 P.L.R. 325. Evidence which

is relevant under any circumstances whatsoever must be distinguished from evidence which is admissible if certain conditions were fulfilled. 9 I.O. 211=13 C.L.J. 18. In the latter case objection should be taken at the earliest possible stage and if such objection is not taken the appellate Court will not entertain it. 9 I.C. 211=13 C.L.J. 18. An objection relating to the mode of proof of a document must be raised when the document is sought to be put in evidence and not at a later stage. 63 C. 1053=1936 C. 316. There is a distinction between the relevancy and admissibility of a document. Evidence which is not relevant under provisions of the Act cannot be made relevant because it is let without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, no objection as to its admissibility can be allowed at a later stage. But the omission to object to the admission of irrelevant evidence cannot possibly make it relevant. 1936 L. 114. When at trial, admissibility of evidence is objected to, it is the duty of the trial Judge to decide at once whether it is admissible. If he holds it inadmissible the document should not find a place on the record and assessors or jurors should be warned not to rely on it. 50 I.C. 481=98 P.L.R. 1918. Where the Court passed an interlocutory order that the evidence was admissible such an order can legally be varied by the Court, though in practice it is not often done. Court therefore can hold the evidence as inadmissible which was formerly held admissible. 39 P.L.R. 262=1937 L. 176. It is wrong for a Civil Court to rely too much on decisions in criminal cases when deciding questions of title in civil suits. 21 P.L.T. 873. See also 21 Pat. 601=23 Pat. L.T. 354=1942 Pat. 432 (award in criminal Court in maintenance proceedings). A party who did not object to the admissibility of secondary evidence of a registered will even in his appeal memo. cannot be allowed to urge it. 31 I.C. 600. The relevant point of time in the proceedings at which the condition of admissibility must be fulfilled is the time when it has to be admitted by the Court before which the evidence is produced and relied on and not the moment when the case is decided. 190 I.C. 849=1940 N.L.J. 459=1940 Nag. 340. No statement of counsel concerning relevant facts in the case can be accepted otherwise than in the witness-box. 1935 N. 69=17 N.L.J. 189. Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used. 43 M.L.J. 448=1922 M. 394 [43 M. 609; 38 M. 160, Foll.] The omission by a party to prevent irrelevant

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts-martial<sup>1</sup> [other than Courts-martial convened under the

Army Act]<sup>2</sup> [the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934.]<sup>3</sup> [or the Air Force Act] but not to affidavits<sup>4</sup> presented to any Court or officer, not to proceedings, before an arbitrator;

#### LEG. REF.

<sup>1</sup> Inserted by Act XVIII of 1919.

But see the Army Act (44 & 45 Vict., c. 53), sec. 127, which is as follows:—

"A Court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence or as respects any other matter or thing whatsoever be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any legislature whatsoever, other than Parliament of the United Kingdom." Act I of 1872 is (subject to such modifications as the Governor-General in Council may direct) applicable to all proceedings before the Indian Marine Courts. See the Indian Marine Act (XIV of 1887), sec. 68.

<sup>2</sup> Inserted by Act XXXV of 1934.

<sup>3</sup> Inserted by Act X of 1927.

<sup>4</sup> As to practice relating to affidavits, see Civil Procedure Code, 1908, sec. 30 (c) and Sch. I, O. XIX; Cr.P. Code, 1898, secs. 539 and 539-A.

evidence from being admitted will not in the absence of a deliberate consent to waive objections, cure the defect. 36 I.O. 906. When the lower Court has given a finding that the document is legally proved, the appellate Court should sparingly interfere with the findings when no objection was taken at the hearing. 32 I.O. 780; 10 O.W.N. 178=1933 O. 128. It does not follow that a document is invalid, merely because it may not be admissible in evidence. 1923 N. 109. Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal. 44 I.O. 422=3 P.L.J. 306. If a document is once admitted in the lower Court without objection, no party can take objection to its being referred to by the Court. 36 I.O. 96=10 S.L.R. 4. Where the only reason given for admitting a document in appeal is that it is a public document but it relates to facts which the defendant is entitled to meet, the admission is illegal. 150 I.O. 306=1934 N. 124. Legal practitioners should confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be in Court for a specific purpose it cannot be treated as evidence in the case for any purpose other than the one for which it was summoned. 131 I.O. 513=1931 A. 600. It is not safe to assume that a case must be false if some of the evidence in support of it appears to be ambiguous or is clearly untrue. There is on some occasions a tendency amongst litigants to back up a

good case by false or exaggerated evidence. 24 O.W.N. 626 (P.C.). As to admissibility of notes of evidence of a speech in a trial for sedition, see 1941 O. 33=1940 O.W. N. 965; (1943) 1 M.L.J. 343. The Court is not entitled to attribute to the witnesses conspiracy and perjury, unless the story told by them, coupled with the surrounding circumstances is of itself so unnatural and improbable that only one conclusion, viz., conspiracy and perjury, is reasonably possible. 1934 P.C. 12=66 M.L.J. 151 (P.C.). An appellate tribunal may bring its knowledge of life and business to bear even in cases where in the lower Court contemporary communications and course of business are used, and it can say that evidence given about them at the trial cannot be true. 34 I.O. 273 (P.C.). In a matter of appreciation of evidence and the credibility of witness the opinion of the trial judge should not be lightly disturbed on appeal. 39 B. 386=42 I.O. 119=28 M.L.J. 593 (P.C.). Also 43 O. 707=31 M.L.J. 1=43 I.A. 73 (P.C.); 28 C.L.J. 306=48 I.O. 561; 39 A. 426; 39 I.O. 666; 27 I.O. 276=20 O. L. J. 501; 76 I.O. 63=46 M.L.J. 334. When dealing with a version spread over several consecutive stages, careful regard should be had to them all and their truth or falsehood must be tested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed, and it would be an error to segregate the incidents and test their veracity in isolation. 52 L.W. 57=72 C.L.J. 263=1940 P.C. 93 (P.C.). A witness's evidence should not be rejected merely because he appeared to be nervous while in the box. 187 I.O. 74=1940 A.L.J. 26=1940 All. 175. The fact that the witnesses for one of the parties to a suit happen to be his employees is not a sufficient ground for not relying on their evidence, especially when none but the employees could be witnesses to the transaction in dispute. 189 I.O. 232=1940 Pat. 629. Where the rejection of a witness's evidence by the trial Judge is solely based on the evidence, oral and documentary, placed before him, and he makes no comment on the demeanour of the witness or on his truthfulness apart from comments on the probabilities of the truth of the story actually told by him viewed in the light of the surrounding circumstances, the appellate Court is in as good a position to judge of the matter as the trial Court. 1934 P.O. 12=66 M.L.J. 151 (P.C.). See also 8 Luck. 315=1933 O. 128; 76 I.O. 63=46 M.L.J. 334. Where the evidence produced by one party is in direct conflict with the evidence

produced by the other the following tests may be applied for judging the veracity of the witness: (1) the evidence which is consistent with the finding which is already established; (2) the comparative nearness in relationship of the witness; (3) the impartiality of the witnesses; (4) the inherent probability of their statements; (5) the impression created in the minds of the Judge by the demeanour of the witnesses in the box. 9 L. 121=1933 O. 197. *See also* 1942 O.W.N. (B.R.) 578; 1941 A.M.L.J. 67. Mere verbal contradictions and discrepancies are not sufficient to discredit the clear and consistent testimony of eye-witnesses, which is also supported by the circumstantial evidence. The measure of stupidity of these witnesses especially when they are villagers, is not the measure of their veracity and truthfulness. 8 Luck. 570=1933 O. 333. *See also* 56 M. 356=64 M.L.J. 439. When a witness makes a reckless statement which appears to be altogether false, the safest course is not to place any reliance on his evidence. 11 O.W.N. 950=1934 A. 388. Discrepancies in the statements of witnesses on material points should not lightly be passed over, as the value of their testimony is seriously affected by them. 36 A. 187=26 M.L.J. 442=23 I.C. 715 (P.C.). As to appreciation of evidence, *see* 45 M.L.J. 438=23 C.W.N. 589=77 I.C. 141 (P.C.). Misapprehension implies a positive and demonstrable mistake or misunderstanding, whereas misappreciation of evidence is more subjective and by no means so capable of logical demonstration. I.L.R. (1938) N. 442=177 I.C. 605 (2)=1938 N. 394. It cannot be said to be an axiom of law that every Court must reject examination-in-chief whenever cross-examination does not confirm it. A Court may believe any witness or any part of any witness's evidence and disbelieve any other part and it is entitled to come to the conclusion that the examination-in-chief is true and that statements in cross-examination are false. 1937 M.W.N. 986. Low status of witness is not sufficient to discredit them. 1924 M.W.N. 445=1924 P.C. 106 P.C. Where the parties to a suit are at issue on a vital question, such as the genuineness of defendant's signature to the document sued on, the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The Privy Council upheld the finding of the Chief Court as to the genuineness of the signature, in reversal of the decision of the first Court. 38 C. 805=21 M.L.J. 1127=38 I.A. 155 (P.C.). In a dispute as to facts, great weight, naturally attaches to the finding of the trial Judge. 15 C.W.N. 717=10 I.C. 963 (P.C.). The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. 45 A. 300=21 A.L.J. 143=1923 A. 352. In India where references to time are generally mere approximations there is large margin of honest error. 15

Bom.L.R. 297=19 I.C. 326. A theory of improbability in order to prevail against positive evidence must be clear and cogent; it must be such as to justify the rejection of the positive evidence as concocted and unreliable. 24 C.W.N. 860=59 I.C. 814=47 O. 1043. Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence and where the character and position of the person is above reproach this probability becomes stronger. The mere fact that this or that thing in a complete transaction is improbable does not count for much as against clear and distinct evidence of reliable witnesses. 39 C. 244=13 I.C. 577=16 C.W.N. 266. The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in existence in 1915. 1923 L. 601. Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery he is not reliable. 1923 L. 438 (2). Without deliberately intending to tell a lie human beings are prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination. 8 O.L.J. 433=1922 O. 178. The evidence of respectable persons with special means of knowledge owing to relationship to the parties on the matters they depose to should not be viewed with suspicion especially in cases where only oral evidence will ordinarily be available. 25 I.C. 660=7 O.L.J. 383. It is a good working rule not to act upon the evidence of persons who are vitally interested in the result of the case, unless that evidence receives corroboration. 1922 P. 111. Where a party comes into a Court with a story, which cannot be believed in its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused. 19 Cr. L.J. 877=47 I.C. 73. The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin which is now not implicitly followed by Courts in the appreciation of evidence. It is the duty of the Court to sift the evidence and separate the truth from the falsehood, if it can. 1923 R. 30. It is generally unsafe to apply the doctrine *falsus in uni falsus in omnibus* to evidence of witnesses in India. Where the evidence is substantially correct simply because there are deliberate falsehoods in it, it should not be totally rejected. 10 O.W.N. 482=1933 O. 269. *Circumstantial evidence* is evidence of circumstances, as opposed to what is called direct evidence. 10 I.C. 929=12 Cr.L.J. 329. *Circumstantial evidence* in order to justify a conviction must be exhaustive and must exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused. 88 I.C. 759=32 P.R. (Cr.) 1916. Circumstantial evidence must like any other evidence be tested and weighed and

must prevail or not by its own inherent proving force. 1 L.W. 1007=26 I.C. 332=16 Cr.L.J. 38. To justify an inference of guilt from circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any reasonable hypothesis other than that of his guilt. 59 I.C. 358=22 Cr.L.J. 154. *See also* 65 P.L.R. 1917=42 I.C. 129; 8 C.W.N. 278; 39 I.C. 322. A 'chance witness' whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation, though and necessarily a false witness, it is proverbially rash to rely upon such evidence. 193 I.C. 209=1941 O.W.N. 565=1941 P.C. 11 (P.C.).

A judge cannot travel beyond the record of the case before him and rely for the rejection of an important witness in the case on information gained from other cases heard by him. 193 I.C. 327=1941 Lah. 22. Record requisitioned—When becomes evidence in the case. A record which has been requisitioned does not become part of the evidence in a pending case merely from the fact that it has been requisitioned. If any document or statement contained in the record are relied upon by a party then they must be duly proved and brought on the record as evidence in the pending case. 1941 R.D. 868=1941 O.A. (Supp.) 788=1941 A.W.R. (Rev.) 914. Where a document called from a witness is produced by him and that is the document required, he should be allowed to prove it so that it can be admitted in evidence although the demand for the document does not describe it as fully as it may. 22 Pat.L.T. 656=1941 Pat. 202.

#### CIRCUMSTANTIAL EVIDENCE AS TO MARRIAGE.

—Even though the connection between a man and a woman was at its inception adulterous the presumption of a marriage arises in a case where it is established that the husband of the woman had divorced her and after that they continued to live together, treated each other as husband and wife and were looked upon by others as such. 35 P.L.R. 532=1934 L. 517. Continuous living as man and wife raises presumption of legal marriage and this presumption is greatly strengthened when they are described as man and wife in municipal papers. 1934 A. 884. A presumption of a marriage arises in a case where it is established that the parties were living together as man and woman and after the death of the man the latter was allowed by his reversioners to retain his property for a period of 41 years. 1937 O.W.N. 1221. Where the evidence was that a widow after her husband's death lived with his first cousin as man and wife, had several children by him, and the two were together cultivating lands and there was nothing to show that they were outcasted or their status as man and wife was repudiated it would not be justifiable to hold that there has not been a re-marriage. 18 R.D. 417. *See also* 1937 O.

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W.N. 619=1936 O. 298. Medical certificate—Value of. 1937 C. 697. Where the *slide taken by the Medical Officer* containing a smear of the discharge from the penis of the person accused of *adultery* was shown to have contained spermatozoa and it was also proved that there was a whitish discharge known as leucorrhoea from the vagina of the woman. *Held*, that the evidence was not conclusive proof that the two were caught "*in flagrante delicto*" in the very act of coitus. 8 Luck. 301=1933 O. 148.

An approximate estimate of the age of a party made by third parties who might not have had any specified means of knowledge is not of much value. 56 A. 766=1934 A. 406 (F.B.). In criminal proceedings the statement of a witness's age forms no part of his deposition and is not usually the statement of the witness himself, but an estimate of the Court. 1933 P. 627. It is a well-known fact that when the age is not in issue, villagers are particularly careless in stating their age. As such a statement of age cannot be of such positive character in determining a particular issue long after the date, when the determination of age was not one under consideration when the statement was made. 1939 A.W.R. (B.R.) 44=1939 R.D. 164. In the case of an unsworn testimony of a young child, that evidence is admissible. Sec. 13 of the Oaths Act expressly provides for cases in which the provisions of secs. 5 and 6 of that Act have not been carried out. 39 Cr.L.J. 585=1938 M. 490= (1938) 1 M.L.J. 289. *Children are a most untrustworthy class of witnesses*, for when of a tender age, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. 34 P.L.R. 536=1933 L. 667. *See also* (1945) 2 M.L.J. 493 (P.C.). The proper tests to be applied with reference to the evidence of a child witness are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. 1941 O.W.N. 1246. *A boy of about seven years is not likely to distinguish between things heard by him and those which he has seen*; and when there is a clear indication of inconsistent statements in his evidence, not much importance can be attached to it. It is not illegal to examine a witness of tender years; but it is important that the Judge should, as a precaution, ascertain in the first instance by means of a few simple questions whether the intelligence of the child is such that it is capable of giving credible evidence; it is also desirable that the record of evidence should show that such a test has been in fact made. When it does not appear that any such attempt was made to test the capacity of the child witness to give his testimony, it is not safe to rely on the evidence of such a witness. 15 P.L.T.



586=1934 P. 651. It is not necessary to tender the evidence taken on commission formally at a trial to make it evidence in the case. (36 C. 566, Ref.) 37 C.W.N. 666=1933 C. 412. Where an arbitrator has examined witnesses and recorded evidence with due formality, it is open to the parties by consent to treat such statements of evidence and proceed with the case before the Court from the stage it has reached before the arbitrator. The consent in such a case relates to the manner in which the evidence has to be proved and not to the relevancy of the evidence itself. 1934 M. 610=67 M.L.J. 358. It is unsafe to rely completely on the evidence of trackers as to the correspondence of trackers. 42 I.C. 129=18 Cr.L.J. 897. Sometimes the identification of the particular accused by witnesses to whom they are strangers is useful. 17 Cr.L.J. 156=83 I.C. 686. Where a witness was examined before the committing Magistrate and was simply tendered for cross-examination in the Sessions Court and the evidence before the committing Magistrate was marked as exhibit in the Sessions Court, such procedure is illegal. 30 I.C. 439=1915 M.W.N. 544. See also 39 Mys.H.C.R. 581=12 Mys. L.J. 1. Statements of accused in police custody are notoriously untrustworthy. 20 I.C. 721=1912 M.W.N. 825. In criminal cases, it is the weight of the evidence and not the number of the witnesses, which the Court has and ought to consider. 63 I.C. 407=24 O.C. 225. When in murder case the only eye-witness to the occurrence has been disbelieved on several points it is not safe to base a conviction on the evidence of such witness, especially when no motive for the murder has been made out. 11 O.W.N. 969=1934 O. 373. Conviction should be resorted to only after the reasonable exclusion of every conceivable hypothesis of innocence. 9 I.C. 400=12 Cr.L.J. 690. Evidence cannot be admitted on the intention of parties when that intention is clearly expressed in the deed. 1928 C. 825.

**EXAMINATION OF PARTY—DEFENDANT AS PLAINTIFF'S WITNESS.**—Where the plaintiff refrained from giving evidence on his own behalf and adopted instead the tactics of calling the defendant as a witness for the plaintiff, with the usual result that important features of his case were denied by his own witness, their Lordships condemned this practice and approved of the course taken by the High Court in treating the plaintiff as a person who put the defendant forward as a witness of truth. 172 I.C. 633=47 L.W. 124=1938 P.C. 59 (P.C.). If a party appears as a witness on behalf of the opposing party the Court should before proceeding to record his statement question him or his counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness the Court should point out to the party producing him that ordinarily speaking the matter should be left as it is and the Court be left to draw

any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however insist on examining the opposite party as his own witness the Court should be careful not to allow him to cross-examine his own witness because unless the evidence is declared hostile, the party producing the witness has no right to cross-examine his own witness. 35 P.L.R. 28=1934 L. 126. The fact that a witness was cited on behalf of the defendants and his evidence went entirely to support the plaintiff's case does not entitle a Court to reject his evidence as that of a witness who had been "won over" by the plaintiff. 147 I.C. 591=1934 A. 226.

**REPETITION AND HEARSAY.**—Distinction between. See 14 P.L.T. 482=1933 P. 199. No standard of special strictness is applicable to the proof of collateral relationships in India, and there is no rule that a person claiming as a collateral heir is bound to allege and prove his title through the common ancestor in all its stages. (6 C. 626, Expl.) 168 I.C. 881=46 L.W. 88=39 Bom. L.R. 1005=1937 P.C. 201 (P.C.). The evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. 46 L.W. 88=1937 P.C. 201 (P.C.).

**PLEADINGS AND EVIDENCE.**—A statement of a party before Court but not on oath is only part of the pleading and not legal evidence. 35 P.L.R. 99=1934 L. 234. Evidence in a previous suit or affidavits filed in a previous litigation do not prove anything. Such evidence or such affidavits can be used powerfully when put to a witness as a means of destroying that witness's testimony and if the attack thus launched is successful it results in the witness leaving the box discredited. That does not however prove what is contained in his previous evidence or affidavits. The matter ends with a witness discredited. 1941 N.L.J. 596. The doctrine of the onus of proof is merely academic where both parties give evidence. Where there is evidence on both sides, the question of onus does not arise at all, and the judge has to determine the issue between the parties on the evidence before him. 1938 P.W.N. 773. Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it questions of pedigree, and it may be sufficient of itself; but the fact that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material. 170 I.C. 335=1937 P.C. 310=(1937) 2 M.L.J. 772 (P.C.). See also 65 O.L.J. 520=41 O.W.N. 1108. It is possible that scandalous and indecent matter might be expunged by the trial Court from the evidence recorded on commission. If it proves to be irrelevant then the matter should be noted in the judgment in the case. But once evidence has been recorded on commission it must re-



## Commencement of Act.

And it shall come into force on the first day of September, 1872.

## Repeal of enactments.

2. [Rep. by Act I of 1938, Sec. 2 and Sch.]

## Interpretation clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

main as such on the record. If it is irrelevant or inadmissible, it will not aid in the determination of the case and should be neglected. 1940 A.M.L.J. 4.

SEC. 2: (NOW REPEALED), ENGLISH LAW.—CL (1), sec. 2 precludes the Courts from following English Rules of Evidence in future. 7 I.A. 63 (70) (P.C.). There are however several Acts of Parliament relating to evidence that are in force in India. See Whitley Stokes' Anglo-Indian Codes, Vol. II, pp. 822-827; Field, p. 53 (6th Ed.). See also 14 C. 721. S. 2 (1) of the Act repeals the whole of the English Common Law on evidence so far as it was in force in British India before the passing of that Act. The section, in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It must be recognised however, that the principle of exclusion adopted by the Act, should not be applied so as to exclude matters which may be essential for the ascertainment of truth. The relaxation of the rule as to reception of hearsay evidence must be held to be permissible where such a course tends to the due investigation of truth, and the attainment of justice. 65 O.L.J. 520=41 C.W.N. 1103. See also 175 I.C. 465=1938 R. 177 (F.B.). S. 2 (1) (now repealed) in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. 193 I.C. 220=45 C.W.N. 435=1941 P.C. 16=I.L.R. (1941) 1 Cal. 468 (P.C.).

SEC. 3: COURT.—The definition of "Court" in this Act is framed only for purposes of this Act and should not be extended beyond its legitimate scope. 12 B. 36. "Court" includes both Judge and jury. 4 C. 483. Registrar or Sub-Registrar not Court under C.P. Code [Cr.P. Code, sec. 105 (2)]; so also a Magistrate holding preliminary enquiry in police investigation. 11 B. 702. The term, "matters before it," include matters which do not fall within the definition of "evidence." 1924 N. 385=79 I.C. 609. "Court" includes all Magistrates. 36 I.C. 171=34 P.R. (Cr.) 1916.

FACT.—Fact in issue cannot be proved by one not called as a witness. 13 I.C. 220=13 Cr.L.J. 28. Misrepresentation of fact—Fact, meaning of. 36 I.C. 850=16 P.R. (Cr.) 1916. State of a man's mind is a fact. 29 Ch.D. 483. Possession is a fact. 25 I.C. 510. On this section, see also 38 Bom.L.R. 1122=1937 B. 31.

DOCUMENT.—The definition of the word

"document" in sec. 3 of the Evidence Act and sec. 29 of the I.P. Code, applies to the word as used in sec. 2 (6) of the Press (Emergency Powers) Act, 1931. 1934 A. 1031=153 I.C. 411.

"EVIDENCE".—This is only a definition of the word as used in the Act. 4 C. 492. The word "evidence" in the Act signifies only the instruments by means of which relevant facts are brought before the Court, *viz.*, witnesses and documents, and by means of which the Court is convinced of these facts. 26 N.L.R. 229=1930 N. 242 (F.B.). What "evidence" means and includes has been described in S. 3. An affidavit is not within that description. On the contrary, the affidavits have been expressly excluded by sec. 1, para. 2 from the applicability of the Evidence Act. 1944 N.L.J. 134. See also 38 Bom.L.R. 1122=1937 B. 31 (confession of co-accused). Heading of deposition—Entry in—Proof of religion—Not much importance to be attached. 176 I.C. 242=1938 R. 89.

"PROVED".—Meaning of. See 1929 A. 303=107 I.C. 564. Also 31 Bom.L.R. 515; 1934 A. 390=154 I.C. 405. The line between 'legal proof' and 'moral conviction' must be kept clear in considering the nature and quantum of proof. But once the evidence comes before Court and stands the test of severe legal scrutiny, that evidence constitutes legal proof. Then the dividing line vanishes. 'Legal proof' is neither more nor less than what is indicated by the definition of the word 'proved' in sec. 3. While the Court is entitled to insist that the best possible evidence should be produced, no hard and fast rule as to the quantum of evidence required for the proof of a particular fact can be laid down as this must necessarily vary with the circumstances of each case. 1944 A.L.J. 87. A Court, when it has to consider whether a fact is proved or not must not expect evidence which cannot be produced or evidence which it is unnecessary to produce. Further more, a Court must consider all the evidence before it and this not merely as a number of independent bits of evidence. The whole of the evidence must be considered together and the cumulative effect of it must be weighed. 184 I.C. 521=1939 O.W.N. 1114. When it is shown that a particular consignment received by the railway servants was kept in the shed which was subsequently looted by the rioters the only reasonable inference would be that the consignment was looted by the rioters who attacked the shed. It is not necessary for the railway servants to prove by direct evidence that the particular consignment was looted by the rioters. A.I.R. 1945 Cal. 267.

"Court." "Court" includes all Judges<sup>1</sup> and Magistrates,<sup>2</sup> and all persons, except arbitrators, legally authorized to take evidence.

"Fact." "Fact" means and includes—

(1) any thing, state of things, or relation of things capable of being perceived by the senses ;

(2) any mental condition of which any person is conscious.

*Illustrations.*

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Relevant."

"Facts in issue."

The expression "facts in issue" means and includes—

any fact, from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

*Explanation.*—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

*Illustrations.*

A is accused of the murder of B.

At his trial the following facts may be in issue :—

that A caused B's death ;

that A intended to cause B's death ;

that A had received grave and sudden provocation from B ;

that A, at the time of doing the act which caused B's death was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by

more than one of those means, intended to be used or which may be used, for the purpose of recording that matter.

*Illustrations.*

A writing<sup>3</sup> is a document ;

Words printed, lithographed or photographed are documents ;

A map or plan is a document ;

An inscription on a metal plate or stone is a document ;

A caricature is a document.

"Evidence."

"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ;

such statements are called oral evidence ;

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its

"Proved."

existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

LEG. REF.

<sup>1</sup> Cf. the Code of Civil Procedure, 1908 (Act V of 1908) ; sec. 2, the Indian Penal Code (Act XLV of 1860) ; sec. 19, General Act, Vol. I and for a definition of "District Judge," the General Clauses Act (X of 1897), sec. 3 (15), General Acts, Vol. IV.

<sup>2</sup> Cf. the General Clauses Act (X of 1897) sec. 3 (31), and Code of Criminal Procedure (V of 1898).

<sup>3</sup> Cf. Definition of writing in sec. 3 (58), General Clauses Act (X of 1879).

"NOT PROVED"—PROOF IN CIVIL AND CRIMINAL CASES.—The evidence in criminal cases must be such as to exclude any reasonable doubt of guilt ; if there be any such doubt the accused is entitled to be acquitted. 22 C. 323.

A fact is said to be disproved when after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved."

A fact is said not to be proved when it is neither proved nor disproved.

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it ;

"May presume."

"Shall presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved ;

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be

"Conclusive proof."

given for the purpose of disproving it.

## CHAPTER II.

### OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

*Explanation.*—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

#### *Illustrations.*

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue :—

A's beating B with the club ;

A's causing B's death by such beating ;

A's intention to cause B's death.

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

6. Facts, which, though not in issue, are so connected with a fact in issue

SEC. 4.—Under sec. 4, it is open to a Court in India upon proof of a marriage either to regard as proved the subsistence of that marriage on a later date, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of sec. 4 in a judicial manner according to the circumstances of the case. 193 I.C. 209=1941 P.C. 11=1941 O.W.N. 565 (P.C.); I.L.R. (1942) 2 Cal. 299=46 C.W.N. 729=1943 Cal. 70.

SEC. 5: SCOPE OF SECTION.—Act does not lay down rules as to the weight of evidence; it only deals with admissibility (Field, 6th Ed., 64). In determining the relevancy or otherwise of any evidence, the Court cannot consider matters beyond the purview of the Evidence Act. 24 I.C. 165=12 A.L.J. 285. In a trial for murder, the case against the accused should be determined on evidence which is relevant and admissible under the Act. 62 I.C. 545=22 Bom.L.R. 1274. Sui; for profits against son of lambardar—Evidence as to the difficulty of collecting rent and difficulty in finding other lambardar on the death of the original lambardar is ad-

missible. 1928 A. 166=107 I.C. 702.

SEC. 6.—Principles of the sections relating to relevancy of facts are mere rules of logic. 1914 M.W.N. 931. Declarations in order that they might be admissible as *res gestae* should be contemporaneous with the transaction in issue, that is, the interval should not be such as to give time or opportunity for fabrication and they should not amount to a mere narrative of a past occurrence. They are admitted when they appear to have been made under the immediate influence of some principal transaction relevant to the issue and are so connected with it as to characterise or explain it. The bare statement of a complainant made sometime after the occurrence is not admissible in evidence. 1941 O.W.N. 1290=1942 Oudh 130. Statement made to Police—Admissibility of. See 50 I.C. 487=17 A.L.J. 760. Evidence of woman raped—*Res gestae*. See 4 M.L.J. 491=1921 Lah. 253, note under sec. 8. Where a woman raped made a statement to her relative shortly after and committed suicide about 3 days after the occurrence, such statement is not admissible under sec.

Relevancy of facts forming part of same transaction.

as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

*Illustrations.*

(a) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact.

(b) *A* is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(c) *A* sues *B* for libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

*Illustrations.*

(a) The question is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether *A* poisoned *B*.

The state of *B*'s health before the symptoms ascribed to poison, and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation and previous or subsequent conduct. 8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

6. 1930 M.W.N. 702. In a case of rape, a statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of the truth of the charge alleged but as corroborating the credibility of the complainant and of the evidence of the consistency of her conduct. 43 I.O. 443=19 Cr.L.J. 155 (F.B.). See also 1930 C. 132=124 I.O. 175 (statement by the girl to the mother that she was bitten by a leech to be used only to contradict the statement made by the girl). Unless a statement by the girl to her father and the offence under sec. 376, I.P. Code, from *res gestae*, such statement is not of much value. 1930 L. 337=127 I.O. 862. Hearsay evidence—Statement of bystander, admissibility. 34 P.R. (Gr.) 1914=27 I.O. 664. The word "bystanders" in Ill. (a) of sec. 6 means the persons who are present at the time of the beating and not the persons who gather on the spot after the beating. The remark made by persons other than the eye-witnesses could only be hearsay, because they must have picked up the news from others. 46 P.L.R. 353=1945 Lah. 46.

Sec. 7.—Where the accused takes the defence founded on an *alibi*, reasoning from

probabilities cannot take the place of evidence. 1930 P. 509=128 I.O. 351.

SECS. 7 AND 45.—Evidence that there were foot-prints at or near a scene of offence or that the foot-prints came from a particular place or led to a particular place, is relevant evidence under sec. 7 and statements as to these facts made by person skilled in identifying foot-prints are not excluded by sec. 45. The words 'science' or 'art' in sec. 45 are to be construed widely. The amendment relating to finger impressions is made to meet particular decisions which had been given by the Courts. The amendment does not operate to limit the wide meanings which should be given to the expressions 'science' or 'art'. Whether a particular tracker called upon to assist, is or is not an expert in this art or science is a matter to be decided by the Judge or Magistrate. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying foot-prints, there is no reason why his evidence should not be given consideration. 1942 Sind 11=I.L.R. (1941) Kar. 525=43 Cr.L.J. 308.

Sec. 8: *Cumtiffe*, J.—Sec. 8 embodies, in a statutory form, the rule of evidence that

**Explanation 1.**—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements—but this explanation is not to affect the relevancy of statements under any other section of this Act.

**Explanation 2.**—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

#### Illustrations.

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

the testimony of *res gestae* is always allowable when it goes to the root of the matter concerning the commission of the crime. It is controlled and circumscribed by sec. 27 of the Act. 63 C. 1053=1936 C. 316. *See also* I.L.R. (1936) N. 78.

**MOTIVE:** Per *Crump, J.*—A motive is that which moves a man to do a particular act. Whether the belief which produces the state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question. 62 I.C. 545=22 Bom.L.R. 1274. Motive can never supply want of reliable evidence of the offence. 7 L. 84=94 I.C. 901.

**EVIDENCE OF CONDUCT.**—As to evidence of conduct and surrounding circumstances, *see* 22 C. 406; 24 W.B. 176; 7 A. 385; 25 S.L.R. 55=1927 Sind 28; 1937 Sind 93; 35 C.W.N. 705=59 C. 40; 161 I.C. 885=1926 Pesh. 72. ‘Conduct’ may in certain circumstances include statements as well as acts but in doing so it still retains the difference between an act and a statement. A statement must consist of words, whether they be spoken or written, or spelled out as would be done by a mute person on his fingers; and words would not always be statements. Acts however exclude words and cannot be translated into words. So where an accused takes certain articles belonging to the deceased from various places and hands them over to the police, he cannot be said to be making a statement; much less making a statement amounting to a confession. To such case sec. 8 applies. I.L.R. (1941) All. 280=1941 All. 145=1941 A.L.J. 86; 1941 O.W.N. 722.

**Res gestae**—REPORT BY WOMAN RAPED—STATEMENTS TO NEIGHBOURS.—The statements were inadmissible under sec. 6 but admissible as a complaint under sec. 8. 4 L.L.J. 491=1921 Lah. 258. As to statements of a raped girl, to persons immediately after occurrence. *See* 82 I.C. 142=1925 N. 74; 1926 P. 58.

**STATEMENT TO POLICE OFFICER AND COMPLAINT IN HIS PRESENCE—ADMISSIBILITY.**—The evidence of police officer and the complainant as to the pointing out of the various places by the accused was a confession of his guilt made while he was in the custody of the Police-officer and inadmissible under secs. 25 and 26. The evidence could not be treated as evidence of conduct, apart from the accompanying statements under sec. 8 of

the Act. 52 I.C. 601=21 Bom.L.R. 724; 152 I.C. 473=11 O.W.N. 1383.

**ACCUSED POINTING OUT SPOT TO POLICE OFFICER—CONDUCT.**—If an accused accompanies a police officer and points out the spot where the stolen property is concealed, it amounts to conduct proof of which is admissible under sec. 8. 35 I.C. 962=17 Or.L.J. 402; I.L.R. (1936) N. 78=164 I.C. 964=1936 N. 200; 63 C. 1063=1936 C. 316; 1937 N. 220=I.L.R. (1937) N. 268 (conversation between accused and police at time of search leading to discovery of incriminating articles is admissible). But the mere fact that the accused pointed out the several places of incidents narrated by the approver is not admissible as evidence of conduct. 1929 L. 794. Statement by person robbed immediately after robbery and assault is admissible as part of the *res gestae*. 6 P. 747=1928 P. 162. Rape—No direct evidence—Child victim not making any statement—Statement of mother as regards answers given by child in reply to questions put to her not admissible. 1930 L. 84=120 I.C. 539. Sec. 8 does not render a statement by a woman raped admissible in evidence when there is nothing to corroborate or confirm the same. 131 I.C. 436=1931 M. 233 (2). Where the accused (a woman) is on her trial for making a false charge of rape, the fact that she made certain allegations which she related in the course of an enquiry which she sought and demanded is relevant. 1935 N. 69=17 N.L.J. 189. A dying declaration by a deceased person made in the form of signs and gestures in answer to questions put to him is admissible evidence. 38 Bom.L.R. 818=1937 B. 872.

**CONDUCT OF ACCUSED.**—Whether the evidence against a person charged with an offence under sec. 147, I.P. Code, is open to doubt, his conduct, some time after the occurrence, cannot be taken to be evidence under sec. 8 and cannot be used against him in the case. 54 I.C. 775=21 Or.L.J. 167. As to evidence of conduct or character, *see* 97 I.C. 1041=1927 S. 28. As to evidence of subsequent conduct, *see also* 5 W.B. (Or.) 28; 9 A. 568. The conduct of a person who has had no part in a crime and has not been called as a witness cannot be brought under sec. 8 as being a relevant fact constituting motive or preparation. 1935 N. 81=17 N.L.J. 274. Though the mere fact that an accused person has absconded will not neces-

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

(c) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B* is relevant.

(d) The question is whether a certain document is the will of *A*.

The facts that not long before the date of the alleged will *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve, are relevant.

(e) *A* is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A*'s presence—"The police are coming to look for the man who robbed *B*," and that immediately afterwards *A* ran away, are relevant.

(g) The question is whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer are relevant facts.

(h) The question is whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that enquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) *A* is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things, which were or might have been used in committing it, are relevant.

(j) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—

as a dying declaration, under section 32, clause (1), or

as corroborative evidence under section 157.

(k) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

sarily fix him with guilt, the fact is undoubtedly a piece of relevant evidence against him. 35 P.L.R. 740. Where the accused, who is charged under sec. 411, I.P. Code, for dishonestly receiving a bullock knowing it to be stolen property, states to the police that he purchased it from a certain person and produces in support of his statement a receipt which is found not to include the bullock and as to which there is evidence that he made an attempt to get it altered, the conduct of the accused can be taken into account to prove his guilty knowledge. 35 P.L.R. 738=1934 L. 695. Admissibility of statements accompanying acts. See 3 B. 17; 14 B. 260; 10 Bom.L.R. App. 2; 4 Bom.L.R. 294, See also 1941 O.W.N. 722 (Admissibility of voluntary statements to police by accused subsequent to the first information report.) What the conspirators did, that is to say, their conduct, is relevant under sec. 8 and it is immaterial whether the conduct on which the prosecution relies was previous or subsequent to carrying out of the object of the conspiracy. 1941 O.W.N. 138=42 Cr.L. J. 165=191 I.C. 466=1941 Oudh 130.

EXPL. (1).—What is relevant under sec. 8 is the particular act upon the statement, and the statement and the act must be so blend-

ed together as to form a part of a thing observed by the witnesses and sought to be proved. Otherwise the statements are inadmissible. 29 N.L.R. 251=1933 N. 136.

EXPL. (2).—An informer's statement to the police that he purchased opium from the accused is not admissible unless it was made in the presence of the accused. 12 I.C. 87=4 Bur.L.T. 222. But the finding of marked coins on the accused and opium on the informer are circumstances from which it may be inferred that the accused sold the opium. (*Ibid.*) The statement made by the police-officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft was not admissible under sec. 3, Expl. 2 because such a statement could not be said to affect the conduct of the accused. 52 I.C. 601=21 Bom.L.R. 724. Charge of forgery of a sale deed—Statements made by accused before Registrar—Admissibility of. 1933 M.W.N. 96. Absence of entries in account book is relevant fact. 1924 N. 22=76 I.C. 327. Agent acting nefariously, presumption from. 80 I.C. 969=17 S.L.R. 15 (33). First information report as evidence of conduct. 64 O. 237=99 I.C. 227. Accusation by woman against man for

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which established the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose

Facts necessary to explain or introduce relevant facts.

*Illustrations.*

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue.

The facts that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife B. B says as he delivers it—"A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

10. Where there is reasonable ground to believe that two or more persons

attempt to ravish—Statements by her to witnesses—Silence of accused—Relevancy. 1938 R. 127.

SECS. 8 AND 32.—A statement of a person believed but not proved to be dead is no doubt not admissible under sec. 32 but the document however is admissible under sec. 8, to a limited extent, to show the conduct of the party. It however is not a direct proof of the facts contained in it. 40 P.L.R.J. and K. 1. Where the deceased had made a complaint to the police shortly before his death, stating that he apprehended danger to his life at the hands of certain persons, it is admissible under sec. 8 whether or not it is admissible under sec. 32 (1). It is evidence of the conduct of a person, an offence against whom was the subject of the trial. I.L.R. (1938) 1 C. 290=42 C.W.N. 129=1938 C. 51.

SEC. 9: SCOPE OF SECS. 9 AND 11.—See also notes under secs. 14 and 15, *infra*, Secs. 9 and 11 read along with sec. 21 justify a Court in admitting into evidence all previous statements made by the accused bearing on the question of his guilt whether made to a police officer or to a third party if the statement is relevant to the fact in the issue. These sections are not controlled by the Criminal Procedure Code. 73 I.C. 963=6 P.L.T. 381. If after the commission of a crime a person whose name is mentioned as a participator in the crime absconds, his conduct implies that he is concerned in the crime. Anything therefore which tends to explain

his conduct and furnishes motive other than a guilty conscience is relevant under sec. 9. 62 I.C. 545=22 Bom.L.R. 1274. Admissibility of judgment to prove identity. See 18 A. 78. As to comparison of thumb marks to prove identity, see 1 C.W.N. 33; 9 C.W.N. 520. As to recitals of boundaries in documents between strangers to suit, see 45 C.L.J. 55=30 C.W.N. 761; 8 L. 657=1927 L. 448. See also notes under sec. 13, *infra*. Evidence of identification of accused. 23 O.C. 258=90 I.C. 444. In a case of sedition, the copy of the accused's letter to the press is admissible under secs. 9 and 14, but it is necessary to prove that such a letter was sent before it could be admitted. 30 Bom.L.R. 314=1928 B. 77. In an offence of conspiracy to commit dacoity, evidence as to previous association of accused for criminal purposes is admissible under sec. 9 but not under sec. 11. 54 B. 524=32 Bom.L.R. 324. As to the admissibility of evidence of assessment of neighbouring land to determine the letting of a piece of land, see 1940 Cal. 47=44 C.W.N. 165=I.L.R. (1940) 1 C. 168. A statement by the brother of a kidnapped woman that the woman denounced the accused as one of the abductors is admissible under sec. 9 as explaining the circumstances of the arrest of the accused and also for the purpose of establishing his identity. A.I.R. 1944 Sind 38.

SEC. 10: SCOPE OF ENGLISH AND INDIAN LAW.—Sec. 10 is wider than the English Law. As soon as it is shown with regard to



Things said or done by conspirator in reference to common design. have conspired together to commit an offence, or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

an individual conspirator that he was privy with the combination and its objects and adopted the acts already performed, he as a conspirator becomes bound by the antecedent and consequent acts of his fellow-conspirator. 17 P.R. (Or.) 1915=28 I.C. 738; 37 C. 467=14 C. W. N. 1114=7 I.C. 359. The section renders admissible in cases of conspiracy such evidence which is not ordinarily admissible under the English or Indian law. The first thing for the prosecution in a case of conspiracy is to give satisfactory evidence to show a common purpose. The existence of the assent of minds which is involved in a conspiracy may be and from the secrecy of the crime, usually must be, inferred from the proof of facts and circumstances which, taken together apparently indicate that they are merely part of a complete whole. 1939 A.L.J. 785=1939 All. 567. There is a considerable inconsistency between sec. 10 and the illustration thereto. 37 C. 467=14 C.W. N. 1114. It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to commit an offence to attract the operation of sec. 10 against the accused. 37 C. 467; I.L.R. (1936) N. 152=1936 N. 97. The object of sec. 10 is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the acts, words or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained. 11 P.L.T. 45=1929 P. 145 (F.B.); 1930 M.W.N. 1264. Sec. 10 means this: if two persons conspire together to commit an offence each is regarded as being the agent of the other and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator in furtherance of the common intention which they had both entertained. First, you must find that there was a conspiracy, and, secondly, that the person to whom the doctrine is to apply should have joined the conspiracy before they can be made liable for anything said or done by others. 81 Bom. L.R. 515; 1944 Sind 1 (F.B.); (conspirator turning approver—Admissibility and value of his evidence). The terms of sec. 10 are very wide and apply to acts done in connection with the conspiracy, and under the section an act done by third persons may in certain circumstances be treated

actually as evidence of the existence of the conspiracy; as for instance when an act is done or something is said in the presence of the persons implicated. But mere statements of third parties made in the absence of the persons implicated form a class by themselves, of no probative value whatever standing alone. The section does not permit of the attaching of weight as real evidence to mere statements of this kind made in the absence of the accused persons, and independent evidence required as corroboration of such statements must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be direct or circumstantial evidence. But it must be evidence which standing alone, would be properly treated as evidence for a jury of a proved intention, so that there would be evidence apart from the statements of the alleged fellow conspirators, incriminating the persons charged. The evidence must be proof of intention and not merely proof of a possible motive for the intention. 178 I.C. 324=1938 P.W.N. 403=1938 P. 497. The words of sec. 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot, are relevant as evidence of the common intention once reasonable ground has been shown to believe in the existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. Such statement is therefore inadmissible in evidence against co-conspirator. 190 I.C. 233=52 L.W. 662=1940 P.C. 170=(1940) 2 M.L.J. 811 (P.C.); 1941 O.W.N. 133=1941 Oudh 130; 57 L.W. 100=(1944) 1 M.L.J. 91 (letter written after failure of plot to carry out common intention not admissible). When sec. 10 refers to the common intention of the conspirators, it refers to the common intention in the future not to common intention in the past. I.L.R.

*Illustrations.*

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen.

The fact that *B* procured arms in Europe for the purpose of the conspiracy. *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Kabul the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy and to prove *A*'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

(1939) Kar. 449=40 Cr.L.J. 882=1939 Sind 185. See 46 Cr.L.J. 667=(1944) 1 M. L.J. 91. Where from the dying declaration made by a person, who is alleged to have been murdered, it appears that there was clearly a conspiracy wrongly to implicate a particular person the Court before it would rely on the evidence of witnesses who have so conspired, and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose must have some other evidence before it which would enable it to distinguish the true from the false. 175 I.C. 99=39 Cr.L.J. 545=1938 Sind 94.

**EVIDENCE OF CONSPIRACY.**—Possession of seditious literature by one member is evidence against the others for finding out the object of the association, even where such possession was obtained or such essays written before the association was formed or before other members joined the association. 46 C. 215=23 C.W.N. 193. As to evidence of conspiracy, see also 30 C. 983; I.L.R. (1939) All 736; 4 C.W.N. 523; 25 B. 230: 28 C. 797; 7 Beng.L.R. 63 and 9 Beng.L.R. 36 App. 2; 106 I.C. 721=2 Luck. 631; I.L.R. (1936) N. 152=165 I.C. 913=1936 N. 97. Ciphers or cipher lists discovered at searches could not be treated as acts, words or deeds of any particular person, but the fact that they existed and that the names and addresses of a number of persons who are alleged to be parties to a conspiracy as charged are mentioned in them, the fact that they are in peculiar forms, such as is not likely to be used for any lawful purpose, taken along with other matter brought out in evidence may give rise to a legitimate inference that the ciphers were prepared in connection with some unlawful purpose requiring secrecy; and in the absence of evidence that the matters appearing from the secret documents are associated with some legitimate or lawful purpose, the ciphers are themselves material for inferring that the names, addresses and other matters appearing in the ciphers are connected with the furtherance of the objects of the conspiracy and as such evidence under sec. 10. 1937 C. 99 (S.B.). See also 1929 P. 145=11 Pat.L.T. 45 (F.B.). The finding of closed covers relating to the conspiracy in possession of one of the conspirators is relevant against the others under sec. 10. 17 P. B. (Cr.). 1915=28 I.C. 738. Confession of

co-accused implicating co-conspirators—Admissibility. 106 I.C. 721=2 Luck. 631. Whenever evidence is sought to be let in under sec. 10 the accused is entitled to insist on strict compliance with its provisions, namely, proof of reasonable ground for belief that the persons named have conspired together. 42 C. 957=19 C.W.N. 676. On a charge of conspiracy, particular facts are proved to show that one or more of the accused took part in it, after general evidence of the existence of conspiracy is first given. 42 C. 957.

**ILLUSTRATIVE CASES.**—In cases of forgery letter written by a third party to a stranger is not admissible against accused. 25 Bom. L.R. 248. See also 40 C. 783. In a charge of conspiracy, evidence of gambling and cocaine cases prior to conspiracy charged are admissible in evidence. 46 C. 710=54 I.C. 53. The evidence of an Excise Inspector of raids on the dens is admissible as leading up to the admission made to him. 46 C. 710. Confession of co-accused by itself not sufficient to base a conviction. 48 A. 409=95 I.C. 74. Trial under sec. 222, Penal Code.—Accused warder in jail—Evidence of previous conduct about carrying negotiations was held admissible. 1922 L. 631=119 I.C. 762. "Anything said" would include the statements made, speeches delivered or declarations made. "Anything done" must be some act done and not merely the intention or knowledge of the person. "Anything written" would include a manuscript, signed or unsigned, written by the person, and matter transcribed by him on a typewriter. But a document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator, in whose possession it is found had received and preserved it. 1933 A.L.J. 799=1933 A. 690. See also 169 I.C. 977=38 Cr.L.J. 818=1937 C. 99 (S.B.). In order to establish that the accused were in correspondence with an individual going by the name of M. N. Roy in Berlin, it is not incumbent upon the prosecution to establish that any of the letters were, in fact, written by the particular M. N. Roy. It is enough to show that some person living in Berlin was in conspiracy with the accused and correspondence was passing between them. 1933 A. 690. A document written by a woman since

When facts not otherwise relevant become relevant.

# II. Facts not otherwise relevant are relevant—

- (1) if they are inconsistent with any fact in issue or relevant fact ;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

## *Illustrations.*

- (a) The question is, whether *A* committed a crime at Calcutta on a certain day. The fact that, on that day, *A* was at Lahore is relevant.  
that fact that, near the time when the crime was committed, *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.
- (b) The question is, whether *A* committed a crime.  
The circumstances are such that the crime must have been committed, either by *A*, *B*, *C* or *D*. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either *B*, *C* or *D*, is relevant.

deceased in which she described her conversations with a third person in which she said that he told her that among his revolutionary friends was the accused, to whom he was accustomed to turn for guidance, is admissible under sec. 10, as the statement if proved is itself a relevant fact by virtue of sec. 10. The statement by the writer is a relevant fact and being admissible under sec. 10 is evidence against all the conspirators including the accused, to the effect that the third person made his statement concerning the accused. 147 I. C. 32=1934 C. 221 (F.B.). A confessional statement made by a deceased conspirator after he had rendered himself liable to criminal prosecution is admissible in evidence against a co-conspirator under sec. 10, though not under sec. 32 (3) when general evidence of the existence of a conspiracy has already been given. 38 C.W.N. 1015. *See also* 159 I.C. 919=1936 O.W.N. 28=1936 O. 164.

SECS. 10 AND 30.—The confession of a person who is dead and has never been brought to trial is not admissible under sec. 30 as the confession of a co-accused. Nor can it be admitted under sec. 10, because sec. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and does not apply to a confession made after the conspiracy, and the acts done in pursuance thereof were at an end. Sec. 10 cannot be extended to cover the case of a confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it. 175 I.C. 99=39 Cr.L.J. 545=1938 Sind 94. A confession by a conspirator made to a Magistrate in Court implicating other conspirators is admissible in evidence under sec. 30, but statements made by a conspirator to the police are not admissible in evidence, if they are incriminating unless they can come under sec. 27. For sec. 10, Evidence Act, is not intended to remove those restrictions which the Evidence Act and the Criminal Procedure Code place upon the admissibility of statements made to the police. Sec. 10 does not avoid in appropriate cases the operation of either sec. 25, Evidence Act, or

sec. 162, Cr.P. Code. It makes no difference if because a man is deaf, these statements are written. I.L.R. (1939) Kar. 449=184 I.C. 145=1939 Sind 185.

SEC. 11.—[*See also* notes under sec. 13 *infra*.]

SCOPE OF SECTION.—*See also* notes under sec. 9. The expression highly probable or improbable is significant and indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate as to render the co-existence of the two highly probable. 1933 A.L.J. 799=1933 A. 690. 13 M.L.T. 282=18 I.C. 999. Where a doctor was charged with criminal negligence, in order to show that a particular injection given by the doctor was too strong and to rebut the presumption that the death was due to an exceptional reaction to that injection in that case, the prosecution tendered evidence of the symptoms, illness and death of nine other children: *Held*, that the evidence was admissible not as evidence of a course of conduct of the carelessness or negligent conduct of the doctor in injecting too much of a proper mixture but as evidence of the reaction to children who were similarly injected at the same time and place so as to prove that too strong a preparation was used for the injection. A.I.R. 1943 P.C. 72 (P.C.). Proof of custom opposed to personal law. *See* 8 I.C. 897, Section to be liberally construed. The illustrations do not go beyond cases familiar in English law. There is a difference between the existence of a fact and a statement as to its existence; sec. 11 makes the existence of facts admissible, and not statements as to such existence unless the fact of making that statement is itself a matter in issue. Hence if a statement does not fall within sec. 32 it cannot be admissible even under sec. 11. 56 A. 766=1934 A. 406 (F.B.). Sec. 11 only refers to certain facts which are either themselves inconsistent with, or make the existence or non-existence of the fact in issue or a relevant fact highly probable or improbable and has no reference to opinions of certain persons in regard to those facts. It does not make such opinions to be

relevant and judgments after all of whatever authority are nothing but opinions as to the existence or non-existence of certain facts. These opinions cannot be such facts as would fall within the meaning of Sec. 11 of the Act, unless existence of these opinions is a fact in issue or a relevant fact. A.I.R. 1945 Lah. 23 (F.B.). Sec. 11 is controlled by sec. 32 where evidence consists of that of persons who are dead. 1928 C. 893=110 I.C. 521. See also 1939 M.W.N. 841=1940 Mad. 273. Statements of living persons who had not been examined as witnesses are inadmissible under sec. 11 or section 32. 1939 O. 113; 11 B.H.C. 90, 91. A statement is included in the definition of "fact" and statements can, therefore, be relevant under sec. 11. 171 I.C. 481=1937 O.W.N. 1058. On this section see also 1925 P. 68; 1924 C. 1067=28 C.W.N. 1092; 1924 M. 537=78 I.C. 176. A judgment in civil suit is relevant under sec. 1. 37 M. 238=23 M. L.J. 447. Although at one time it was held that a judgment not *inter partes* could not be admitted in evidence under any circumstances, the tendency in recent years is to admit such judgments under certain circumstances and for limited purposes under sec. 43, read with secs. 11 and 13, 59 C.L.J. 320=1934 C. 788. Entry in butwara paper. See 87 I.C. 694=1926 C. 116. Entry in Hospital Register—In-door patients in a hospital—Admissible to prove that the person mentioned in the entry was in the hospital on a certain date. 56 P.L.R. 1918=43 I.C. 429. Statement of wounded person on the day of occurrence to a Magistrate to the effect that it was the accused who had attacked herself and her co-wife. *Held*, sec. 11 does not justify the admission of the contents of the statements. 54 I.C. 887=23 C.W.N. 933. Copies of printed newspapers containing an account of some proceedings, found in possession of one accused, are evidence of the fact of the publication of such an account in that paper but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned "highly probable or improbable." 1933 A.L.J. 799=1933 A. 690. A letter written by the accused where it is self-condemnatory is *prima facie* evidence against him and is admissible in evidence; it is enough if it can be traced to the writer. It is admissible though it was intercepted or surreptitiously detained and opened. 41 C. 545=22 I.C. 179=18 O.W.N. 386. Facts disclosing similar fraudulent transactions are admissible to prove intent. 39 A. 273=39 I.C. 673=15 A.L.J. 241. Horoscope, See 21 O.C. 298=48 I.C. 400. Police Report. See 2 O.L.J. 299=30 I.C. 292. The previous activities of the accused against the complainants are admissible under sec. 11. 6 R. 6=1928 R. 118. Deed inadmissi-

ble by reason of sec. 49, Registration Act, is admissible under sec. 11 if it is inconsistent with fact in issue. 1930 A. 130. If in a suit for arrears of rent, the defendant denies the oral lease and says that the sale deed executed by him in favour of the plaintiff is bogus, the evidence about the nature of the sale deed is relevant on the question of the existence or non-existence of the oral lease under sec. 11, (2). I.L.R. (1943) Nag. 340. Contents of will left by deceased are admissible under secs. 11 and 21 (2) to prove religion of executant. 7 R. 720=1933 R. 42. Where the precise date of the death of the last holder is in question, a statement in a copy of the application for probate of his will that the deceased died on a particular date is admissible in evidence under sec. 11, if not under sec. 32 (5), where it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the application was filed about one year after the testator's death. (45 I.A. 256; 20 C. 758; 25 M. 183, Ref.) 12 P.L.T. 891=1931 P. 224. Where question as to dedication to religious endowment is in issue, the gift of property to the institution is admissible. 1930 A.L.J. 964. A statement by a person that certain parties are governed by a particular school of Hindu law is admissible in evidence under sec. 11 only if he is a member of a connected family (i.e.) a family which had descended from the same stock from which those parties descended and not when he is neither an agnate nor a relative of theirs. 43 C.W.N. 395.

SECS. 11 AND 13: JUDGMENT NOT *inter partes*—HOW FAR ADMISSIBLE.—Although a judgment not *inter partes* may be used in evidence in certain circumstances as a fact in issue, or as a relevant fact, findings of fact in or reasons for that judgment are not admissible in a litigation between other parties. The fact that there was a litigation or that as a result of that litigation the then plaintiffs recovered possession of the lands may be relevant under sec. 11 of the Evidence Act. The judgment in that case will be evidence only to the extent of showing the existence of these facts. Assuming that a suit is a transaction within the meaning of sec. 13 (a) of the Evidence Act, the existence of the suit itself will be a relevant fact and for this purpose the judgment will be evidence to show the *factum* of the suit as also to show its nature and scope so as to enable the Court to see whether or not it can be said that by it the right in question was claimed, recognised, asserted or denied. The suit might be an instance in which certain rights might have been claimed or recognised, etc., within the meaning of sec. 13 (b)

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant :—

(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence ;

(b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

of the Evidence Act. Even then the judgment will be admissible in evidence only for the limited purposes of the clause, namely, to prove "the instance". 77 C.L.J. 194. See also 49 C.W.N. 791 (Map prepared in previous suit between defendant and another person—Maker of map not examined—Admissibility).

SECS. 11, 14 AND 15.—Except as evidence of intention, evidence of similar transactions is inadmissible in evidence under secs. 14 and 15. 17 Mys.L.J. 238. The *first information report* besides its use as a corroborative or contradictory piece of evidence under secs. 147 and 145 of the Evidence Act, becomes when duly proved a relevant fact within the meaning of sec. 11 (2) of that Act and as such retains some evidential value even after being sworn against by the author thereof. 190 I.C. 322.

SEC. 12.—See 47 C. 671=24 C.W.N. 501=58 I.C. 929; 164 I.C. 385=1936 R. 332.

SC. 13: SCOPE.—Sec. 13 is nothing more than a declaration of the common rule of evidence in England, but it has been given wider construction in this country and it is not confined as it is confined in England, to the proof of incorporeal rights. But although that be the case in India, its application cannot be extended to allow judgment to be used in evidence in cases which are definitely excluded by secs. 40 to 44 of the Evidence Act. Where, therefore, what the plaintiff in a suit seeks to establish through a judgment is not a right or custom but a fact—a fact which was presumably proved in a previous action to which the defendant in the suit was not a party, the case comes neither under secs. 40 to 44, nor under sec. 13 of the Evidence Act, and the judgment not *inter partes* is not admissible in evidence. 166 I.C. 664; 42 P.L.R. 248=1940 Lah. 309; 1937 Lah. 437. Sec. 13 (a) only refers to the admissibility of any transaction by which a right is asserted. It would be a farfetched application of the section to say that if in a deed of partition between two persons rights are alleged with reference to the property which either has or has not any reference to the right to partition, these allegations should be considered as a transaction by which the right is asserted. 54 C.L.J.

353=1932 C. 398. See also 31 C.W.N. 32=1927 C. 1. 46 C.W.N. 169=1942 Cal. 445 (document by tenant describing nature of tenancy—landlord not party to it—is inadmissible). Assertions of permanent rights continuing over a long period of years in various documents of transfer executed by tenants are admissible under sec. 13, though the weight to be attached to these recitals in the documents depend upon the circumstances of each case. 49 C.W.N. 183=1945 Cal. 283. Ordinarily and in the absence of special circumstances, a judicial decision in recognition of denial of a custom is good evidence in proof thereof. There may be cases in which the judicial decision relating to a custom may not be of great value; but where it is arrived at in a well-contested case in which there is no reason to suppose that the parties could not, or did not, produce all evidence available to them to value as the decree as a piece of evidence is great. 1939 A.L.J. 708=1939 A.W.R. (H.C.) 671=1939 All. 626. Section not confined to public rights, but also applies to private rights. 6 C. 171; 39 C.L.J. 526. It also covers rights of ownership and also incorporeal rights. 10 B. 439; 15 M. 12; 12 A. 1. But see 145 I.C. 944=1933 P. 636.

A statement of a Kulkarni of a village as to the existence of a tenancy right in the village is admissible. 190 I.C. 342=45 C.W.N. 57=1940 P.C. 192=(1941) 1 M.L.J. 427 (P.C.). See also 45 C.W.N. 590 (Statement in deed of transfer about nature of tenancy). A map prepared in a previous suit is not relevant under sec. 13 in a subsequent suit, when the land in dispute in the two suits is different. 190 I.C. 689=42 P.L.R. 247=1940 Lah. 309. See also 1945 Cal. 492. Documents of transfers and subleases dating from 1879, in all of which there is an assertion that the lease is permanent, are admissible in evidence under sec. 13 for the purpose of proving that the lease is permanent. 190 I.C. 622=71 C.L.J. 209=1940 Cal. 393.

DOCUMENTS ADMITTED UNDER THIS SECTION.—Where a custom is pleaded under which the ryots are entitled to sell their houses in the village copies of sale deed produced to prove the instances of such

a custom are admissible in evidence. 1940 A.L.J. 650=1940 All. 535. Under this section, maps, 5 C. 287; 164 I.C. 277=1936 P. 462; rent receipts, 16 M. 194; entries in taluq maps, 22 I.C. 645; 1936 P. 462; old maps, 16 C.W.N. 116=13 I.C. 332; sale deeds, 23 W.R. 293; zamindari papers, 101 I.C. 792=1927 C. 576; documents under which title to land is devised, when title is in question, have been admitted. (*Ibid.*) Patwari papers. 1936 R.D. 479. See also 39 Bom.L.R. 288. As to chittas by Government, see 98 I.C. 85; 40 C.W.N. 821. Recitals in sale-deed are not evidence of title and cannot be used to prove a grant. It is however permissible to use them, to show the nature of the title that was being asserted and as transactions relevant under sec. 13 by which a right was claimed or asserted on some past occasion. 1933 P. 656. See also I.L.R. (1938) L. 494=40 P.L.R. 1054=1938 L. 795.

A sale certificate is admissible in evidence under sec. 13 as a transaction by which the right to possession of certain plot of land as constituting the tenancy-lands was recognised. 71 C.L.J. 504=1940 Cal. 539. "Instances in which the right was claimed, recognised or exercised"—Meaning of. 15 P. 260=1936 P. 543. See also 40 P.L.R. 968=1938 L. 635; 41 P.L.R. 21; 1939 Lah. 105; 45 C.W.N. 590. Judgments not *inter partes* in previous cases in which the right involved in the present litigation was asserted are admissible. 60 I.C. 142. See also 1927 N. 19; 13 O.L.J. 684=1 Luck. 50; 13 O.L.J. 696=1 Luck. 489; 6 C. 171; 28 C.W.N. 942; 82 I.C. 99=1926 C. 194; 40 O.L.J. 30=1924 C. 1046; 176 I.C. 549=1928 S. 132 (Proceedings under sec. 145, Cr. P. Code); 1924 O. 19; 11 C. 745; 15 C. 233; 13 C. 352; 12 M. 9; 15 M. 12; 22 I.A. 60=22 C. 43 (P.C.); 24 I.A. 10=19 A. 277 (P.C.); 29 I.A. 24=29 C. 187 (P.C.); 25 C. 522; 24 B. 598 (599); 40 I.C. 159; 1930 P. 231=125 I.C. 115; 162 I.C. 334=1936 O.W.N. 375=1942 Pat. 372. Judgments not *inter partes* are admissible to show the existence of custom of a public nature. See 7 W.R. 210; 7 M.H.C. 307; 12 M. 9; 163 I.C. 924=1936 L. 929. The word "asserted" in sec. 13 (b) includes both a statement and enforcement by act. The evidence tendered under this section need not necessarily be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act, would also be admissible, if it amounted to a claim. A.I.R. 1939 M. 432=49 L.W. 409=(1939) 1 M.L.J. 602=186 I.C. 255. Under sec. 13 instances "in which the right of custom is claimed, recognised or exercised," etc., must be instances prior to the suit in question. *Post item* instances are inadmissible. 1939 Lah. 105; 41 P.L.R. 670=1939 Lah. 152; 41 P.L.R. 21. See also 67 C.L.J. 111=1938 C. 763 (Recitals in

decree); 1939 L. 152; 1937 L. 223; 1939 L. 152; 1944 A.W.R. (Rev.) 193. Also as authoritative statement of facts as found by the Court. 94 I.C. 694=9 N.L.J. 215; 22 N.L.R. 49=1926 N. 109; 1926 N. 129; 1 Luck. 489=1926 O. 578. See also 1938 C. 763. Also as evidence of transactions but not as proof of title. 36 C.W.N. 866=140 I.C. 385. A judgment not *inter partes*, together with the plaint which preceded it and the steps in execution which followed, are admissible as evidence of an assertion of right, but cannot alter the burden of proof as between rival claimants. 167 I.C. 329=1937 P.C. 69=(1937) 2 M.L.J. 631 (P.C.). See also 1937 L. 437; 65 C. L.J. 333=1937 C. 773; 77 C.L.J. 194; 23 Pat. 763=1945 Pat. 211. Pleadings and judgment in previous suit are admissible. A decision in a custom case is not a judgment *in rem*. It is only relevant under sec. 13 as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons. 36 P.L.R. 256=1934 L. 861; 34 P.L.R. 753=1933 L. 553. It is doubtful whether a judgment recognizing a custom is relevant under sec. 13. Even if it is, it is far from having the same importance as a clear cut instance of custom recognised by the parties themselves. 17 L. 809=39 P.L.R. 148=1937 Lah. 223. Judgments subsequent to the suit in which they are relied on as evidencing the particular transaction or instances in dispute are not admissible in evidence. 1939 L. 152. The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case, evidence of that fact in another case, where parties are not the same. 56 I.A. 119=56 C. 1003=1929 P.C. 99=56 M.L.J. 562 (P.C.). Where a judgment is not *in rem* nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. 26 N.L.R. 33=1930 N. 1 (F.B.). Decrees. 1929 O. 472=114 I.C. 670; 1929 P. 749. In a rent suit, decree by another co-sharer landlord is admissible. 112 I.C. 785=1928 C. 355; *contra* 112 I.C. 787=1928 C. 353. Judgment referring to illegitimacy of a person is admissible as establishing an instance in which the legitimacy of the person was denied. 3 Luck. 481=1928 O. 233. A judgment in which the purchase at a revenue sale by the plaintiff's predecessor is recited is admissible in evidence as evidence of a transaction within the meaning of sec. 13 though the defendants were not parties thereto. 56 C.L.J. 369=1933 C. 222. See also 41 Bom.L.R. 561; 1939 Bom. 313. The purpose of sec. 13 is to enable a right which may be consti-



tuted by a number of acts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of sec. 13 for the purpose of ascertaining the parties to the dispute and the contention of the parties, the subject of the dispute, and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of facts as evidence of those facts in another case. 176 I.C. 549=1938 Sind 132; 1939 A.L.J. 708=1939 All. 626. See also 73 C.L.J. 76. Although a finding in a previous suit *inter partes* does not operate as *res judicata*, it is the paramount duty of the party against whom it is given to displace that finding. 73 C.L.J. 76. See also 1944 A.W.R. (Rev.) 293=1944 R.D. 550. Previous proceedings on the question of the existence of the right to the office and property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issue before it, leave should not ordinarily be refused even though they are produced late. 51 L.W. 339=1940 Mad. 540= (1940) 1 M.L.J. 302. Judgment not *inter partes* is admissible for certain purposes. 59 C.L.J. 320=1934 C. 788. See also 1940 R.D. 623=1941 A.W.R. (Rev.) 433. Judgment not *inter partes* is admissible to prove motive of transaction alleged to be *benami*. 8 P. 783=1929 P. 739. Judgment not *inter partes* in which an adoption was upheld is admissible. 114 I.C. 616. See also 41 Bom.L.R. 561=1939 Bom. 313. But judgment not *inter partes* throwing light on title of landlord in respect of other villages is not admissible. 31 Bom.L.R. 335. Where certified copies of the decree and of two pedigrees found with it are produced, the Court may presume that the two pedigrees, found with the decree were the two pedigrees, filed in the suit. Both pedigrees should be admitted as pedigrees filed by the respective parties to the suit and not as evidence of relationship under sec. 32 (5). The statement in the decree that the pedigrees were filed is evidence under sec. 35 as an entry in a public record or under sec. 13, as evidence of the course of proceedings in a suit. 56 A. 468=1934 P.C. 157=67 M.L.J. 274 (P.C.). A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible as establishing a particular transaction in which the partibility of the estate was asserted and recognised. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any finding of

fact there come to, other than the transaction itself, be relevant to prove partition in a subsequent suit. 58 I.A. 125=58 C. 1187=61 M.L.J. 9 (P.C.). See also 41 P. L.R. 670=1939 Lah. 152; 1944 A. W. R. (Rev.) 293. In order to prove the existence or non-existence of a particular custom it is only judgment that can be produced as an instance. But if such judgment is not produced a Judge's recitals about such judgment cannot be relied on. 181 I.C. 703=41 P.L.R. 670=1939 Lah. 152. Statement made in prior litigation is admissible in subsequent suit. 1929 A. 361. Assertion of right under cl. (b) need not be successful assertion. 92 I.C. 104. See also 1938 L. 846. As to family custom, see 82 I.C. 886=40 C.L.J. 331. A kabala reciting that holding was homestead land is admissible although it is not *inter partes*. 55 C. 355=1928 C. 315. Also discharged mortgage bond to prove rate of rent. 1928 C. 703 (2). Also the statement of agent that his principal was a bastard. 1928 O. 233=3 Luck. 466. Will containing recital as to permanent tenancy where question related to native of tenancy is admissible. 56 C. 275=1929 C. 473; 46 C.W.N. 169. Dispute regarding nature of land—Recitals in sale deeds in favour of one party to suit showing nature of same land—Admissible both under secs. 13 (b) and sec. 32. 52 A. 464=1930 A. 299. See also 1937 L. 688; 1938 L. 846. Recitals in mortgage-deed—Evidentiary value against third party. 57 I.A. 339=58 C. 858=60 M.L.J. 142 (P.C.); 1937 L. 688. Recital in *Zarpehgi* deed describing the land as *sirat*—Extent of admissibility. 150 I.C. 884=1934 P. 81. See also 1939 Sind 209; 39 Bom.L.R. 288; 46 C.W.N. 169; 1940 Mad. 273. In a suit for a declaration against the landlord that plaintiff has a rent-free title to the land, a kabala, which is a title deed of plaintiff is admissible in evidence, at least, to explain the nature of his possession. 1933 P. 695. Suit to establish right as *mahant*—Papers containing recognition of rights by revenue officers and residents of villages—Admissible. 1930 A.L.J. 964. See also 20 Pat. 870 (Village note as evidence of custom). The opinion expressed by the Law Committee of a Municipality by its resolution is not admissible in evidence when the members of the Committee have not been examined. 1931 A.L.J. 757=1931 A. 499 (S.B.). Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings within the meaning of sec. 33 so as to make statements made therein as to the existence of a custom admissible in a subsequent civil suit between the parties. But the statements cannot at the same time be excluded. Though they may not be admissible as evidence of the custom, they can be looked into to assess the value of the Deputy Collector's report and order. These latter are admissible under sec. 13, as recog-



*Illustration.*

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the mortgage, particular instances, in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or

Facts showing existence of good-will towards any particular person, or showing state of mind, or of body, the existence of any state of body or bodily feeling, or bodily feeling. are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

nizing a custom in dispute. 1935 A. 187; 1937 Lah. 223.

RECITALS OF BOUNDARIES IN DOCUMENTS BETWEEN STRANGERS, not admissible. 8 L. 651=1927 L. 448; 1934 L. 750. But see 1933 P. 636=145 I.C. 944; 1936 L. 114; 1936 L. 1005. See also 45 C.L.J. 55; 44 C. L.J. 682=99 I.C. 907=1927 C. 230 (following 23 B. 63; 11 Bom.L.R. 409; 14 C.L.J. 467); 101 I.C. 542=45 C.L.J. 138; 30 C. W.N. 826=1926 C. 822; 30 C.W.N. 761=1926 C. 948; 1926 C. 479=91 I.C. 688; 10 Mys.L.J. 75. Also that in documents executed by third parties to plaintiffs is not admissible if the executant is not dead and does not come to corroborate it. 109 I.C. 728=1928 L. 428. Recitals of boundaries relating to adjacent lands are not admissible. 110 I.C. 520=1928 C. 893. See also 1939 M.W.N. 841=1940 Mad. 273 (Description of land as being situate in a particular village). 49 C.W.N. 791=1945 Cal. 402 (Map and Chitta relating to disputed land prepared by defendant before suit—Admissibility in evidence as ascertain of right). A mere statement of boundary cannot be classed with any of the verbs in sec. 13 "created, modified, recognised, asserted or denied," and is, therefore not admissible under sec. 13 (a). 107 I.C. 293=1928 M. 105 (2). Reference to a work of history and social customs at the appellate stage of a case in proof of a custom which has not been pleaded is irregular and must be avoided. Such a work by an author who is alive and available as a witness to the custom set up is inadmissible in evidence when the author is not called as a witness and no reason is adduced for not calling him. 192 I. C. 290=21 Pat.L.T. 1118=1941 Pat. 146.

SECS. 13 AND 32 (3).—Evidence in probate proceedings given by a widow holding a life-estate under the will as to the necessity for an alienation by her by way of mortgage is not admissible in evidence against her successor-in-interest in a suit against the latter by the mortgagee. 173 I.C. 988=19 P.L. T. 234=1938 P. 301.

SECS. 13, 35 AND 74.—Printed copies of an index register, containing the general index of lands given on lease in a particular city with certain particulars and maps of the survey numbers situated in the different wards

of the city, are public documents and admissible in evidence under sec. 74, being records of the acts of public officers. They are also relevant under secs. 13 and 35 and admissible. I.L.R. (1942) Bom. 357=44 Bom. L.R. 295=A.I.R. 1942 Bom. 161.

SECS. 13 AND 42.—A judgment on a question of custom is relevant, not merely as an instance under sec. 13 but also under sec. 42 as evidence of custom. But its value depends upon the nature of the inquiry and the evidence produced. 177 I.C. 775=40 P. L.R. 29=1938 L. 309. A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible under secs. 13 and 43 of the Act, as establishing a particular transaction in which the partiability of the estate was asserted and recognised. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding or a "transaction" within the meaning of S. 13, for the purpose of ascertaining the parties to a dispute, their contentions and the subject of the dispute, and the final decision of the Court, but not for proving the reasons for Court's decision and for using its findings of fact as evidence of those facts in another case. I.L.R. (1945) Kar. 40=A. I.R. 1945 Sind 57.

Sec. 14.—Sec. 14 applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does in a trial for the offence of arson. 1941 Rang.L.R. 566=1941 Rang. 324. A letter from the respondent to the co-respondent in a divorce proceeding is good evidence under sec. 14 of the respondent's feeling towards the co-respondent at the time it was written. 47 C.W.N. 251. The mental capacity of a party cannot be said to be irrelevant when upon the contractual relations entered into by the party, his property is sought to be made liable and the contract is in English, a language of which the party is said to be ignorant; and, when he is shown to be lacking in mental capacity, the party should establish that the party liable has signed the contract with an understanding mind. 1942 Sind 17=198 I.C. 567.

<sup>1</sup>[*Explanation 1*.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

*Explanation 2*.—But where upon the trial, of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.]

#### Illustrations.

(a) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

<sup>2</sup>[(b) *A* is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, *A* was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.]

(c) *A* sues *B* for damage done by a dog of *B*'s which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z*, and that they had made complaints to *B*, are relevant.

(d) The question is, whether *A*, the acceptor of a bill of exchange knew, that the name of the payee was fictitious.

#### LEG. REF.

<sup>1</sup>Substituted by sec. 1 (1) of Act III of 1891.

<sup>2</sup>Substituted by sec. 1 (2) of Act III of 1891.

ILLUS. (B).—See 75 I.C. 67 and 76. See also 8 B. 223; 11 B.H.C. 90 (93); 61 I. C. 647.

ILLUS. (C).—See 13 B. 532.

SECS. 14 AND 15: RELATION OF SECS. 14 AND 15.—Evidence of the opinions of the other Judges on other documents written or attested by the accused in proceedings to which he is not a party is not admissible to prove his intention or knowledge in his trial for giving false evidence in respect of a document. 38 I.C. 723=13 N.L.R. 35. Sec. 15 must be read as subject to sec. 14 so far as evidence of knowledge and intention is concerned. 38 I.C. 723. See also 1928 Lah. 382. It is settled law that under neither of secs. 14 and 15 can the evidence of facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it or whether the act in question was done accidentally or with a particular knowledge or intention, evidence of similar acts may, under certain conditions, be admitted. Sec. 14 is wholly inapplicable to a case where the state of mind or feeling of the accused is not a fact in issue or a relevant fact. 1928 L. 382=112 I.C. 850; I.L.R. (1945) Bom. 278. Evidence of a collateral offence cannot be received as substantive evidence of the offence on trial, though, under sec. 14, evidence may be given of intention and such matters where the factum of such intention or like matters is relevant. 46 Bom.L.R.

811=I.L.R. (1945) Bom. 278=1945 Bom. 152.

PREVIOUS CONVICTION—EVIDENCE NOT ADMISSIBLE TO SHOW STATE OF MIND.—60 I.C. 331=5 P.L.J. 706; 112 I.C. 850=1928 L. 382; 8 Mys.L.J. 385. But see 146 I.C. 1064=1933 O. 355=10 O.W.N. 688, when it was held admissible to prove habit and association.

EVIDENCE OF PREVIOUS CRIME—ADMISSIBILITY.—When a person is charged with an offence, evidence of his participation in an independent crime cannot be received as substantive evidence of the offence on trial but evidence may be given to prove the elements mentioned in sec. 14, such as intention, etc. 22 I.C. 187=18 C.L.J. 578. In a prosecution under sec. 209, I.P. Code, evidence relating to other suits by the accused against other persons may be admissible under secs. 14 and 15 to show the *animus* of the accused, and a systematic course of fraud and to rebut the plea of good faith or mistake. 46 I.C. 896=22 C.W.N. 494. But the evidence relating to similar suits by other persons is not admissible unless those suits form part of the same transaction or the result of a conspiracy between them. (*Ibid.*) See also 6 B.H.C. 90. Series of similar acts involving forgery is evidence of intention but not forgery itself. 40 C. 783=33 I.C. 306=20 O.W.N. 262; 8 Mys.L.J. 385. In a prosecution under sec. 304-A, I.P. Code, for rash driving of motor-car, evidence regarding similar occurrence previously is inadmissible under sec. 14 or 15. 1929 M.W.N. 395. In a charge under sec. 409, I.P.C., for embezzling specific sums, evidence of embezzling other sums is not admissible. 1928 L. 382=112 I.C. 850=142 I.C. 274 (2)=1933 O. 136. Where proceedings under sec. 108 (b), Cr.P. Code, are started against a person in order to prevent him from delivering speeches likely to create communal tension, in the inquiry, speeches delivered by the same person on prior

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that *A* knew that the payee was a fictitious person.

(e) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.

The fact that previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B* is relevant, as proving *A*'s intention to harm *B*'s reputation by the particular publication in question.

The facts that there was no previous quarrel, between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B*.

(f) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B*, being induced to trust, *C*, who was insolvent, suffered loss.

The fact that at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that *A* made the representation in good faith.

(g) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner, by the order of *C*, a contractor.

*A*'s defence is that *B*'s contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C*'s own account, and not as agent for *A*.

(h) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith and that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found.

occasions are admissible in evidence under sec. 14. They serve to show the existence of a particular state of mind or intention. III.

(e) to the section is very similar to the facts of the case. 189 I.C. 74=41 Cr.L.J. 713=1940 Nag. 134.

**PREVIOUS DACOITIES.**—In a charge of dacoity, evidence of other dacoities committed by the accused is admissible either under s. 14 or 15. 1912 M.W.N. 49=13 I.C. 781. Where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity, it is open to the Crown to prove that he actually took part in the dacoity, for the latter was not the offence of which he was acquitted. Even if he was acquitted on a charge of dacoity, it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of dacoity. 7 O.W.N. 862=128 I.C. 739=1930 O. 455. In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, simple theft or bad livelihood in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged. 46 B. 358=25 Bom.L.R. 214; 32 Bom.L.R. 324=1930 B. 157.

**PREVIOUS CHEATING.**—Where a licensed clerk was charged with cheating by collecting 2 annas more than what was due, from each licensee, evidence of similar action with others is not admissible under sec. 14 or 15. 84 A. 93=12 I.C. 987=8 A.L.J. 129. See also 17 Mys.L.J. 238.

**COUNTERFEIT COINS AND INSTRUMENTS.**—In

the trial of a person for being in possession of counterfeit coins and instruments and materials for counterfeiting in his house in the district where he is tried, evidence of such possession in his house in another district is admissible. 61 I.C. 647=23 Cr.L.J. 407.

**POSSESSION OF STOLEN CATTLE.**—In Sind possession of stolen cattle three or four months after theft is sufficient to raise presumption of guilt under this section; but the accused may set up title by lawful origin to rebut the presumption. 38 I.C. 271=10 S.L.R. 167. The accused was charged under s. 420, I.P. Code, for having borrowed money on mortgage, representing himself to be major, though he was minor, *held*, that the evidence of transactions which took place on the occasion of the loan was relevant to show the intention or knowledge or otherwise of the accused. L.R. 1 A. (Cr. 103).

**OFFENCE UNDER SEC. 124-A, I.P. CODE—SPEECHES.**—Previous speeches forming part of a series of speeches or lectures delivered, within a short period of time are admissible. Period of six months not long. 1930 L. 867. Other newspaper articles written by the accused at the same time are admissible. 8 Mys. L.J. 49. A writing made some time after the committing of an offence under s. 124, I.P. Code, is admissible in evidence under s. 14. But the writing should be within a reasonable time of the particular occurrence. 30 Bom.L.R. 315=1928 B. 78. A Court has no concern with the justice or otherwise of the claims of the accused or with the rectitude of his political views; but the Court may take cognizance of the fact that he does hold certain views; for as a guide to his conduct and intentions these views are most relevant consideration. 1933 Cr.C. 833=1933 A. 498.

The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that *A* knew of the notice did not disprove *A*'s good faith.

(i) *A* is charged with shooting at *B* with intent to kill him. In order to show *A*'s intent the fact of *A*'s having previously shot at *B* may be proved.

(j) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.

(k) The question is, whether *A* has been guilty of cruelty towards *B*, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is, whether *A*'s death was caused by poison.

Statements made by *A* during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of *A*'s health at the time an assurance on his life was effected.

Statements made by *A* as to the state of his health at or near the time in question are relevant facts.

(n) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, where *A* was injured.

The fact that *B*'s attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that *B* was habitually negligent about the carriages which he let to hire is relevant.

(o) *A* is tried for the murder of *B* by intentionally shooting him dead.

The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*.

The fact that *A* was in the habit of shooting at people with intent to murder them is relevant.

(p) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

15. When there is a question whether an act was accidental or intentional<sup>1</sup> [or done with a particular knowledge or intention.]

Facts bearing on question, whether act was accidental or intentional.

the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

#### LEG. REF.

<sup>1</sup> The words within brackets were inserted by Act III of 1891, sec. 2.

**Sec. 15: SCOPE.**—Sec. 15 is applicable to all cases where the question is whether an untruthful statement is "accidental or intentional" or made with particular knowledge or intention." 39 A. 273=15 A.L.J. 241. There is a presumption of user as of right from open user for a long time. 95 I.C. 269=1926 L. 522. Evidence of a single act is admissible and in this sense one evidentiary fact can form a series within the meaning of s. 15, with the fact to be proved. The acts of which evidence is tendered must be of the same specific kind as that in question. 1941 Rang.L. R. 566=1941 Rang. 324=45 C. 957.

**SUBSEQUENT OCCURRENCES.**—Sec. 15 covers both previous and subsequent similar occurrences. 46 I.C. 696=22 C.W.N. 494.

**INCIDENTS IN A SERIES OF SIMILAR TRANSACTIONS.**—Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible except upon the issue whether the acts charged against the accused were designed or accidental, or except to rebut a defence otherwise open to him. Where the charge against the accused is that he administered *dhtura* to a certain person at a certain place with intent to rob him, evi-

dence of other incidents may be admissible with a view to rebutting any defence that the administration of *dhtura* at that place was accidental. But before such evidence is admissible the presence of the accused at that place has to be established. The fact that he had *dhtura* in his possession months afterwards cannot help the prosecution, because it cannot be possibly inferred from that fact that he was in possession of *dhtura* when he was at that place on the date of occurrence. 43 Cr.L.J. 413=A.I.R. 1942 Pat. 291. See also 9 I.C. 931=32 P.L.R. 1911; 73 I.C. 262=1923 N. 248; A.I.R. 1943 P. C. 72 (P.C.). Evidence of similar acts may be received to prove a party's knowledge of the nature of the main act or transaction and of his intent with respect thereto. 19 C.W.N. 676=45 C. 957. The acts tendered must also have been proximate in point of time to that in question. 45 C. 957. In a case of criminal misappropriation evidence of similar acts in the previous year is admissible. 1928 L. 880=111 I.C. 387; I.L.R. (1939) Kar. 249. Evidence of a single instance of a similar nature is not admissible, as it would not constitute "a series of similar occurrences" of misappropriation. 50 C.W.N. 457. The words of sec. 15 are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating officer in the course of his investigation and not properly proved. There is also a differ-

*Illustrations.*

(a) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant.

(c) *A* is accused of fraudulently delivering to *B*, a counterfeit rupee.

The question is, whether the delivery of the rupees was accidental.

The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant, as showing that the delivery to *B* was not accidental.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

*Illustrations.*

(a) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached *A*. The facts that it was posted in due course and was not returned through the Dead Letter Office, are relevant.

## ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

ence between the admissibility of evidence and its cogency or weight. I.L.B. (1940) Kar. 249=184 I.C. 474=1939 Sind 209. The report of a Naib Tahsildar which is based on the statements of unknown persons who happened to be present at the time of his inspection, is purely hearsay evidence and is not legally admissible. 1940 A.W.R. (B. B.) 152.

EVIDENCE OF ASSOCIATION AND JOINT ACTION.—Sec. 15 is not applicable where there was no question of the act being accidental or intentional or forming part of a series of similar transactions. 47 C. 671=24 O.W.N. 501=58 I.C. 929 (F.B.). Sec. 14 would not also apply where the defence was a complete denial and no question of the character contemplated in sec. 14 did or could possibly arise. 47 C. 671. Where the accused who was accidental and innocent it is open to the presence in company, and armed at a spot was accidental and innocent it is open to the prosecution to rebut this story, and to produce evidence that in the same locality raids have taken place in which one of the gang had been concerned. 71 I.C. 360=24 Or.L.J. 136 (Pesh.). In the case of actual dacoity the prosecution is bound to prove the accused's commission of all the acts which constitute the offence. 71 I.C. 360. S. 15 admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for dacoity and evidence that one or more members of the gang had been

concerned in previous and similar offences committed at the same place is admissible in evidence for this purpose. (*Ibid.*).

SEC. 16.—Refusal of a registered letter sent by post precludes the person refusing from pleading ignorance of its contents. 16 W.R. 223. See also 16 C. 681; 9 A. 366. But there must be evidence of posting and of proper address. See sec. 114, *illus.* (f).

SEC. 17.—Admission may be verbal or contained in documents (as) maps, bills, receipts, pleadings, letters, books and other entries or even horoscopes. 23 W.R. 325; 11 O.L.J. 22; 5 C. 864; 22 W.R. 220; 7 W.R. 249; 9 W.R. 162; 23 W.R. 27; 1924 O. 19; 73 I.C. 428; 28 M.L.J. 266; 28 M.L.J. 92=26 I.C. 899. Admissions of liability made by some of several defendants in their written statement in the suit will not be evidence against the other defendants who have no opportunity of testing their veracity by cross-examining them. If the plaintiff wants to rely on such admissions he must examine the admitting defendants at the trial and make the admissions evidence. 44 Mys.H.C. B. 499=18 Mys.L.J. 186. The entire statement must be taken together; particular passages cannot be selected to the exclusion of the rest. Admission operates merely to shift the onus and raises only a rebuttable presumption. 1942 N. 387=78 I.C. 981; 10 L. 694=1928 L. 318. Admission must be deemed to be exhaustive. It must be read as it stands and it is not permissible to take

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly, authorised by him to make them, are admissions.

Admission by party to proceeding or his agent :

one part of an admission and reject another part. 49 A. 704=100 I.C. 1037=1927 A. 385. An admission is the best evidence against the party making the same, and unless it is shown that it is untrue and is made under circumstances which does not make it binding on the party, must be presumed to be true. The weight of the admission increases with the knowledge and deliberation of the speaker or the solemnity of the occasion on which it is made. 38 C.W.N. 861. *See also* 39 P.L. R. 876. Admissions are of no evidential value once they are proved untrue. 49 A. 707. As to who can make binding admissions, *see* 26 C.W.N. 273=15 L.W. 404=1922 P.C. 102. As to admissions gathered from entries in account books, *see* 23 L.W. 272=96 I.C. 423=1926 M. 955. *See also* 1937 C. 433 (S.B.). The value of admission must depend upon the circumstances in which they were made, and possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is also a material point to be considered. If the facts admitted is one within the personal knowledge of the party admitting and there is no evidence of convincing explanation forthcoming, its value is considerable. If, on the other hand the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little. 1939 A.L.J. 708=1939 All. 626. A plea of a particular status taken on the basis of a document is a matter which relates to the interpretation of that particular document and cannot operate as an admission under sec. 17. The nature of the document and the status of the parties concerned have to be determined according to the terms of the document itself and by a competent Court. No amount of interpretation of the document by a party can therefore operate as an admission. 1940 O.W.N. 1233. Mere acceptance of rent does not constitute settlement of land, nor would the filing of an arrears of rent suit constitute such a settlement. But the latter would operate as an admission under sec. 17 against the zamindar. 1941 A.W.R. (Rev.) 454=1941 R.D. 414. *See also* 1944 R.D. 346. The absence of denial in written statement of an allegation in the plaint may amount to an admission only for the purpose of that suit, and cannot have the effect of an admission capable of being proved under sec. 17 in another litigation. 48 P.L.R. 21. As to admissibility of statement of accused to police as admission, *see* 44 C.L.J. 258=1927 C. 17. As to effect of erroneous admission, *see* 77 I.C. 875. An erroneous admission may be withdrawn. 1931 L. 6.

VAGUE ADMISSION IS NO ADMISSION.—*See*

21 A.L.J. 869=1924 A. 193.

ADMISSION IN FIRST INFORMATION REPORT is valuable corroborative evidence; is cannot support a conviction, when the maker of the report himself is an accused person and cannot therefore be examined as a witness. 63 I.C. 822=22 Cr.L.J. 694 (L.). But where such a report contains an admission not amounting to a confession the admission is admissible in evidence against the accused. 63 I.C. 822.

SECS. 17, 18 AND 31: ADMISSIONS—EVIDENTIARY VALUE.—Where a person who is alleged to have made an admission regarding his status in an agreement with the Government files a suit for a declaration as to his status as against others, the Government are neither a necessary nor a proper party to this question which is independent of the validity or invalidity of the agreement. As between the parties to the suit, it will be necessary to consider whether the statement in the agreement amounts to the admission claimed and, if so, to consider its evidential value along with the other evidence, as sec. 31 expressly provides that admissions are not conclusive proof of the matters admitted. Even if it amounts to a clear admission it will not act as a bar to the suit. 63 I.A. 348=60 B. 634=71 M.L.J. 691 (P.O.).

SECS. 17 AND 31.—There cannot be an admission regarding the operation of law. If a person could not succeed to a holding under the law an admission that such a person succeeded to the holding cannot confer on him any tenancy rights. 1942 O.W.N. (B.R.) 198=1942 O.A. (Supp.) 165. Where a plaint containing an admission is subsequently amended, the admission contained in the original plaint cannot be considered to be of any value. Admissions contained in a plaint cannot be utilised in part and rejected in part. 1942 O. W.N. (B.R.) 209=1942 O.A. (Supp.) 150.

SMO. 17 AND 115.—The question whether or not a person is entitled to succeed as the heir of a deceased person is a question of law and there can be no legal admission about it. Where a landholder acquiesces in a person continuing to remain in possession of a holding under the impression that he was the heir of the deceased tenant, if it is later on found that he was not the heir the acquiescence in his possession would only operate as a licence which can revoke at will and the landholder would not be estopped from ejecting him. 1942 A.W.R. (Rev.) 212=1942 O. A. (Supp.) 238=1942 O.W.N. (B.R.) 340. *See also* 1944 R.D. 346.

SECS. 18 AND 21.—It cannot be said that sec. 18 to 21 do not apply to admissions in criminal cases. The illustrations given



Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

apply to criminal cases, and there is nothing in the sections to suggest that they apply to civil cases only. Incriminating statements by an accused under sec. 164, Cr.P. Code, though not admissible as confessions in evidence may be admitted as admissions against interest under secs. 18 to 21. The fact that the statement is not a full confession but is only a partial confession or something less than a confession or is of a self-exculpatory nature cannot be made a ground for excluding it either from evidence or from consideration. It is true that extra-judicial confessions are to be regarded with caution, but it does not follow that they are always to be rejected. They may be made in such circumstances as to have no reasonable doubt as to their truth. I.L.R. (1941) Kar. 257=1941 Sind 129.

SEC. 18; "PROCEEDINGS", MEANING OF.—146 I.C. 653=1933 R. 292. "Presumptive evidence," meaning of. See 1926 L. 299=93 I.C. 309. Where a certain fact was sought to be proved by the plaintiff by referring to an admission contained in a document and the defendant remained *ex parte*, held, that the admission should be given effect to unless there was anything in the plaintiff's own evidence contracting it. Such an admission is presumptive evidence. 1926 L. 299. For an admission to be relevant, it should be shown that the person who made it had an interest at the time of making it within sec. 18. 21 I.C. 714=19 O.L.J. 1. The statement of one person cannot be regarded as the admission of another person merely on the allegation that the two are in collusion. 151 I.C. 261=1934 A. 684. Statements by previous mahants cannot be regarded as admissions binding on the present incumbent of the office. 12 L. 497=1931 L. 161. Admission not to be used against a co-defendant unless it is made in his character of a person jointly interested with the co-defendant. 30 C.W.N. 254=1926 C. 705. An admission or even confession by a co-defendant is no evidence. 29 P.L.R. 715=1928 L. 769; 1929 L. 721=11 L.L.J. 404. Admission by one of the defendants that the land in a suit is ancestral is not binding on the others when they are not represented by him

and have independent rights of their own. 122 I.C. 109=1930 L. 238. See also 70 O.L.J. 200. Recital in a mortgage bond as to receipt of consideration is admissible as against a subsequent purchaser. 8 P. 766=1929 P. 254. See also 1943 Pesh. 17 (Admission by donor in deed of gift that possession is delivered is binding on him).

ADMISSION BY PARTIES TO SUIT.—Such admissions are generally contained in pleadings, written statements or depositions. See 7 W.R. 249; 9 W.R. 162; 5 Beng.L.R. 529; 14 W.R. (P.C.) 28; 13 M.I.A. 438; 15 W.R. 437; 17 W.R. 372; 22 W.R. 303; 23 W.R. 27. Such writings (to become admissible) must conform to legal requirements. 24 W.R. 114; 6 C. 762. See also 21 W.R. 34; 21 W.R. 414. An admission could only be given in evidence against the party making it and not against any other party. The only exceptions to the rule are laid down by secs. 18 to 20. 137 I.C. 710=34 Bom.L.R. 35=1932 B. 117. An admission on a pure question of law is not binding upon a party. 1928 L. 779=113 I.C. 99; 1929 N. 343=119 I.C. 698; 1929 L. 879=120 I.C. 532. But admission as to existence of custom is binding. 1928 L. 779=113 I.C. 99. An admission made by a party in a proceeding is of no value if a decree opposed to it is passed. 48 C.W.N. 15.

ADMISSION BY AGENT, BINDING ON PRINCIPAL.—See 2 Bom.L.R. 651; also 12 P.L.T. 582. The fact of agency must be proved. 8 Bom.L.R. 273; 46 I.C. 709=19 O.L.J. 789. Statement of agent before Settlement Officer that his principal was a bastard is admissible as an admission. 3 Luck. 416=1928 O. 233. A person called by a party as his witness cannot be deemed to be his 'agent' within the meaning of sec. 18. 34 Bom.L.R. 35.

The Home Minister speaks on behalf of the Government as its spokesman and his answers to questions put to him in the House as Home Minister, in relation to matters dealt by him as Home Minister, are admissible in evidence as admissions made by the Government. When Government is a party to the proceedings, these admissions are relevant and admissible under the Evidence



### 19. Statements made by persons whose position or liability it is necessary

Admissions by persons whose position must be proved as against party to suit.

to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such

position or is subject to such liability.

#### Illustrations.

- A undertakes to collect rents for B.
- B sues A for not collecting rent due from C to B.
- A denies that rent was due from C to B.

Act against the Government. The Crown may of course show that the admissions were really not admissions or that they were made under a mistake or that they were not binding on Government for any other valid reason, but unless this is shown the admissions must be taken in evidence against Government. A.I.R. 1948 Cal. 377 (S.B.). See also 219 I.C. 81.

**ADMISSION BY COUNSEL ATTORNEYS AND PLEADERS.**—As to circumstances when they are binding on the client and when not, see 18 M. 73; 47 Bom.L.R. 114. Admission by pleader in lower Court cannot be set aside by engaging another pleader in appeal. See 102 I.C. 283 following 9 W.R. 465; 11 M.L.A. 253; 6 C.W.N. 52; 21 M. 279; 22 M. 538 (adverse opinion expressed by vakil in argument not binding on client); 9 W.R. 375; 6 C.W.N. 62; 21 M. 279; 22 M. 538 (admission of fact by a vakil is binding on client). But see also 17 W.R. (Cr.) 49, where the Court held that such admissions are not binding in criminal cases. See also 27 O. 421; nor when they relate to matters of law. See 18 W.R. 367; 16 W.R. 246=1934 A. 531.

**ADMISSION BY PARTNERS.**—See 11 C. 588. An admission by one partner made in a representative capacity would be evidence against the firm. If in a suit against a partnership for damages for infringement of trade mark, one of the partners admits the infringement but disputes the claim for damages, the admission will bind the other partners. 148 I.C. 763=1934 L. 625. When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable, not only against himself, but also against the others whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the person in his character of one jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance. 222 I.C. 604. Admissions by one of several co-defendants. Such admission can only bind the persons making it. 22 W.R. 519; 6 A. 395; 7 A. 353; 22 I.A. 113 (P.C.); 22 W.R. 214; 9 C.L.R. 359; 2 C.W.N. 166; 11 C. 588; W.R. (F.B., Bul.) 23; 20 Pat. 855=1942 Pat. 230. Admissions by guardians do not generally

bind the wards. See 10 C.L.R. 377; 20 W.R. 223 (Signature of guardian when not binding on minor. 13 C. 292). So also are admissions by guardian *ad litem* or next friend (Tay., Evi., 8th Ed., sec. 742; Field, 6th Ed., p. 89). As to admissions by Court of Wards, see 24 I.A. 107 (P.C.). Statements made by suitor in representative capacity are binding. See 1 W.R. 339 (executor); see also 8 W.R. 63; 14 W.R. 162. As to statements by interested persons when binding, see 5 W.R. 268; 10 W.R. 89; 14 W.R. 484; 18 W.R. 105=22 I.C. 714=19 C.L.J. 1; 1945 Mad. 361=(1945) 1 M.L.J. 378 (Statement by a person jointly interested in the subject-matter of litigation (*i.e.*) a brother of the party as to heirship of a deceased person is admissible). Evidence as to admissions and promises made by alleged thieves before a panchayat is admissible without proof of the actual words used. 13 P.R. 1914 (Cr.)=26 I.C. 625. Bhatwara Kesra is admissible in evidence. 1929 P. 32=7 P. 85.

**SECS. 18 AND 21, ILLUS. (c) AND (d).**—A statement by the accused which amounts to an admission that he was present at the scene of the crime and that he was accompanying the persons who had committed the crime and which is otherwise exculpatory, fixing the sole guilt on the other man, although entirely inadmissible as against the other accused, is admissible for what it is worth, against the person making it under sec. 18, *vide* Illus. (c) and (d) to sec. 21. 162 I.C. 6=1936 R. 131. An admission of incriminating facts made by an accused person to a Magistrate under sec. 164, Cr.P. Code or a statement made to the Court during the course of the trial, admitting that he was at the scene of the crime when the murder took place, cannot be ruled out as inadmissible in evidence. It is admissible, in evidence for what it is worth against the accused making it under secs. 18 to 21. Such a statement is not a confession. A confession must either admit in terms the offences or at any rate substantially all the facts which constitute the offence. I.L.R. (1939) Kar. 800=41 Cr.L.J. 477=1940 Sind 53.

**SEC. 19.**—On the section, see 5 M. 239; 25 M.L.J. 51; 25 M.L.J. 329=20 I.C. 792; 62 I.C. 417. Secs. 19 and 20 are exceptions to the general rule in sec. 18.

A statement by *C* that he owed *B* rent is an admission, and is relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*.

Admissions by persons expressly referred by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

*Illustration.*

The question is whether a horse sold by *A* to *B* is sound.

*A* says to *B*,—"Go and ask *C*; *C* knows all about it." *C*'s statement is an admission.

Proof of admissions against persons making them and by or on their behalf.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

SEC. 20.—*See also notes under sec. 18 supra.* Sec. 20 contemplates the existence of three parties: first the party who refers; secondly, the party who is referred; and thirdly, the party to whom the reference is made. The principle is that when one party refers another second party to a third party for information, the first party is presumed to undertake to adopt as his own the information furnished by the third party. These conditions cannot be said to be fulfilled where a master calls for a report from a servant, regarding the conduct of another servant who is dismissed for misconduct, where there is nothing to indicate that in doing so the master intends to regard the servant's report as conclusive on the matter. Sec. 20 cannot apply to such a case and the report of the servant cannot become admissible as against the master in a suit for damages for wrongful dismissal even if such report corroborates the version of the dismissed servant (plaintiff). 40 C.W.N. 865. Unless an express reference has been made to a witness on a certain question his statement will not constitute an admission as regards that question. L.R. 2 I.A. 204. Admission by person nominated by the parties. 80 I.O. 16=46 A. 710. *See also* 42 M. 625; 21 A.L.J. 209=71 I.O. 761. Agreement to be bound by the statement of a referee is an admission. 103 I.C. 34=1927 A. 659. *See also* 1939 A. W.R. (H.C.) 7. A reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute and is not justified by sec. 20. 1946 M.W.N. 161=50 C.W.N. 465= (1946) 1 M.L.J. 339 (P.C.). Effects of admission. *See* 37 I.C. 933. *See also* 1935 O. 118=1935 O.W.N. 15. Effect of entry by creditor in debtors' books. *See* 14 Bom.L.R. 1020.

SEC. 21: ADMISSION—EFFECT.—An admission may be proved as against the person who makes it or his representative in interest but it cannot be proved by or on behalf of the person who makes it or by his representative in interest. This section is the affirmation of the well-known rule that a man shall not be allowed to make evidence

for himself. 1939 Mar.L.R. 244 (Civ.) Admissions are not conclusive unless they amount to estoppel. 53 B. 321=1929 B. 147; 164 I.C. 530; 40 C.W.N. 75. Mere admission of signature on blank paper, effect of. *See* 165 I.G. 805=17 P.L.T. 621=1936 P. 588. If the Court wishes to proceed upon the admission of a party, it should consider the admission as a whole or reject it altogether. 1935 P. 24; 14 L. 218=1933 L. 179; 89 L. W. 34=1934 M. 100; 151 I.C. 297=11 O. W.N. 579 and 1367=1934 O. 370; 1933 B. 326. An admission against the interest of the party making it must be regarded as true until it is clearly proved to be untrue. 34 P. L.R. 788 (2)=1933 L. 885; 1934 L. 662=35 P.L.R. 578. *See also* 1939 Mar.L.R. 253 (Civ.); 15 Luck. 191=1940 Oudh 35 (admission shifts the burden of proof on the party making it). *See also* 1939 Mar.L.R. 253. Evidentiary nature of admissions vary very much in value according to circumstances and the Court is quite at liberty to reject them, if it is satisfied from other circumstances that they are untrue. 152 I.C. 1042. Admission in a document by a pardanashin lady. 59 C.L.J. 532=1934 C. 851. *See also* 40 C.W.N. 75=164 I.C. 530. A statement made by a party to the suit to a third party or stranger of which the other party had no knowledge, and the truth of which he never directly or indirectly admitted is altogether inadmissible in evidence. 1940 A.M.L.J. 115.

"ADMISSION" AND "CONFESSION"—DISTINCTION.—Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent; while the term confession is usually used in Criminal Courts as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the 'forgery' case be regarded as confession at all. 37 C. 487; 1929 C. 589. Under sec. 21 a confession being a species of admission would be relevant and can be proved against the accused unless it can be shown that there is some provision of law which excludes the proof of such a confession. 1934 A.L.J. 178=1934 A. 351=56 A. 720; 1939 Mar.L. R. 244 (Civ.); 170 I.C. 201=1937 C. 433;

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under sec. 32.

1939 A.L.J. 107 (Admission of guilt in an application to Magistrate is admissible under sec. 21. It does not become inadmissible under secs. 24 and 25). *See also* 163 I.C. 805=17 Pat.L.T. 472=1936 P. 358; 167 I.C. 30=1937 M. 19.

**ADMISSIONS BY REPRESENTATIVE IN INTEREST ARE BINDING.**—*See* 22 C. 909=22 I.A. 129; 1926 O. 41; 24 C. 62 (purchaser at execution sale is representative of judgment-debtor and is bound by the latter's admissions). *See also* 1924 N. 208; 8 I.A. 65=10 O.L.R. 281; 17 M. 223; 31 C. 380; 100 I.C. 835=26 C.W.N. 273 (P.C.). Where the son and mukhtar-i-am of a party makes an admission before the partition officer, it is admissible under sec. 21 in proceedings for the division of joint sir; it would constitute a strong piece of evidence, but is not conclusive. 1940 A.W.N. (B.R.) 138=1940 R.D. 364. Where the admissions are wrong in point of fact and are made in ignorance of legal rights they have no binding effect, 1941 A.L.W. 492=1941 O.W.N. 648=1941 Oudh 429. The admission of one defendant contained in deposition in an earlier suit is not admissible in a subsequent suit against persons who were his co-defendants in the earlier suit. 20 Pat. 855. A person who was no party to a suit cannot be bound by any admissions arising out of the institution of the suit in which he acted merely as the general agent of one of the parties and in that capacity verified the plaint. 1942 O.W.N. (B.R.) 145=1942 A.L.J. (Supp.) 23. Admission by a person that he is not a legitimate son is not conclusive, but, if made by him against his own interest, it may be taken as true unless shown to be otherwise. 48 P.L.R. 187=223 I.C. 505.

**ORAL CONFESSIONS.**—An oral confession by an accused to a Magistrate is, as an admission by him, a relevant fact and may be proved at his trial under this section by the evidence of the Magistrate. 1929 L. 794.

**ADMISSION BY WITNESS.**—Where in cross-examination a witness admits that a statement previously made by him is false he ought to be asked in re-examination why he made a statement which was false. The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that the statement is in substance true. 51 I.C. 449=20 Cr.L.J. 465. *See also* 13 C.W.N. 409=1 I.C. 320; 7 I.C. 505; 20 W. R. 69; 2 A.L.J. 21. Admission by the accused made before the beginning of the proceedings alone can be proved under sec. 21, as in a civil suit. 36 M. 457=22 M.L.J. 73. The deposition of an insolvent reduced to writing is admissible as evidence against him in a criminal charge. 54 I.C. 478=46 C. 996

[(1896) 2 Q.B. 260; 19 Ch.D. 580, Ref.] Oral and documentary evidence as to the statement of a postman in a departmental enquiry are inadmissible in evidence in his absence. 26 I.C. 307 (1)=16 Cr.L.J. 3. Statement on oath at coroner's inquest is admissible at the trial. 50 B. 111=28 Bom. L.R. 111=1926 B. 151. Will is admissible to prove religion of deceased. 7 R. 720. A document containing the admission of third persons cannot be used as evidence against the parties but the document can be admitted in evidence as proof of the fact mentioned therein as evidence of the transaction if it could be shown that it was executed in due course of business to settle disputes between the parties. 146 I.C. 937=1934 P. 48. A party cannot use in his favour an admission by his predecessor made in his own interest. 41 C. 57=17 C.W.N. 1013=20 I.C. 78. *See also* 93 I.C. 996=1926 L. 381. Statement of deceased's father as to the exclusion of daughters from inheritance by custom is admissible. 8 Luck. 445=1933 O. 246. *See also* 1937 C. 515=41 C.W.N. 1089. Where a woman has described herself as the wife of a person in a contemporaneous transaction, it would be admissible in evidence when there is a dispute as to the fact of marriage because she had the special knowledge in respect of the marriage and it would be proved by her. 193 I.C. 161=1941 O.W.N. 249=1941 Oudh 284. As to admission in *butwara* proceedings, *see* 1926 C. 290. A confession is evidence for the prisoner as well as against him and must be taken altogether. 52 I.C. 145=20 Cr.L.J. 737 (N.). But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. (Ibid.) If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part. 53 I.C. 145=20 Cr.L.J. 737 (N.). Danger of resting judgment upon verbal admissions of the sum due. *See* 10 I.A. 74 (79)=13 O.L.R. 266 (271) (P.C.). Entries in solicitor's books of account regarding object of purchase for client are neither inadmissible nor irrelevant, nor hearsay. 33 C.W.N. 493=57 M.L.J. 581 (P.C.). The statement that a document is a copy of the original is admissible when made by a deceased person in a document relating to a relevant fact and also as an admission under sec. 21. 56 I.A. 146=52 M. 453=56 M.L.J. 730 (P.C.). Where the execution of a mortgage deed is admitted but the receipt of consideration is denied, the onus lies heavily on the defendant (executant) because it was inconsistent with his own admissions in writing. 1928 P.C. 39=54 M. L.J. 208 (P.C.). In a title suit, the proceedings in the previous title suit between the pre-

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

#### Illustrations.

(a) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged.

*A* may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

*A* produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under section 32, clause (2).

sent defendant and a third person are relevant under sec. 19 and the pleading of the defendants are admissible as admission of the defendants under sec. 21. 1930 P. 405. See also 35 P.L.R. 463=1934 L. 527; 41 C.W.N. 1089=1937 C. 515.

**DENIALS OF PARTY.**—Though 'Court' is bound to receive admissions in evidence, no such rule applies to denials. 49 A. 482=1927 A. 383. Cl. (3) of sec. 21 is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance, as part of the *res gestae* or as a statement accompanying or explaining a particular conduct. Where a purchase is made by a parent in the name of his child the contemporaneous acts of the parent may be admissible but not the subsequent acts and declarations. 7 O.W.N. 683=1930 O. 441. An admission by a Hindu father that a house built by him was constructed out of the self-acquisition of one of his sons only has the effect of relieving that son from proving that the house was built out of his self-acquisitions; but it does not relieve him from proving what the actual cost of construction was when he claims that amount out of his father's estate. 62 C.L.J. 430=40 C.W.N. 75. An admission made by a party is not absolutely binding on him and its only effect is to shift the burden as against him. He is at liberty to prove that his admission was mistaken or untrue and is not estopped or concluded by it unless another person has been induced by it to alter his condition. 67 C.L.J. 495. See also 1939 Mar.L.R. 253 (Civil); 15 Luck. 191=1940 Oudh 35.

**SECS. 21-25.**—Unless it is so specifically stated in the Cr.P. Code, no rule about the relevancy of evidence in the Evidence Act is affected by any provisions of the said Code. The admission of guilt in an application presented to a Magistrate is admissible under sec. 21 of the Evidence Act. It does not be-

come irrelevant under sec. 24 or sec. 25 of the Act. I.L.R. (1939) All. 367=1939 A. L.J. 107=1939 All. 242.

**SECS. 21-27.**—Secs. 21 to 27 do not suggest that statements which would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused person might make many admissions which do not implicate itself him in any criminal charge; and these would be admissible under sec. 21 in a trial on a criminal charge against him. Where in the course of an inquiry into the conduct of certain police officers held by a Magistrate who is deputed for the purpose, the officers who are not even under arrest make certain statements to the Magistrate, such statements are admissible in evidence against them, in a trial on a charge against them, under secs. 348 and 330, I.P. Code, of wrongful confinement and hurt for the purpose of extorting a confession. Such statements are not statements recorded under sec. 164, Cr.P. Code. 1941 M.W.N. 505=54 L.W. 81=1941 Mad. 720.

**SECS. 21 AND 34.**—Under sec. 21, an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. Statements in zamindari papers which are entries in books of account regularly kept in the course of business are relevant under sec. 34. Such statements can therefore be taken into account though they may be admissions on behalf of the zamindar. 1940 P.W.N. 498=19 Pat. 398=1940 Pat. 622.

**SECS. 21 AND 145.**—Under sec. 21 of the Evidence Act, a party's previous admission is relevant and can be used as evidence against him if that party has not appeared in the witness-box at all. The value of that admission as a piece of evidence depends on the circumstances of each case but ordinarily au-

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

22. Oral admissions as to the contents of a document are not relevant, unless

When oral admissions as to contents of documents are relevant.

and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules herein-after contained, or unless the genuineness of a document produced is in question.

23. In civil cases no admission is relevant, if it is made either upon an express

Admissions in civil cases when relevant.

condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it

should not be given.

*Explanation.*—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

24. A confession made by an accused person is irrelevant in a criminal pro-

admission is a valuable piece of evidence. An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness-box but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved in the statement made by the party in the witness-box by considering the statement as a whole. A previous admission of a party who has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box is such which involves a denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with specific portions of that statement which were sought to be used as admission. Without complying with the procedure laid down in sec. 145 of the Evidence Act, the admission contained in the previous statement cannot be used as legal evidence against that party. 47 P.L.R. 391=A.I.R. 1946 Lah. 65 (F.B.).

Sec. 23.—When an attorney goes to an adverse party with a view to a compromise or to an action you must always look with great care to his evidence of what then occurred. Per Lord St. Leonards in 5 H.L. Cases at p. 245. Admissions before a person to whom the parties went for a compromise are admissible. See 95 I.C. 363=1926 L. 548. But an offer of a certain compensation without prejudice in land acquisition proceedings is not admissible. 92 I.C. 319=1926 L. 509. An admission contained in a draft of a compromise deed filed in Court has to be excluded

under sec. 23 where the document provides that the parties to it would be free to repudiate any condition of the proposed compromise by which in their opinion, their rights were prejudicially affected. 48 C.W.N. 15. Where certain letters were in the ordinary course tendered by the plaintiffs in evidence and they were marked 'without prejudice' and the defendant's counsel admitted them, *held*, that the privilege was withdrawn and that the letters were as free to be used as evidence in the judicial proceedings. *Held also*, that under sec. 23 in order to sustain a plea of privilege as regards the letters it must be shown that both the addressor and the addressee intended to claim the same. 6 O.W.N. 1088=1930 O. 105.

Sec. 24: CONFESSION, WHAT IS.—A confession is not defined in the Evidence Act but it has been judicially interpreted as meaning an admission made at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime. The statement should however be considered as a whole. It would not be right to take isolated portions of it and to consider whether any of them, regarded separately, amounts to an admission of guilt or not. 1933 Cr.C. 1284=1933 R. 326. It should relate to the particular crime with which accused is charged. I.L.R. (1945) Bom. 278=46 Bom.L.R. 811=1945 Bom. 152. It is only when an utterance is made with an *animus confitenti* that it would become a confession; if, therefore, the declaration is made neither with an intention to confess, nor does it amount to an admission of facts from which guilt is directly deducible, the declaration would not amount to a confession. When a statement is not a confession that is no impediment in strict law to use it

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

ceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise<sup>1</sup> having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

#### LEG. REF.

<sup>1</sup> For prohibition of such inducements, etc., see the Code of Criminal Procedure, 1898 (Act V of 1898), sec. 343.

against the person making it in the capacity of an accused. But the practice of taking a statement on oath as from a witness and then using it at a later stage against an accused is not a commendable one. Further, part of a statement cannot be used to corroborate evidence which includes that statement itself, and which is obviously in much need of corroboration. 1937 N. 254=I.L.R. (1937) N. 524; 43 O.W.N. 893=1939 Cal. 610. A man of sound mind and of full age who makes a statement in ordinary simple language must be bound by the language of the statement made and by its ordinary plain meaning. 159 I.C. 875=1936 O. 156. Where the accused in a conversation with the remanding Magistrate stated to the Magistrate that the police wanted him to turn approver; that he had given true facts to the police; that he was in fact guilty and that he had told the police where he had sold the stolen property. *Held*, there was no confession; all that was said to the Magistrate was that the accused had made disclosures to the police on the promise of pardon. 143 I.C. 400=1933 L. 987. See also 1941 P.W. N. 653 (mere admission of being present in the company of dacoits is no confession of dacoity). A confession is admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by secs. 24, 25 or 26. 1931 All. 9. Oral confession—Accused not shown to understand language in which questions put, but in answer making signs—Conduct held not to amount to confession. 1930 L. 84=120 I.C. 539. Any statement by a person which would suggest an inference as to his guilt may be a confession. 59 I.C. 324=22 Bom.L.R. 1247; 1930 A. 29. A confession is not hit by sec. 24 when none of the persons to whom it was made was a person in authority, though they may have promised not to tell the police. 45 P.L.R. 391=A.I.R. 1943 Lah. 312. As to confession to panchayatdars, see 76 I.C. 329=1924 M. 230. Sec. 24 will apply even if the person confessing was not an accused person at the time of confession. A statement falling within sec. 339 (2) of the Code

excludes the operation of sec. 24. 59 I.C. 324=22 Bom.L.R. 1247. To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt so clean as to leave no other hypothesis tenable. It is enough if they lead to an inference of guilt. 43 I.C. 605=19 Cr.L.J. 189 (M.). But the statement of a man who takes particular care at every stage to show that he did not take part in the offence does not amount to confession. 1935 A.W.R. 48. The words "accused person" in secs. 24 to 26 include any person who subsequently becomes accused, provided that at the time of making the statements criminal proceedings were in prospect. (*Ibid.*) There is no provision of law which forbids a Magistrate from recording a confession on a Sunday or any other holiday and at a place other than the Court-house. 1930 L. 171. See also 165 I.C. 795=38 Cr.L.J. 84. Construction of confession. See 1945 Lah. 10.

**INADMISSIBLE CONFESSION.**—Inadmissible confession would be inadmissible wholly 38 I.C. 767=18 Cr.L.J. 383 (Bur.). The Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. 1930 A.L.J. 1481 (F.B.); 35 P.L.R. 559=1934 L. 673; 143 I.C. 362=1933 L. 665; 35 P.L.R. 659=1934 L. 630; 1933 M. 888=65 M.L.J. 837; 44 P.L.R. 448=1942 Lah. 271; 44 Cr.L.J. 77=1933 B. 401; 1933 A.L.J. 581; 34 P.L.R. 349=1933 L. 232; 1933 R. 326. But it is not an infallible rule of practice. 144 I.C. 160=1933 Pesh. 38; 1933 R. 204=149 I.C. 49; 11 O.W.N. 636=1934 O. 222. See also 40 P.L.R. 265=1933 Lah. 850.

**ACCEPTANCE OR REJECTION OF CONFESSION.**—Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. 1939 Lah. 534. In a case where there is evidence other than the confession of the accused, the Court is not bound to take the confession as a whole. If it is satisfied that a part of the confessional statement is false, it may reject that part and take into consideration that part of the



confession which corroborates the evidence of the witnesses. 188 I.C. 326=41 Cr.L.J. 576=1940 Lah. 157. The Court is at liberty to disregard any statement in the confession which it disbelieves. 46 I.C. 705=19 Cr.L.J. 785 (N.). The circumstances under which a confession is made must always be scrutinized with great care and caution, and in all cases the period of the retention of the accused in police custody before a confession is made is always an important fact to be carefully considered. Illegal detention does not necessarily vitiate a confession. It is a fact to be carefully considered in every case. 31 S.L.R. 494=1937 Sind 251. Where the confession of an accused has been excluded by the trial Magistrate under sec. 24, it cannot be taken into consideration in revision even though such confession may be excluded wrongly. 1930 S. 168. Where the accused makes a confessional statement there is evidence to show that the exculpatory portion is false, the Court can ignore that portion of the confession and use the rest of it against him. 47 P.L.R. 11.

**CONFESSION — EVIDENTIARY VALUE.**—All parts of a confession are not entitled to equal weight. Some may be believed while others rejected. 3 O.W.N. 800=1926 O. 618. *See also* 42 P.L.R. 1. The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority is a rule of policy. 18 O.W.N. 705=23 I.C. 678 (P.O.). A confession to be admissible must be voluntary and made without any pressure. 35 A. 260=19 I.C. 307; 52 I.C. 881 (1)=20 Cr.L.J. 721. *See also* 47 L.W. 143. Under sec. 24, which is a rule of exclusion, it is not necessary that there should be a decision in so many words that a confession is not irrelevant. In every case in which a confession is admitted in a criminal case, that fact that evidence of the confession is admitted is sufficient to make the confession evidence. It is open to the defence to object to the evidence of confession going in, but till such objection is raised, there is no need for the Court to pronounce a formal decision on the question of the relevancy of the confession. The actual fact of admission of the confession is sufficient for the purpose. 1938 M.W.N. 1120=48 L.W. 777=(1938) 2 M.L.J. 1065. If a confession is not voluntary in the wider sense of the term, *ex hypothesi* the person who made it did not do so with the desire to tell the truth. This fact, in itself, introduces an element of suspicion. In such circumstances if facts are proved which suggest, that an inducement of some kind, although outside the terms of sec. 24, was in fact given, the Court may well refuse to accept the confession as true. 63 C. 1053=1936 C. 316. Where the Magistrate in whose presence a confession was

made is called as a witness and swears that the statement was made before him freely and willingly and not in the presence of a policeman, the confession is voluntary and can be acted upon. 2 L.L.J. 653. Where the accused are unable to explain away their confessions which clearly indicate their guilt, the confessions alone are sufficient for their conviction. 5 O.W.N. 968=1928 O. 35 (a). The evidence of an admission of guilt to villagers may be strong as evidence against an accused 'as a confession before a Magistrate. It requires no corroboration. 5 O.W.N. 698=1928 O. 393; 1929 O. 272. Where an attempt is made to rely upon an extra-judicial confession, every precaution should be taken to ascertain as exactly as possible the very words which were used by the prisoner who is supposed to have confessed. 28 S.L.R. 285=1934 Sind 119. Though extra-judicial confessions have to be received with care and caution there is no reason why they should not be believed when they are clear, consistent and convincing. 12 Mys.L.J. 73=39 Mys. H.C.R. 320. Confession against himself to a witness is valid and admissible. 1929 M. 92. Where a confession was approved to have been made without any sort of influence or tutoring and the same was not contradicted by other evidence, *held*, that the accused could validly be convicted on the strength of the confession alone. 114 I.C. 771=1929 O. 167. *See also* 167 I.C. 162=41 C.W.N. 183=1937 C. 39; 38 Cr.L.J. 84=165 I.C. 795. Where the main foundation for the conviction is the confession alleged to have been made by the accused there are three things which the prosecution must establish: (a) that a confession was made, (b) that evidence of it can be given, and (c) that it is true. 152 I.C. 1032=1934 Sind 172. Where the case against the accused depends mainly upon an alleged confession and there is a conflict as to the manner in which the confession had been obtained by the prosecuting agency, the accused is justified in asking the Court to give him the benefit of the doubt. 119 I.C. 420=30 Cr.L.J. 1080. Where the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable. 177 I.C. 617=40 P.L.R. 890=1938 L. 594.

**CONFESSION IN POLICE CUSTODY, INADMISSIBILITY OF.**—Question of admissibility of confession comes when statement is made to police officer or while in police custody. 1929 C. 539. When a confession was made after being in police custody for several days and protracted consultation between the accused and the investigating officers and was subsequently retracted, the confession is inadmissible. 53 I.C. 929=23 C.W.N. 886. *See also* 1937 C. 39=41 C.W.N. 183; 5 L.L.J. 128; 21 Cr.L.J. 177=54 I.C. 881 (P.); 18 Cr.L.J. 106=37 I.C. 314=10 Bur.L.T. 270;



17 Cr.L.J. 402=35 I.C. 962. Moral exhortation is not objectionable. 5 W.R. 32. The mere fact of the accused being in police custody is no reason for presuming that his confession was induced by threat or promise. 98 I.C. 250=1926 O. 622. Where the threats made do not influence the accused's confession it is admissible. 5 W.R. 175. A self-exculpatory statement by an accessory after the fact is inadmissible in evidence. 99 I.C. 282=30 C.L.J. 503. Sec. 24 does not admit as legal evidence an incriminating statement to headman at the latter's suggestion to speak the truth, lest witnesses for the other side may let it out when called. 18 Cr.L.J. 106=37 I.C. 314.

**CONFESSION UNDER INDUCEMENT, THREAT, ETC.—WHAT CONSTITUTES INDUCEMENT.**—The expression "you had better tell the truth" has always been held to import a threat or promise unless the words are qualified in some manner. The words do not mean mere exhortation to tell the truth, for the accused had already been questioned by the police. The words are susceptible of the interpretation that the accused was told that it would be better for him if he told the truth and that amounts to an inducement. 152 I.C. 998=1934 L. 417. *See also* 167 I.C. 795; 1937 C. 39; 41 C.W.N. 183; 1938 P. 308=17 P. 369; 1940 All. 46; 1941 M.W.N. 956; 1942 Mad. 49=(1941) 2 M.L.J. 1070; 1942 Mad. 237; 56 L.W. 479=(1943) 2 M.L.J. 293. The question whether the words used were intended to convey to accused an inducement, etc., must depend on surrounding circumstances, in which those words were used. The burden is on prosecution to prove that the confession was not improperly induced. 1933 Sind. 409. Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true his prayer for being made an approver will receive due consideration, the confession made under such circumstances is inadmissible. 45 A. 633=21 A.L.J. 585=74 I.C. 529. Sec. 24 makes a confession inadmissible if it appears to have been caused by any inducement or promise. 45 A. 300=21 A.L.J. 143=1923 A. 352; 1929 Sind. 245; 1930 A. 29; 1942 Mad. 237 (asking accused to produce weapons coupled with a promise that nothing would happen if they produced the weapons). The expression used in sec. 24 is not "proved" but "if it appears" which is not as strong an expression as "proved". Though the accused has not adduced evidence to substantiate the allegation that the confession was obtained by threat or inducement, it is still open to him to show that the circumstances under which it was made would justify that inference. *Quære*: whether the onus of proving that a confession is voluntary is on the accused or the prosecution. 33 C.W.N. 1112=1929 C. 726; 61 C. 399=38 C.W.N. 659=1934 C. 636.

Under sec. 24, unless it appears to a Court that an inducement, threat or promise was held out by a person in authority a confession would be relevant without any formal proof of the voluntary nature of the statement and formal evidence that the statement was voluntary is not required from the prosecution in practice. 54 L.W. 327=(1941) 2 M.L.J. 1070=1942 Mad. 49. Where the accused whose confession is being recorded informs the Magistrate that he is making the confession under inducement, the confession is not admissible, and cannot be allowed to go to the jury. Whether there was inducement or not is immaterial. 45 B. 1086=60 I.C. 1006. A confession by an accused to a Magistrate who did not record or administer any of the necessary warnings or adopt any of the safeguards, made after the police had threatened him and retracted at the earliest possible moment after the accused got out of the influence of the police, is inadmissible and insufficient in itself to base a conviction. 1933 M.W.N. 723. Where a confession is positively proved by the record of Magistrate that it was voluntary, the mere fact that the accused confessed in the hope of pardon will not justify its rejection as being improperly induced, in the absence of the evidence to suggest that any police officer or other person in authority did or said anything which could, possibly be construed into holding out a hope of pardon. (8 L. 230, Ref.) 34 P.L.B. 704=1933 L. 388. Where the Magistrate has not put the necessary preliminary questions to the accused with a view to satisfy himself that his statement was voluntary, the irregularity can be cured under sec. 533 of the Cr.P. Code, provided the omission has not injured the accused in his defence on the merits. In other words, the Court is enabled under sec. 533 to take evidence to prove that the confession was "duly made", i.e., in accordance with secs. 164 and 364. If the questions were not put at all, the confession is not 'duly made'. But it is not necessarily irrelevant. The Court may satisfy itself that there was necessarily no inducement or threat and so fulfil the requirements of sec. 24. The weight to be attached to it depends on the facts of each case. 1933 A.L.J. 1551 (F.B.). The statements made by the accused in the trial of the police officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder. 59 I.C. 324=22 Bom.L.B. 1247. A confession made by an accused person under fear, encouraged by a police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate is inadmissible in evidence. 60 I.C. 417=32 C.L.J. 204. A confession made by an accused person on an inducement by a police officer that he would be offered a pardon is inadmissible in evidence. 60 I.C. 417. The evi-

dence of an accomplice, if suspicious, requires corroboration. 60 I.C. 417; 9 P.R. 1911 (Cr.)=10 I.C. 340. The fact that a police officer got by means of threat information from a prisoner as to a circumstance incriminating the latter does not render that information inadmissible in evidence. 17 Cr.L.J. 33=32 I.C. 321. It is not possible for a Court to say that the making of the confession "appears" to it to have been caused by any inducement, threat or promise, except upon evidence which is before the Court. 4 P.L.T. 186=72 I.C. 961; 1928 L. 676. The influence may be suggested by the confession itself or by the prosecution evidence or by the evidence adduced by accused or by surrounding circumstances which the Court is bound to take into consideration. 72 I.C. 961=4 P.L.T. 186. It cannot be stated as a proposition of law that no statement made on oath can be a voluntary statement that would be admissible under sec. 24, which says nothing about voluntary statements. A statement made on oath may be said in certain cases to be made as the result of the holding out of a threat; but that is a question of fact. The administering of an oath is not necessarily or always tantamount to a threat to the person under oath. 55 L.W. 462=A.I.R. 1942 Mad. 654=(1942) 2 M.L.J. 112. Where an application to be made as an approver was made from jail by an accused and he also expressed a wish to make a statement it was held that though it might be an indication of an anxiety on the part of the accused to earn a pardon by becoming an approver, it was not a reason to hold that any inducement was held out to the accused to make a confession. 1943 O.W.N. 88.

Under sec. 24 there must be something from which the Court can infer that the inducement or promise was given to the accused by some person who had authority to give it. It must be shown that hope was directly inspired by some one who had authority to make the promise. 109 I.C. 225=1928 C. 500. An approver's disclosure is in its very nature always the result of an inducement or promise, namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats of violence, to that extent the provisions of sec. 24 would be applicable and the confessional statement would have to be ruled out of evidence. 9 L. 608=1928 L. 320 (2). The mere fact that there was a race for pardon does not detract from the value of the confession, if that race for pardon does not appear to have been caused by an inducement or promise held out by one in authority. 113 I.C. 65=30 Cr.L.J. 49. It is open to the High Court to rule out a confession caused by any inducement, threat, etc. I.L.R. (1943) 1 Cal. 487=A.I.R. 1943 Cal. 625.

. WHO ARE PERSONS IN AUTHORITY FROM

WHOM THREAT OR INDUCEMENT PROCEEDS.—There is no statutory definition of the words "person in authority"; but it is well settled that the words have reference to a person who has authority to interfere in the matter under inquiry. Generally speaking a "person in authority" is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. 12 P. 241=14 P.L.T. 82=1933 P. 149 (S.B.). Sec. 24 refers only to a person in actual authority, the test being the possession of some power or control over the accused with reference to his case. 37 I.C. 42=18 Cr.L.J. 58. The belief of an accused that the persons to whom he made a confession were "persons in authority" is not sufficient to bring them within the term. The test is: Had the person authority to interfere with the matter? Whether a certain person is a person in authority would largely depend upon the circumstances of each particular case. Mukhais to whom confession was made by accused were held to be not persons in authority. 152 I.C. 1032=1934 S. 172. The expression "person in authority" has a wider meaning than the actual prosecutor and the test is, has the person any authority to interfere in the matter and any concern or interest in it sufficient to give him authority. 43 I.C. 605=19 Cr. L.J. 189 (M.). See also 40 B. 220=17 Bom. L.R. 1059. Police Patel in a village is such a person. 40 B. 220=17 Bom.L.R. 1059. So also a Mukhia of a village. 97 I.C. 44=1926 A. 737. But see 1934 S. 172. Also village Choukhidar. 1936 A.L.J. 999=1936 A. 753 (F.B.). See also 17 P. 369=174 I.C. 524=1938 P. 308. The words "person in authority" may also include the prosecutor. 1945 Cal. 360=79 C.L.J. 149=46 Cr.L.J. 653. A collecting panchayat and an assistant panchayat are both persons "in authority" within the meaning of the section. 50 C. 127=1933 C. 458. Panchaytdars are not persons in authority within the meaning of sec. 24. 45 M.L.J. 845=1924 M. 230. The president of a panchayat which was to consider a case is a person in authority. 20 O.W.N. 512=33 I.C. 828. Also the president of a Village Vigilance Committee. 1939 M.W.N. 341=49 L.W. 522=1939 Mad. 515; I.L.R. (1940) Lah. 217=42 P.L.R. 711. Whether a person who is merely the landlord of the village and a member of the Union Board is a person in authority within the meaning of sec. 24. See 63 C. 1089=1936 C. 227. As to agent of landlord, see 164 I.C. 891=1936 L. 264. The words "person in authority" in sec. 24 include the prosecutor. 68 I.C. 413=26 C.W.N. 54. A confession made by an accused to the Superintendent of Exercise in a trial for illicit possession of opium is admissible provided no inducement, threat or promise was held out to the accused for making the confession. 22 C.W.N. 451=45 I.C. 284. An Honorary Magistrate who is also a jail-

dar is a 'person in authority'. 152 I.C. 998=1934 L. 417. A lambardar being a person in authority, a confession induced by him by the use of threats is inadmissible. 4 L.L.J. 235=1922 L. 263; 26 P.R. 1916 (Cr.); 34 I.C. 642. A zaildar or lambardar is an officer who is to help the police in their investigation. 14 P.R. 1911 (Cr.)=12 I.C. 973. See 1929 O. 272; 1936 A.L.J. 376=1936 A. 470; 18 L. 794=40 P.L.R. 186. See also 1928 L. 476 (where a villager was directed by the police to make the accused to confess by inducement). A confession made to *Thugyi* by an accused who had been sent for by the former after being told that he would not be punished if he was not a party to the offence is irrelevant and inadmissible in evidence as the *Thugyi* is a person in authority within the meaning of sec. 24. 26 I.C. 129. Other answers and questions based on the inadmissible statement are also inadmissible. (*Ibid.*) Neither a co-villager nor a zamindar, is a person in authority unless the zamindar is directed by the police to investigate. 37 I.C. 42=18 Cr.L.J. 58; 9 I.C. 718=12 Cr.L.J. 119. *Katwari* in C.P., is not a police officer. 25 Cr.L.J. 147=1924 N. 29. (See also notes under sec. 25, *infra.*) A confession to a Jail Warder is not admissible. 1930 M.W.N. 1249. Where a post office clerk begged of his superior to be saved if he disclosed every thing and the latter having promised to help him the accused made a confession. *Helid*, that the confession was procured by inducement held out by a person in authority. 60 C. 719=1933 C. 644. A village headman is a person in authority but where accused made the confession of his own accord, out of remorse and there was no proof of inducement such confession is admissible. 6 O.W.N. 947. An inamdar holds semi-official position and he is not a person in authority under this section. 1929 L. 558. A village panch actively assisting the police officer is a 'person in authority' and a statement made to him under veiled threat and inducement is inadmissible. 8 P. 289=1929 P. 275. Statement made to moniagar on his asking accused to speak the truth is not one made under threat or promise and is admissible whether moniagar is "a person of authority". 1929 M.W.N. 791.

**DUTY OF COURT.**—The Judge should satisfy himself by putting searching questions to such witness as had anything to do with the confession. The first question that ought to strike every judge is "why the accused made the confession?" It is important to ascertain from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make

it before the Magistrate that an inquisitive mind can be satisfied. 55 A. 91=1933 A. 31. It is for the Judge to decide for himself whether *prima facie* the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. It is not the province of jury to decide the question of admissibility of evidence. If the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the evidence as admissible does not necessarily mean that it is true and it is for jury to make up their minds whether they should accept the confession, and in doing so they should naturally be guided by their opinion on the question whether the confession was voluntary or not. 142 I.C. 639=1933 O. 187. See also I.L.R. (1943) 1 Cal. 487=1943 Cal. 625. If the circumstances are such as to raise a strong suspicion in his mind that the confession has been induced by threats or promises of the nature described, in that section, then the confession is irrelevant. It is not necessary for the defence to establish conclusively that there was such inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat. 184 I.C. 222=43 O.W.N. 893=1939 Cal. 610. Where the confession was taken at extraordinary length throughout a considerable number of days and it described in the greatest possible detail a whole series of crimes which had been committed and it further appeared that the confession was probably induced by some threat or promise. *Helid*, that the confession should not be admitted in evidence till there was a thorough enquiry that it had been made voluntarily. 145 I.C. 863=1933 O. 835 (S.B.). When once the voluntary character of a confession is challenged by the defence the Judge should make a thorough enquiry to see whether in fact the confession was voluntary. 1933 C. 835; 1939 M.W.N. 611; 17 Mys. L.J. 238; 1939 A.L.J. 966=1939 A.W.B. (H.C.) 768.

**RETRACTED CONFESSION, EVIDENTIARY VALUE OF.**—A retracted confession uncorroborated in material points by other reliable evidence, is of no value. Conviction on it would be bad. 58 I.C. 49=5 P.L.J. 430. See also 30 I.C. 436; 16 Cr.L.J. 612; 75 I.C. 151=24 Cr.L.J. 304; 1929 L. 597 (whether against himself or co-accused); 1933 Sind 133; 146 I.C. 180; 11 O.W.N. 851=1934 O. 405; 63 C.L.J. 232=196 C. 316; 1937 L. 208; 163 I.C. 319=1936 N. 88. If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. 55 A. 91=1933 A. 31. Where a confession is neither voluntary nor true and is subsequently retracted it is not sufficient for the conviction of the maker especially on a capital charge of murder. 145 I.C. 470=34

Cr.L.J. 1009=1933 O. 265. A convicted prisoner undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied the implication of the petitioner. *Held*, the statement was not admissible in evidence. 54 I.C. 893=21 Cr.L.J. 189=18 A.L.J. 87. *See also* 62 I.C. 545=22 Bom.L.R. 1274. It is unsafe for a Court to rely and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true. 26 C.W.N. 1010=71 I.C. 497=1928 L. 329 (2); 1930 C. 141; 1930 A. 29. *See also* 1938 L. 731; 68 C.L.J. 206. A retracted confession should carry practically no weight as against a person other than its maker. 26 C.W.N. 1010=71 I.C. 497; 1942 Lah. 271; 1944 Cal. 249. It is very unsafe to convict an accused person upon a retracted confession unless the confession is confirmed by other evidence. 36 I.C. 133=17 Cr.L.J. 453. *See also* 151 I.C. 716=1934 L. 715; 196 I.C. 597; 23 Pat.L.T. 387=1942 Pat. 90; 1941 Nag. 86. The corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the co-accused with the crime. 19 Cr.L.J. 275=44 I.C. 179. The amount of corroboration depends on the circumstances of each case. 145 I.C. 133=35 Bom.L.R. 371=1933 B. 230. Where in case of an alleged poisoning of husband by wife, the wife retracted her confession which was voluntary and various articles stained with the poison were recovered in the viscera and vomits of the deceased. *Held*, there was sufficient corroboration. 15 L. 310=152 I.C. 206=1934 L. 150 (2). When a retracted confession is the sole evidence against an accused, it can be of but little value, especially remembering the competition for pardon which sometimes occurs where a number of persons are suspected of an offence and some have already confessed or are believed to have confessed. 17 Cr.L.J. 226=34 I.C. 642=26 P.B. 1916 (Cr.). A Court should not convict a person upon a statement made by him but subsequently retracted owing to a promise of pardon, in the absence of corroboration in material particulars unless the peculiar circumstances of making the confession or the reasons of retraction show the genuineness of the confession in spite of its revocation. 31 I.C. 831=16 Cr.L.J. 815; 44 P.L.R. 448=1942 Lah. 271; (1943) 2 M.L.J. 634 (F.B.). *See also* 47 Bom.L.R. 648=1945 Bom. 484. It is, however, not safe in general to convict on an uncorroborated confession from point of view of common experience and prudence, and when it is a question of a confession against a co-accused the corroboration must not only confirm the general story of the crime but must clearly connect

the co-accused with it. 30 P.R. 1914 (Cr.)=15 Cr.L.J. 626=25 I.C. 634. *See also* 30 I.C. 436=16 Cr.L.J. 612; 8 P. 289=1929 P. 275; 1942 Lah. 271; 47 Bom.L.R. 648=1945 Bom. 484. There is no rule of law requiring a retracted confession to be supported by corroborative confession in material particulars. The use to be made of such a confession is more a matter of prudence than of law. 46 I.C. 1005=19 Cr.L.J. 861 (N.). *See also* 26 C.W.N. 1010; 152 I.C. 1032=1934 Sind 172; 151 I.C. 924=1934 L. 89; 57 C.L.J. 218=1933 C. 747 (F.B.). The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character. 52 I.C. 50. *See also* 60 I.C. 789; 25 I.C. 634. A retracted confession is admissible in evidence but it should have no weight unless either corroborated in a material particular or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases, the retracted statement may be given full weight. 8 P. 262=1929 P. 212; 1929 M.W.N. 791; 143 I.C. 499=34 P.L.R. 703=1933 L. 388; 159 I.C. 875=1936 O. 156. As against the co-accused, a retracted confession may be taken into consideration subject, however, to the rule that it cannot form the basis of a conviction without substantial and independent corroboration both as to the crime and the criminal. Further, a higher standard of corroboration in regard to a retracted confession must be demanded than in the case of the testimony of an approver because the testimony of an approver can be tested by cross-examination whereas the confession of an accused cannot be subjected to such a test. 44 Cr.L.J. 77=44 P.L.R. 448=A. I.R. 1942 Lah. 271. Accused fully alive to consequences—Confession unexplained—Conviction on basis of retracted confession is legal. 1929 O. 381. A retracted extrajudicial confession can in law be a sufficient basis to support a conviction. 1929 Sind 253. There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted provided that the Court is convinced that the statement is voluntary and true. 1930 A. 29. *See also* 1930 C. 141; 12 Mys.L.J. 353; 11 Mys.L.J. 407; 150 I.C. 1056=35 Cr.L.J. 1180. It should very carefully scrutinise the confession and then decide for itself whether it is reliable and trustworthy. When the Court finds that the confession is not true, and is made with the sole object of implicating others without any intention to implicate himself, it cannot be acted upon by the Court and a conviction cannot be based on it. 151 I.C. 298=11 O.W.N. 1012; 1934 O. 418. The mere fact of the retraction of a confession is not in itself sufficient to make it appear that it was unlawfully induced but will be corroboration of the approver's statement. 113 I.C. 65=30 Cr.L.J. 49. The confession of an accused although retracted, may be

Confession to police officer  
not to be proved.

25. No confession made to a police officer<sup>1</sup> shall  
be proved as against a person accused of an offence.

#### LEG. REF.

<sup>1</sup> As to statements made to a police officer investigating a case, *see* sec. 162, Cr.P. Code (V of 1898).

taken into consideration against a co-accused. 119 I.C. 325=30 Cr.L.J. 1046; 1944 Cal. 249; and is admissible in evidence against co-accused. 1930 L. 667. But its value as a piece of evidence is almost nil. 1935 A.W. R. 48. *See also* 10 O.W.N. 405=1933 O. 263. It can sustain a conviction if it is corroborated by the production of articles for which the accused can give no explanation. (*Ibid.*) There is no absolute rule that a confession, having been retracted cannot be acted upon without material corroboration. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, the confession can be acted upon as it stands and without any further corroboration. 53 M. 160=1929 M. 837=57 M.L.J. 681. *See also* 1930 A. 29 (confession by a Sessions Judge before a Magistrate but retracted later); 1942 Lah. 271. Court is at liberty to base a conviction on the retracted confession of the accused, if it thinks that it has a ring of truth about it. But it should be very slow to base a conviction upon such a confession which is not corroborated by any other satisfactory evidence, which does not impress the Court and which does not explain any strong motive for the crime. 11 O.W.N. 950=1934 O. 388. Where the confession is voluntary and not made under pressure, then there cannot be any doubt as to his guilt and conviction may be maintained even though it was subsequently retracted by him. 119 I.C. 420=1930 L. 88; 1930 O. 353.

#### RETRACTED CONFESSION—PROOF OF.—

Where a confession is retracted both before the committing Magistrate and the Sessions trial it cannot be used unless the Court is otherwise satisfied of its truth and voluntary character. 45 M.L.J. 613=1924 M. 391. *See also* 93 I.C. 978=1925 L. 605; 1933 O. 315=8 Luck. 518; 44 P.L.R. 77=1942 Lah. 271; 1942 Pat. 90. After the confession of an accused was recorded pardon was tendered to him and he was examined as witness for the prosecution. He denied all knowledge of the occurrence and also did not seem to recollect anything about the confession. His examination was therefore stopped by the Magistrate and the pardon withdrawn. But he was not tried jointly with the other accused and was examined as a prosecution witness in the Sessions Court. There also he denied all knowledge and made serious allegations against the police. He was declared hostile and cross examined and for the purpose of contradicting him, the confession made by him was read over to him. *Held*, that the prosecution

was not justified in reading the confession which he retracted and which according to him was not voluntary. 61 C. 399=38 C.W.N. 659=1934 C. 636. Where approver is tried on the basis of his statement which is retracted it must be corroborated by other evidence. 9 L. 608=1928 L. 320 (2). Where an accused when retracting a confession alleged ill-treatment and inducement by the police to extract the confession, the onus is on him to prove such ill-treatment and inducement. 47 I.C. 811=22 C.W.N. 809. A first information report is not admissible in evidence at all, if in substance it is a confession to the police. 73 I.C. 266=1923 N. 251. *See also* 63 I.C. 822 (L.).

EXTRA-JUDICIAL CONFESSION THOUGH RETRACTED subsequently is undoubtedly admissible. When the subsequent discoveries fully corroborate it, a conviction could be sustained on that alone. I.L.R. (1940) Nag. 679=1940 N.L.J. 623=1941 N. 86. The accused, who was charged with murder, made a statement on a morning to the Superintendent of Police, which led to the discovery of a bill-hook which the accused said was the weapon used by him to kill the deceased. It was admitted that for four hours on the night before and for two hours on the morning on which he made the statement, the Superintendent of Police was questioning him. *Held*, that this was a flagrant violation of the Madras Police Executive Orders, and that the statement of the accused was not a voluntary statement and could not be admitted as it was ruled out by sec. 24, although the evidence regarding the production of the bill-hook alone could be admitted in evidence. 1934 M.W.N. 1134=50 L.W. 742. The word "accused" in secs. 24 and 26 includes any person who subsequently becomes accused. A person who is suspected of complicity in a murder and makes a confession before the coroner under sec. 19 of the Coroners' Act, is an accused person within the meaning of secs. 24 and 26 when he is later on charged with the murder or abetment of murder. His confession would be admissible against him and against his co-accused if the requisites of an admissible confession are present, though it may be retracted later on. 42 Bom.L.R. 938=1941 Bom. 50=I.L.R. (1941) Bom. 27.

SEC. 25: STATEMENT NOT AMOUNTING TO CONFESSION.—A statement made by an accused to a police officer if it does not amount to a confession may nevertheless be used against him and more particularly if the statement made turns out to be false in the light of the other evidence in the case. 23 Cr.L.J. 193=65 I.C. 849. *See also* 1941 Lah. 82. The word "confession" in sec. 25 is not restricted to actual admission of guilt but includes inculpatory statements from which

inferences of guilt can reasonably be drawn or which suggest the guilt of the person making the statement. 42 I.C. 1092=19 Cr.L.J. 42 (L.B.). Every statement made to the police by an accused person is not a confession and statements which are not of an incriminating nature are admissible. 151 I.C. 437=1932 Sind 100. If the first information of an offence is given by the accused to a police officer, and that information admits his own guilt, it is "confession", which cannot be proved under sec. 25. 36 Bom.L.R. 1117. See also 34 P.L.R. 1000=1933 L. 899. Statement of an accused made at the police station against the co-accused is inadmissible and cannot be used as evidence as against the co-accused. 34 P.L.R. 259=1933 L. 167. Where the circumstances of the case compel a tribunal to act only upon a confession, and to reject all other evidence, the confession must be used *literatim et verbatim* and due effect must be given to every statement in it whether in favour of the accused or against him. 38 I.C. 740=18 Cr.L.J. 356; 14 Cr.L.J. 252=19 I.C. 508. Confession made to police officer is admissible to prove the ownership of property regarding which he is charged. 6 I.C. 62=21 Cr.L.J. 414 (N.). Section applies to every police officer and is not restricted to Regular Police Force. 26 C. 569. An admission made by the accused to the police is inadmissible against him under sec. 25. 17 Cr.L.J. 51=36 I.C. 480. As to distinction between admission and confession before police, see 10 Beng.L.R. App. 2; 6 C. 530; 10 C. 1022. The test which has to be applied in deciding whether sec. 25 applies, is the position of the person at the time when it is proposed to prove the admission not his position at the time when he is alleged to have made it. 13 Cr.L.J. 465=15 I.C. 305; 11 Mys.L.J. 438. A confession therefore made to a police officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence. A confession made by an accused to a police officer might be admissible in favour of a co-accused but not against him. 15 I.C. 305. A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and a *fortiori* it is inadmissible in a separate proceeding against the other accused. But when the maker is examined as a witness on behalf of the other accused it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court, under the provisions of sec. 155. 61 C. 967=38 C.W.N. 1005=1934 C. 616. The expression "police officer" in sec. 25 is used in its usual and more comprehensive meaning, and includes police officers of the Native States as those of British India. 43 I.C. 111=14 N.L.R. 192. The term "police officer"

in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. 71 I.C. 360=14 Cr.L.J. 136 (Pesh.). Hence in common parlance and among the generality of people, a Sub-Divisional Magistrate cannot be taken to be a police officer. He is a member not of the police service but of the Provincial Civil Service and much of his work is judicial. 150 I.C. 991=1934 P. 256. Police officer includes person invested with police powers. 8 R. 52 (Assistant Superintendent of Pakokku Hill Tracts exercising the powers of Additional District Magistrate). (1946) 1 M.L.J. 368 (Special Officer of Commercial-tax Department empowered under Hoarding and Profiteering Prevention Ordinance). The statements of approver to a Police Inspector being really confessions, are inadmissible. 35 M. 247=22 M.L.J. 490 (S.B.). See also 15 Cr.L.J. 474=24 I.C. 562; 15 I.C. 325. Confession made to a police officer in Nizam's Dominions is not admissible in evidence. 19 Cr.L.J. 73; 43 I.C. 111=14 N.L.R. 192. Confession before administrator in Portuguese territory not admissible. See 26 Bom.L.R. 706=1924 B. 480. It would be difficult to hold that a member of the civic guard should be treated as anything else than a police officer when called out on duty, even though he may not have the powers of investigation. There may also be cases in which a confession made to a civic guard would have to be regarded as being a confession made to a police officer, though he had not been technically called out on duty; but this would rather be a result of the ordinary rule of prudence which often makes it necessary to exclude confessions made to Village Lambardars or other notables who are assisting the police in the course of investigation. 46 P.L.R. 15. Even if a police-man happens to be a member of a crowd of villagers and a confession was made to the villagers at-large, the mere fact that a police man happened to be present in the crowd would not make the confession inadmissible in evidence. 1934 A. L.J. 143=1934 A. 132. The test to decide whether a statement is a confession or not, is to see whether the accused states that he has done something which amounts to an offence thereby accusing himself of committing of an offence. 17 P. 15=19 P.L.T. 452=1938 P.W.N. 338. The prohibition contained in sec. 25 applies only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and does not apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence. 43 P.L. R. 672; see also 1942 Lah. 37. The prohibition contained in sec. 25 is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of any offence made by the accused to a police officer, and it makes no difference whether the offence is



Confession by accused while in custody of police not to be proved against him.

26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate<sup>1</sup> shall be proved as against such person.

#### LEG. REF.

1 A Coroner has been declared to be a Magistrate for the purposes of this section, see sec. 20, Coroners' Act (IV of 1871).

one of which the accused can be convicted at the trial at which it is sought to prove the confession made to a police officer. The admissibility of a confession does not depend upon the offence charged. A confession made by an accused to the police of an offence of culpable homicide not amounting to murder is not admissible in a trial for murder on the same facts. 1941 Sind 134=I.L.R. (1941) Kar. 292. A confession made to the police in the course of the investigation of a crime is inadmissible in evidence, though the confession relates to another crime. The whole spirit of sec. 25 is to exclude confessions to the police, and the moment a statement is found to amount to a confession it does not matter at all of what crime it is a confession. I.L.R. (1937) M. 358=1937 M. 209=(1937) 1 M.L.J. 154; see also I.L.R. (1942) Mad. 77=(1941) 2 M.L.J. 209. Excepting in very rare cases the value of an extra-judicial confession is not very high and where there is no other corroborative evidence in support of it, it is very unsafe to rely on such confession. 184 I.C. 390=1939 A.L.J. 732=1939 All. 685. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. A confession cannot be construed as a statement by an accused "suggesting the inference that he committed" the offence. 66 I.A. 66=43 C.W.N. 473=(1939) 1 M.L.J. 756=1939 P.C. 47 (P.C.); 1941 O.W.N. 722=1941 Oudh 359; 1942 Lah. 37. Confession made to private individual in presence of Chaukidar—Admissibility of. 11 O.W.N. 636=1934 O. 222. A statement by an accused arrested on a charge of unlawful possession of opium to Excise Officers, the police servants remaining in room in another part of the house, is still a statement made while in police custody and therefore inadmissible. 39 I.C. 977=21 C.W.N. 694. Whether Excise Officers who have large powers of search, arrest and detention are to be regarded as police officers within the meaning of sec. 24. 21 C.W.N. 694; 28 Bom.L.R. 1196=1927 B. 4 (F.B.) (overruling 28 Bom.L.R. 674). See also 82 I.C. 151=46 C. 411; 28 Bom.L.R. 674=97 I.C. 665=1926 B. 517. Confession made to excise peon is inadmissible under sec. 25. 31 Bom.L.R. 49=1929 B. 70. See also 7 R. 771. Also admission of the accused to the Excise Sub-Inspector. 150 I.C. 1144=1934 N. 136; 46 P.L.R.

329. An Excise Officer is a police officer. 61 C. 607=38 C.W.N. 930=1934 C. 580 (F.B.); 1935 N. 13; 46 Cr.L.J. 213=1945 Lah. 10. Village Chaukidars are police officer. 16 Cr.L.J. 62=26 I.C. 654; 165 I.C. 701=1936 A.L.J. 999=1936 A. 753 (F.B.); 17 P. 369=174 I.C. 524=1938 P. 308. But see *contra* 1934 A.L.J. 143=1934 A. 132. *Kotwar* in C.P., is not a police officer. 76 I.C. 291=1924 N. 29; 57 I.C. 88=21 Cr.L.J. 558 (N.). Village Munsiff is not a police officer. 7 M. 287. A political Muharriar Oghi is a police officer. 144 I.C. 160=34 Cr.L.J. 804. A member of the frontier constabulary is a police officer. 71 I.C. 360=24 Cr.L.J. 146 (Pesh.). As to village headman in Burma, see 2 R. 31=81 I.C. 540. An extra-judicial confession made by the accused to a Lambardar and a Safedposh cannot be admitted in evidence. 35 P.L.R. 659. Under sec. 25 only confessions are excluded and not admissions not amounting to a confession. The accused, a police officer, made a confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount. *Held*, that statement as to acceptance of bribe being confession was inadmissible under sec. 25 but the statement as to rumour and approach of people to the accused to get the matter hushed up being admission was admissible. 193 I.C. 878=1941 Lah. 82.

SECS. 25 AND 27.—Sec. 25 to which sec. 27 is a proviso applies equally to confessions with regard to offences not under investigation. Where a person while under custody for a criminal breach of trust in respect of a cycle that he had taken on hire and then sold, confessed that he had similarly sold another cycle and as a result of that confession that cycle was discovered, the confession is admissible under sec. 27. 55 L.W. 677=(1942) 2 M.L.J. 549=1943 Mad. 89; I.L.R. (1943) Mad. 456. On a joint trial of four accused, before an accused is convicted on the basis of confession made by them, there must be evidence on the record which leads one to conclude that it was the particular accused who made the crucial statement or that it was he who was responsible for the discovery of the relevant facts. 55 L.W. 355=A.I.R. 1942 Mad. 532 (1). As sec. 25 stands at present confessions made in a first information report must be excluded from its operation. But, however, the statements made in the course of such an inadmissible confession are not excluded for the purposes of sec. 27. I.L.R. (1940) Nag. 679=1940 N.L.J. 623.

SEC. 26: CONFESSION IN CUSTODY OF Po-



1[*Explanation*.—In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George 2[\* \*] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.<sup>3</sup>]

#### LEG. REF.

1 The explanation was added by Act III of 1891, sec. 3.

2 Words ‘or in Burma’ omitted by A.O., 1937.

3 See now the Code of Criminal Procedure (Act V of 1898).

**LIEGE—EXTRA-JUDICIAL CONFESSION.**—The accused who was in the lock-up of the Magistrate under trial was sent up by the Magistrate to a hospital or treatment with two policemen in charge. The latter waited outside in the verandah. During his examination inside the dispensary by the doctor, the accused made a confession within the hearing of the doctor. *Held*, that it was excluded by sec. 26. 42 B. 1=42 I.C. 597=10 Bom.L.R. 683. See also 1939 A.L.J. 732; 91 I.C. 806 =1925 L. 557; 1937 M. 209=(1937) 1 M.L. J. 154; I.L.R. (1940) Nag. 679=1940 N.L. J. 623; 1936 L. 380; 1936 N. 190. A confession while in police custody is of little value. 10 P.R. 1914 (Cr.)=25 I.C. 825. See also 12 W.R. (Cr.) 82. As to meaning of “in custody,” see 77 I.C. 429=1924 R. 173. Evidence to prove a confession made while an accused person is in police custody is inadmissible. 22 I.C. 150=15 Cr.L.J. 6. See also 22 B. 235; 1929 N. 350. In 7 W.R. (Cr.) 56, evidence of policeman who overheard a prisoner’s statement made in another room to another held admissible. But see also 20 B. 165; 39 I.C. 977=21 C.W.N. 694. Where the accused in judicial lock-up made a confession to fellow prisoners, the policeman whose duty it was to guard the lock-up was present. *Held*, that his presence did not make the confession inadmissible as accused was in magisterial custody as opposed to police custody. 151 I.C. 894=1934 L. 75. A police officer when giving evidence should not be allowed to state that an admission of guilt was made by the accused. 13 I.C. 783=16 C.W.N. 238; 15 C. 607. See also 19 B. 363. An accused’s confession to some person other than a police officer is admissible in evidence. 26 I.C. 654; (as) at coroner’s inquest. 28 Bom.L.R. 111=50 B. 111=1926 B. 151. Admissions of facts which are not of an incriminating nature are admissible in evidence. 4 Bom.L.R. 312. Actual arrest and detention are not necessary. 1 R. 609=77 I.C. 429=1924 R. 173. Statement made by accused to the police in ignorance of the complaint filed against him is admissible under secs. 25 and 26 as the accused was not in police custody nor was he aware of the complaint against him and the statement could be used as an admission under sec. 18 and to use the statement was not contrary to sec. 162 of the Criminal Proce-

cedure Code. 9 P.L.T. 449=111 I.C. 721=1928 P. 473. The accused was in the police lock-up for three days and was subsequently brought out temporarily, and taken to the house of the Superintendent of Post Offices. The accused made a confession before this officer and was subsequently taken back to the police lock-up. *Held*, that the confession was inadmissible in evidence as the separation of the accused from the police was only temporary. 108 I.C. 398=1928 L. 282. Sec. 26 is not inapplicable in cases where the arrest by the police officer of person making the confession is illegal. Whether the arrest is legal or illegal the mischief which the section is intended to avert remains all the same, and a confession made by the arrested persons while in the custody of the police officer is inadmissible under sec. 26. The illegality of the arrest does not affect the operation of sec. 26. 17 P. 369=19 P.L.T. 268=1938 P. 308.

**POLICE OFFICERS** referred to in sec. 26 need not be investigating police officers. 42 B. 1=42 I.C. 97=19 Bom.L.R. 683. Sec. 26 has always been taken to apply to confessions made to some person other than a police officer. I.L.R. (1940) Lah. 242=188 I.C. 498=1940 Lah. 129 (F.B.). Confessional statement to dafadar after arrest not admissible. See 21 P.L.T. 171. A confession to a Police Patel is inadmissible. 31 I.C. 340 (2)=17 Bom.L.R. 898. Police officers in Native States are police officers under this section. 22 B. 235. See also 20 B. 795 and other cases cited under sec. 25. Jailor is not police officer. 20 B. 794. “Police officer” includes a Chowkidar. 1943 Cal. 612. Where the accused was in the custody of the village chaukidar when he admitted his guilt before certain villagers, *Held*, that the confession was not admissible in evidence. 8 Luck. 410=10 O.W.N. 348=1933 O. 192; 11 O.W.N. 119=1934 O. 19. As sec. 25 refers only to a police officer, a Court should not extend it to other classes of officers merely on grounds of similarity of functions. The restrictive provisions of sec. 25 should not be applied to Excise Officers. 39 Cr.L.J. 338=1938 M. 460=(1938) 1 M. L.J. 238. But see also 1938 Sind 1=32 S. L.R. 185. Statements by accused to C.I.D. Officer—Admissibility. 1938 M.W.N. 825. The expression ‘police officer’ is not to be read in a technical sense but in its more comprehensive and popular meaning. Whatever reasons existed for inducing the Legislature to make a departure from the English law and exclude a confession made to a police officer apply with equal if not greater force to an officer who is clothed with powers of a police officer and is actually engaged in the investigation of a crime in respect of which the con-

fession is made to him. Hence an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a police officer within the scope of sec. 25. 32 S.L.R. 185=172 I.C. 968=1938 Sind 1. Where an accused confesses to having caused the death of a woman and admits having robbed her after her death, but during that confession introduces into it circumstances with a view to excuse himself from a conviction for murder if cannot be contended that the confession must be accepted as it is and that so taken it is not sufficient for a conviction. Such a contention is wholly unacceptable and is contrary to practice and authority. When the confession is shown to be voluntary and made with due apprehension of what was said and of the consequences, the confession must be accepted and acted upon along with other circumstances as a whole, including the other evidence, in the case. 187 I.C. 481=1940 M.W.N. 169.

There is no statutory period of time to which an accused is entitled for making a confession after he is sent to the magisterial custody. All that is required is that he must have sufficient time for reflection, the mere fact that the confession was made one day after the accused was handed over to the magisterial custody would not by itself show that he had no sufficient time for reflection or make the confession bad on that account. 47 Bom.L.R. 63=1945 Bom. 292.

**STATEMENT MADE IN POLICE CUSTODY AND BEFORE MAGISTRATE** is not admissible either against him or against a person jointly tried with him, unless it has led to discovery of any fact mentioned in sec. 27. 28 I.C. 145=16 Cr.L.J. 257. A confession though made in the presence of a Magistrate is of very little value, when the accused is not aware of his presence. 22 I.C. 150=15 Cr.L.J. 6. See also 31 S.L.R. 460=1937 Sind 212. A confession made in the presence of a Magistrate though on leave, is nevertheless relevant and admissible. 22 I.C. 150. *Juge de* instruction in French India who is a sort of committing Magistrate with power to commit or discharge a prisoner but not to convict is "a Magistrate" within the meaning of sec. 26 and a statement made by an accused in police custody to such person is admissible in evidence. 52 M. 529=56 M.L.J. 628. Confession to Honorary Magistrate—Admissibility of. 152 I.C. 998=1934 L. 417. Confession made before Magistrate of Native State, is within the section. 144 I.C. 157=1933 A. 286; 151 I.C. 311=1934 Sind 103. A statement made by the accused at the dock before the Magistrate, if it amounts to a clear confession is certainly admissible in evidence against the accused; its value is not discounted by the fact that the accused was at that time in the custody of the police. 1930 M.W.N. 1249. The mere

fact that the Court constable was allowed to remain present while the co-accused were making their confessions before the Magistrate does not involve the total exclusion of the confessions from evidence, but it certainly detracts from their evidentiary value. 152 I.C. 275=14 P.L.T. 111=1934 P. 586. See also 165 I.C. 319=1936 R. 455. The "custody" of a police officer for purposes of sec. 26 is not mere physical custody. A person may be in the custody of a police officer, though the latter may not be physically in possession of the person of the accused making the confession. Once an accused person is arrested by a police officer and is in his custody, the mere fact that for some purpose or other the police officer happens to be temporarily absent and during such absence leaves the accused in charge of a private individual, does not terminate the custody of the police officer. The accused must be deemed to be still in the custody of the police officer. 17 P. 369=19 P.L.T. 268=1938 P. 308; 1941 Pesh. 22.

**ORAL CONFESSION.**—A confession to be admissible in evidence need not be recorded. It may be oral, and may be proved by the Magistrate to whom the oral confession was made. 45 I.C. 843; 11 P.R. 1918 (Cr.); 34 P.L.R. 896=1933 L. 513; 1934 A.L.J. 178=1934 A. 351. See also 1933 Cr.C. 1513=1933 L. 998; 10 O.W.N. 923=1933 O. 432. A confession made by an accused to a Magistrate on leave in the presence of a police officer who had the accused under arrest at the time is not admissible in evidence, where no record was made of his statement under sec. 164 of the Cr.P. Code. 118 I.C. 46=1929 A. 855. Where a Magistrate simply accompanies a police officer while the police officer is making the investigation, the evidence of the Magistrate as to what happened is not admissible under sec. 26. 34 Cr.L.J. 754=1933 A. 394. See also 1941 Pesh. 22 (confession to doctor while in police custody but not in presence of police officer is inadmissible).

**PLEA OF GUILTY BY UNDEFENDED ACCUSED ENFEEBLED BY ILLNESS.**—A plea of guilty can be allowed to be withdrawn of the accused was at the time of making it, enfeebled by illness and was undefended. 28 I.C. 145=16 Cr.L.J. 257.

**CONFESSION—ADMISSIBILITY OF, AGAINST CO-ACCUSED.**—A confession by an accused is not admissible against co-accused under sec. 30. If the former is convicted on his plea of guilty. 28 I.C. 145=16 Cr.L.J. 257; 150 I.C. 875=1936 O. 156. A confession of an accused recorded outside British India by a Magistrate is not excluded by sec. 26. 69 I.C. 257=17 N.L.R. 113. Confession not recorded under sec. 164, Cr.P. Code, but recorded under sec. 339 (2), Cr.P. Code, before tender of pardon. I.L.R. (1943) Kar. 285.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

SEC 27.—(N.B.—See also Notes under secs. 24-26.)

SCOPE OF SECTION.—See 45 C. 557=22 C. W.N. 213=44 I.C. 321; 1941 Nag. 86. Sec. 27 has to be read as a proviso not only to sec. 26 but to secs. 25 and 26 taken together. 1941 P.W.N. 653. Sec. 27 controls the prior secs. 24, 25 and 26. If therefore a confession comes within the purview of sec. 27, it is admissible in evidence, even if it is hit by sec. 24 of the Act. Sec. 27 is not merely a proviso to sec. 26, but also secs. 24 and 25. Sec. 27, however, only refers to the statement of a person accused of any offence and in the custody of a police officer. It does not apply when the person making the confession is not in the custody of a police officer at the time when the confession is made. 24 Pat. 671. Sec. 27 has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. 54 L.W. 136=1941 Mad. 765=(1941) 2 M.L.J. 209. The exact information received from the accused must be established before sec. 27 can be resorted to. 46 C.W.N. 180=I.L.R. (1942) 1 Cal. 436=1942 Cal. 593. The word "thereby" in "fact thereby discovered" in sec. 27 refers to that portion of the information only which may be held to be the proximate cause of the discovery. In order that this may be admissible against the accused, (1) the information must be the one given by the accused—the statement conveying the information must be his own statement in his own language, and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible. 48 C.W.N. 180=1942 Cal. 593; 55 L.W. 263=1942 Mad. 444=(1942) 1 M.L.J. 517. See also 49 Mys.H.C.R. 444; 50 Mys.H.C.R. 108. Sec. 27 is an enabling section providing an exception to the previous ones which exclude confessions made to or in presence of the police. If the conditions of the section are fulfilled, it allows a confession to be proved. I.L.R. (1936) N. 78=1936 N. 200. Sec. 27 is the nature of a proviso relating to the previous sections which lay down the general rules as to the inadmissibility of confessions made in certain circumstances. Whether a confession to which sec. 27 applies was induced by promises or not is immaterial. The general ground for not admitting confessions made either to a police officer, or made under any inducement or made by persons while in custody is clearly the danger of admitting false confessions; but the necessity for this precaution disappears

when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. (1936 N. 200, Foll.) I.L.R. (1937) N. 268=168 I.C. 962=1937 N. 220. Under sec. 27 so much of the information given by the accused as relates distinctly to the facts of the discovery in consequence of the information given by him may alone be proved, whether it amounts to a confession or not. Where the fact discovered was that the grave in which the corpse of the deceased was interred was dug up with a spade produced by the accused, the only part of the information given by him which can be admitted is that relating strictly to the discovery of the spade with which the grave was dug. It is not possible to admit any statement by him that he murdered the deceased. 1937 M.W.N. 881. See also 1939 A.L.J. 732=1939 All. 685. Where a person accused of murder makes a statement in the presence of the police and the panch that he had committed the murder and had removed the ornaments of the deceased, which he afterwards produces the statement that the accused had committed the murder does not fall within sec. 27 because it is not a statement required to lead up to the production of the property. It is quite enough to say that he would show the property which belonged to the deceased. 45 Bom.L.R. 884. See also 56 L.W. 107=(1943) 1 M.L.J. 192; (1943) 2 M.L.J. 283. Where facts are discovered by the accused himself combined with a statement, such a statement is not admissible under sec. 27. The Court must distinguish between cases where discovery is made in consequence of information given and a disclosure by an accused accompanying a statement. While in the former case a statement of the accused leading to discovery is admissible, the statement in the latter case is inadmissible under sec. 27. 1940 M.W.N. 1238=52 L.W. 898=1941 Mad. 306; 1941 M.W.N. 956. The intention of the Legislature in enacting sec. 27 was that the minimum portion of a confession made to a police officer or of information given to him should be admitted into evidence which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order to adequately sustain such discovery. 170 I.C. 453=I.L.R. (1937) A. 710=1937 A. 485; 53 L.W. 567=1941 Mad. 658. The preamble in a confessional statement which has no relation to the discovery of the facts is not admissible under sec. 27. (1939) 2 M.L.J. 487=1939 M. 593. The word 'person' is used in sec. 27

in the singular designedly. The section ought to be construed strictly. In cases where one accused has agreed to point a place where a fact will be discovered in pursuance of his statement, that section would not cover similar statements of other accused persons in police custody. 1945 O.W.N. 44=1945 A.W.R. (C.C.) 23=1945 O.A. (C.C.) 23=1945 Oudh 235; 1945 Cal. 137. See also I.L.R. (1944) 2 Cal. 76. Sec. 27 refers to a fact being discovered; a fact means and includes, according to the definition in sec. 3, "anything state of things or relations of things capable of being perceived by the senses". 1940 M.W.N. 163. "Leading to discovery"—Statement leading to discovery not immediately but ultimately admissible. 1940 M.W.N. 163=1941 M. 290. Statement leading to discovery—What constitutes—Fact discovered not because of statement made but due to act of another—Statement not admissible. 1940 Mad. 744=(1940) 1 M.L.J. 758. See also 1941 M.W.N. 956; 50 Mys.H.C.R. 106; 49 Mys.H.C.R. 444. Before pointing out the pile of stones under which the dead body lay buried, the accused stated to the police officer that the dead body had been buried by him. Held, that the statement was admissible under sec. 27. 47 P.L.R. 254. (Discovery of fact—Accused producing articles alleged to be stolen and making confession—Subsequent claim to articles as own—Admissibility of confession. See 46 Cr.L.J. 613=A.I.R. 1945 Pat. 161). Information given by an accused, leading to discovery of facts under sec. 27, is not inadmissible on the ground that the officer recording the information knows before so recording what information the accused is going to give. 1943 M.W.N. 11. Statements which are admissible under sec. 27 can be proved only against the person who made them. The section does not sanction the letting in of the statement of one person as evidence against another person. I.L.R. (1944) 2 Cal. 76. See also 1945 O.W.N. 44; 49 Mys.H.C.R. 444. Where a confession is made by the accused while in police custody after he was arrested by the Chaukidar and was being escorted under his control, its admissibility is not affected by the possibility of its having been made during the temporary absence of the Chaukidar. Where a place is pointed out by the accused to a police officer as the place of occurrence and nothing is found there, the pointing out of the place is really evidence of a confession of his guilt and is therefore inadmissible under sec. 26. 195 I.C. 493=1941 O.W.N. 953=1941 Oudh 563. The only portions given by the accused which can be admitted under sec. 27 are those which relate distinctly to the facts discovered thereby. But statements made by one accused involving another accused, cannot be admitted when they do not in any way relate to those facts. 1940 M.W.N. 764=52 L.W. 284. Before a confessional statement

made by a person accused of an offence who is in the custody of a police officer may be proved against him, two conditions must be observed firstly some incriminating thing must be proved to have been found as the direct result of the information supplied by the accused and, secondly, it must be confined to that portion which refers exclusively to the thing found; in other words, when any incriminating object is proved to have been found as the direct result of information given by a person accused of any offence in the custody of a police officer that portion of the information which has led to the object being found may be proved—provided it refers clearly to that object, even though the information provable is self-incriminating. The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in sec. 27 is a confession of the offence charged and not of anything else. I.L.R. (1937) Mad. 695=1937 Mad. 618=(1937) 2 M.L.J. 60 (F.B.). If an accused makes a statement which is admissible under sec. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. I.L.R. (1936) N. 78=1936 N. 200. See also 17 Mys.L.J. 158; 52 L.W. 981; 1941 A.L.J. 86. In regard to statements made by accused persons the Cr.P. Code does not, in sec. 162, alter the provisions of sec. 27, Evidence Act. There is no contradiction in the two sections as sec. 162 does not apply to statements by accused persons. 55 A. 463=1933 A. 440. See also 43 Bom.L.R. 157; I.L.R. (1940) Nag. 679=1940 N.L.J. 623; 1939 Pat. 577=1939 P.W.N. 300; 1941 P.W.N. 653; I.L.R. (1939) Mad. 947=(1939) 2 M.L.J. 455. Sec. 27 qualifies not only secs. 25 and 26 but also sec. 24 all three of which lay down general rules excluding confession and the same broad grounds underline all the three. 45 C. 557. See also 6 A. 509; 11 B.H.C.R. 242; 9 L. 671; 1928 L. 476; 152 I.C. 998=1934 Cr.C. 643=1934 L. 417. The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions but the necessity for the exclusion disappears in a case provided by sec. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. 1928 L. 476. See also 61 C.1053=63 C.L.J. 232=1936C. 316. Sec.27 has nothing to do with the question whether the fact discovered is or is not relevant. 10 L. 283=1929 L. 344 (F.B.). Sec. 27 being a proviso to the two preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being

exercised to see that the purpose and object of secs. 25 and 26 and the safeguard provided in sec. 27 are not rendered nugatory by any lax interpretation. 34 C.W.N. 106=1930 C. 291. See also 173 I.C. 418=18 P.L.T. 964=1938 P. 60. As to the use that can be legitimately made of confession to police when direct evidence is given against the accused at the trial. 77 I.C. 890=1924 A. 207. It is open to the defence to check such evidence, e.g., the consistency of an approver's story. 34 C.W.N. 106. A statement made by an accused to a police officer is inadmissible against a co-accused. 20 A.L.J. 178=65 I.C. 849. In construing sec. 27 the word "confession" does not necessarily mean a complete confession of guilt but means any includes any incriminating statement. 115 I.C. 1=1929 L. 338. See also 1941 Nag. 86. Statements made by an accused to a police officer in the circumstances provided for in sec. 27 have been treated as a matter of unquestioned practice in all the High Courts, as admissible in evidence notwithstanding that they have been made to an investigating officer during the progress of an investigation, and fall under sec. 162, Cr.P. Code. Both sec. 27 and sec. 162 must be given effect to sec. 162, having effect in every case except those to which sec. 27 applies by way of exception or proviso. 1939 Pat. 577=18 P. 450=20 P.L.T. 420. A confessional statement made by the accused and recorded by the police officer to whom it is made is not taken out of statements admissible under sec. 27 merely because it is attested by witnesses present at the time. 56 L.W. 479 (1)=(1943) 2 M. L.J. 293. See also 20 Mys.L.J. 367. It does not follow that a statement falling under sec. 27 by an accused person is inadmissible, because it is made by him to a Sub-Inspector of Police at an interview in violation of the Jail Rules and Police Standing Orders. (1943) M.W.N. 11.

Per Collister, J.—Sec. 162, Cr.P. Code, contains provisions plainly and directly, and therefore specifically affecting sec. 27 quod statements made under that section by an accused person to a police officer in the course of an investigation. In other words, there is a 'specific provision to the contrary' within the meaning of sec. 1 (2) of the Cr. P. Code. I.L.R. (1940) All. 396=1940 A. L.J. 241=1940 All. 263 (F.B.). See also 1939 N.L.J. 585. The provisions of sec. 27 have not been repealed by sec. 162, Cr.P. Code. Sec. 27 embodies the special rule, while sec. 162, Cr.P. Code, is the general rule, and the latter rule does not derogate from the former. Therefore statements made by accused persons to the police after their arrest, and admissible under sec. 27 are admissible in evidence against them and are not excluded by sec. 162, Cr.P. Code. 50 L.W. 423=1939 Mad. 840=(1939) 2 M. L.J. 635. Per Young, C.J., Tek Chand, Din Mohammad, Monroe and Ram Lall, JJ. (Dalip Singh and Bhide, JJ., dissenting). —Sec. 27 is pro tanto repealed by sec. 162, Cr.P. Code, and evidence of information,

whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not be considered admissible in evidence. I.L.R. (1940) Lah. 242=188 I.C. 498=1940 Lah. 129 (F.B.). The effect of the amendment of sec. 162, Cr.P. Code, in 1923 upon sec. 27 has been left open and not decided by the decision in 18 Pat. 234 and sec. 277 is still valid and applicable as before. I.L.R. (1940) Nag. 679=1940 N.L.J. 623. See also 43 Bom.L.R. 157. The words of S. 162, Cr. P. Code, are wide enough to exclude of confessional statement made to a police officer in the course of investigation, irrespective of whether a discovery is made or not. But the provisions of sec. 27 are quite independent of sec. 162, Cr.P. Code and the amendment of the latter in 1923 is not intended to abrogate or impair the effect of sec. 27; hence a statement excluded by sec. 162 may become admissible under sec. 27. 185 I.C. 310=1939 N.L.J. 585=1940 Nag. 66. See also 188 I.C. 311=44 Cr.L.J. 573; 44 Cr.L.J. 41.

**Applicability of Section.**—Sec. 27 is a proviso to secs. 24, 25 and 26. Statement made to the police is admissible though the accused himself makes the discovery about which the statement it made. 12 Cr.L.J. 119=9 I.C. 718; 1930 C. 291. See also (1939) 1 M.L.J. 756 (P.C.); 24 Pat. 671. It must be strictly construed. 1930 C. 291; 10 O.W.N. 937=1933 C. 404. Secs. 161 and 162 of Cr.P. Code do not override the provisions of secs. 27 and 28. 5 P. 63=1926 P. 232. See also 4 R. 72=1926 R. 116; 55 A. 563; 35 P.L.R. 738=1934 L. 695; 23 Pat.L.T. 475=1942 Pat. 156; 20 Mys.L.J. 367. Confession to person in authority who holds out inducements to confess is not admissible even so far as it relates to the discovery of articles. 4 R. 72=96 I.C. 145. See also 41 Cr.L.J. 242=1940 Mad. 12. Where there is immediate connection between discovery and statement made to a police officer, the latter is admissible in evidence. 20 Cr.L.J. 305=50 I.C. 481. If the recoveries were made in consequence of the information, supplied by the accused, the statements made by them are admissible. 1923 L. 434. A statement is admissible in evidence under sec. 27, if as a consequence of it, there is discovery incriminating the person making the statement. 72 P.L.R. 1916=33 I.C. 823. See also 16 Cr.L.J. 545=29 I.C. 817=11 P.R. 1915 (Cr.); 47 P.L.R. 254. The Legislature has prescribed two limitations in order to define the scope of the information provable against the accused: (1) The information must be such as has caused the discovery of the fact, and (2) the information must "relate distinctly" to the fact discovered. The requirements of both the conditions must be satisfied before an incriminating statement can be received in evidence. Thus only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. 10 L. 283=115 I.C. 6 (F.B.). (9 L. 626=1928 L. 308, overruled; 1926 M. 638; 1928 P. 162,

diss. from). See also 1929 L. 338; 1929 Sind 175; 1930 Sind 225; 151 I.C. 883=36 Bom. L.R. 384=1934 B. 233; 30 N.L.R. 269=150 I.C. 623=1934 N. 71; 28 S.L.R. 41=1934 Sind 159; 1933 N. 252. Under sec. 27, the information to be proved must relate distinctly to the fact thereby discovered. The word "distinctly" in sec. 27 is used in some sense other than the word "directly". It is meant to exclude certain things and to limit and confine the information which may be proved within definite limits and not necessarily to include everything which may relate to that information. Even more important is the word 'discovered'. It is used in a peculiar sense. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer rests on the credibility of the statement of accused, but rests on the credibility of the witnesses who depose to the existence of that fact. The rest of the information is not admissible. 1929 L. 338=115 I.C. 1. Though a person points out a place not his own where stolen property is concealed, the Court should not conclude that the person had received or retained it. 39 I.C. 330=1 P.R. (1917) (Cr.). Accused's knowledge of place of concealment does not prove that he concealed it. 1923 L. 238 (2). The mere knowledge of the place of concealment does not show that the person having such knowledge actually received the stolen articles or participated in the act of concealment. 1923 L. 238 (2).

**Custody of Police Officer.**—"Custody", meaning of. See 18 L. 106; I.L.R. (1936) N. 78. Per Bhide and Din Mahommed, JJ.—"Police custody" does not necessarily mean custody after formal arrest and it also includes "some form of police surveillance and restriction on the movements of the person concerned by the police". It is open to an accused person to prove in every case that arises that he was actually in the custody of a police officer, although in the police diaries he was not shown to have been formally arrested. I.L.R. (1940) Lah. 242=188 I.C. 498=1940 Lah. 129 (F.B.). In the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Cr.P. Code, their presence with the police under some restraint amounts to the "custody" which is contemplated by the section. If a statement made by a person in the above circumstances leads to the discovery of any matter, it is admissible. 18 L. 106=1937 L. 620. When a person stated that he has done certain acts which amount to an offence he accuses himself of committing the offence; and if he makes the statement to a police officer as such, he submits to the custody of the officer within the meaning of S. 46 (1) Cr.P. Code and is than in the custody of a police officer within the meaning of sec. 27. 12 P. 241=1933 P. 149 (S. B.). Where a person had been suspected from the beginning itself and was treated as accused person and

was not kept under much restraint as he could hardly have absconded. Held, that he was in custody of police and statements leading to discovery of things were admissible. 15 L. 310=1934 L. 150 (2); 34 P.L. R. 637=1933 L. 516. Even if an accused is not formally arrested when he gives information leading to discovery, if it is proved that he was arrested before he went to the spot from which the articles are recovered, the accused shall be deemed for all practical purposes as in police custody when giving such information. I.L.R. (1936) N. 78=1936 N. 200. Where a police officer, although he arrested a person charged with being in possession of cocaine after the finding of the cocaine with him, interviewed the accused and was with him for a considerable time and walked with him to the place where the accused pointed out the spot where the cocaine might be found, held, that the accused was in police custody at the time when he made the statement as to the spot where the cocaine could be found and his statement was admissible under sec. 27. 144 I.C. 74=1933 C. 148. Statements made by the accused to the daroga showing the place in the jungle where the occurrence in question, viz., taking away a female and having sexual intercourse with her took place, cannot be admitted in evidence they being in the nature of a confession made of a police officer while in custody. Sec. 27 has no application and would make the statements admissible. 143 I.C. 797=1933 C. 146.

**Statement to police—Recording of—Duty of Police.**—It is not the duty of the police to decide what evidence is admissible and what is not, and a statement made by an accused person should not be mutilated. The duty of the police, if they desire to record a statement, is to record it as given and leave it to the Court to decide what evidence is admissible. The practice of police officers giving statements not made to them in the first instance in evidence but statements made obviously for the second time before panchayatdars must be condemned. Such a second statement is inadmissible in evidence. It is the first statement of the accused, to whomsoever made, that leads to the discovery of a fact, if a fact is discovered. I.L.R. (1940) Mad. 254=1940 M.W. N. 860=1940 Mad. 710.

The correct procedure for recording and proving a confessional statement admissible under sec. 27 of the Evidence Act, is for the police officer to record in the first person the statement of the accused, and when he gives evidence, to say that the accused made a confession statement, that he took it down, and then, for the purpose of refreshing his memory, to refer to the actual statement, which is in the police diary and prove before the Court by that method what the accused had said. 58 L.W. 85=1945 M.W.N. 102=1945 Mad. 202=(1945) 1 M.L.J. 223. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused.



They should not be paraphrased. It will be for the trial Judge who has such a record before him to decide how much of it is admissible under the section. I.L.R. (1937) M. 695; 1937 M. 618=(1937) 2 M.L.J. 60 (F.B.). See also 171 I.C. 225=(1937) 2 M.L.J. 32.

**Information not leading to Discovery.**—Statements leading immediately to the discovery of property are properly admissible. Other statements connected with the one thus made and immediately, but not necessarily or directly connected with the fact discovered are not admissible. 32 I.C. 136=13 A.L.J. 1077; 1930 B. 244. See also 53 L.W. 567=1941 M.W.N. 371; 1937 A.M.L.J. 18; 31 S.L.R. 494=1937 Sind 251; 1942 Cal. 593; 1942 Mad. 444=(1942) 1 M.L.J. 517. The language of the section and its place in the Act make it clear that discovery therein referred to is discovery to or by police officers. 49 C. 167=25 C.W.N. 788. Statements made by an accused person which are or may be provable under sec. 27 should be clearly and carefully recorded by the police officers concerned.

**Information from two Persons—Only that Leading to Discovery is Admissible.**—Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. 64 I.C. 502=1932 L. 315. See also 1939 A.M.L.J. 56; 1938 M.W.N. 1272. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of sec. 27. (Ibid.) See also 1930 B. 244. Where two or more persons are alleged to have given certain information to the police which led to the arrest of the accused, it is only the information given first which is admissible under secs. 27 and 29. 17 Cr.L.J. 273=34 I.C. 993; 1927 L. 739; 1930 B. 244. Information by two persons which leads to the discovery of a fact is relevant and so much of the statement of each which relates to the fact discovered is admissible against both; statements of co-accused after the discovery are irrelevant. 17 Cr.L.J. 506=36 I.C. 474; 1930 B. 244. After one accused has made a discovery the other should not be asked to do the same. 36 I.C. 474.

**Joint Discovery—Track Evidence.**—Track evidence is of no value if the comparison is made 8 or 9 days after the affair. 15 Cr.L.J. 499=24 I.C. 587. Where more than one accused person in custody of the police point out this or produce that jointly, such an evidence of joint discovery is not sufficient for a conviction. 24 I.C. 587. Joint discoveries are not admissible at all against any of the accused unless it can be shown who first made the discovery. 116 I.C. 619=1929 L. 665.

**Statement after Discovery—Pointing out Property—Value of.**—A statement by accused not leading to discovery of property

but made after discovery and production of the property is irrelevant. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by some one else. 13 Cr.L.J. 529=15 I.C. 801; 48 L.W. 780. When a material fact has already been discovered, the accused's statement while in police custody relating thereto is not admissible under sec. 27. 12 Cr.L.J. 35=9 I.C. 232; 36 P.L.R. 40=1934 L. 786. See also 48 L.W. 780=1938 M.W.N. 1118. The discovery previously need not be necessarily by the police officer. 152 I.C. 565=1934 L. 313. A fact known to the police cannot be re-discovered on the statement of an accused person so as to make such statement or such incriminating conduct admissible under sec. 27. 1929 S. 250. See also 1929 N. 350; 50 Mys.H.C.R. 106. No portion of any statement made by the accused to any police officer during investigation is admissible under sec. 27 in as much as sec. 162 of the Cr.P.Code contains specific words affecting sec. 27. I.L.R. (1940) All. 396=1940 A.L.J. 241=1940 All. 263 (F.B.).

**Illustrative Cases—(a) Evidence held Admissible.**—Where an accused person stated to the police that he had buried an article at a particular place, took the police that he had buried an article at a particular place, took the police to that place and delivered the article to them, the statement of the accused to the police is admissible under sec. 27. 112 I.C. 55=29 Cr.L.J. 967. So also a statement that he buried the dead body at a particular place. 1930 L. 530. The discovery of ornaments at his house by accused is clearly a fact discovered. 45 A. 300=73 I.C. 62=1923 A. 352. The statement of the accused that he could point out a spot and that blood stains would be found there is admissible, but not that it was at that spot that he committed the crime. 14 Cr.L.J. 190=19 I.C. 190. If the accused produced the article himself, the fact that he produced it at a particular place may be proved, but the accompanying statement that he buried it there is inadmissible. 19 I.C. 190.

**(b) Evidence held not Admissible.**—A person accused under sec. 328, I.P.Code, pointed out during the police investigation a dhatura tree and said that he had taken the fruit of it. The statement was inadmissible. 32 I.C. 136=13 A.L.J. 1077. On a trial for murder a witness stated that the accused offered to point out the place where the dead body was and on being questioned as to who had buried the body he said that he (accused) had done to. Held, that the accused's statement that he buried the body was not admissible in evidence. 55 I.C. 685=21 Cr.L.J. 349 (L.). The discovery of a person who is afterwards proved to be dacoit is not the discovery of a fact within sec. 27. 43 I.C. 111=14 N.L.R. 192.

**Miscellaneous.**—The expression "fact" as



Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court been fully removed, it is relevant.
29. If such a confession is otherwise relevant, it does not become irrelevant, merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered,

whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

defined in sec. 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in sec. 27. 10 L. 283=1929 L. 344 (F.B.). The word "information" cannot be used as synonymous with the word "statement". The word "information" as distinct from the word "statement" connotes two things, namely, a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by other person. 115 I.C. 1=1929 L. 338. A confession caused by some inducement from some person in authority is inadmissible in evidence. 14 Cr.L.J. 417=20 I.C. 401 (Bur.). There is no reason why the general rule that a confession should be voluntary should not apply to a confessional statement under sec. 27. If it has been induced, it is of no evidential value, and the Court would exclude it from consideration. 50 L.W. 435=1939 M.W.N. 873.

**Statement of accused while in Custody of Police.**—A husband assaulted his wife and his wife died as a result of it. The husband immediately went to the police station and reported that he went to the west facing room and finding his wife sitting, wounded her and she became senseless. On receipt of this information the police went to the house and found the corpse. Held, that the statement to the police was not admissible under sec. 27 as the husband was not, at the time of making the statement, a "person accused of an offence" not having been charged with any offence then. 7 P. 411=1928 P. 491. It is legitimate to record evidence that an accused person said: "I will point out certain property" if such statements lead to a discovery, but it is not legitimate to record as evidence that an accused said "I will point out certain property which I obtained as my share of the booty in the dacoity". 44 I.C. 967=19 Cr.L.J. 459. Where there is practically no evidence at all against an accused except an incriminating statement under sec. 27, the latter should be viewed with great caution and suspicion. 14 Cr.L.J. 190=19 J.C. 190. The statement of an accused that he buried the weapon in certain place is relevant but not the part of the statement that it was the weapon with which he had

committed the crime. (Ibid.) A statement made by an accused may be proved under sec. 27 so far as it relates to any material facts discovered in consequence even though the police were present when the statement was made. 69 I.C. 377=14 L.W. 418. To bring an information by accused under sec. 27 the information must have had the direct effect of leading to the discovery of the stolen property. Unless a confession is corroborated in material particulars and by independent testimony it should not be the basis of a conviction. 54 I.C. 479=11 L.W. 8. (See also notes under sec. 30, infra.) An accused gave information to the police in these words: "I shall produce the lathi with which I killed Ismail." It had been admitted as evidence under sec. 27. The lathi which the accused handed over had no marks of blood whatsoever. Held, that if the mere fact of the lathi having been handed to the police might be relied upon, for the purpose of introducing an alleged confession made by the accused to the police the provisions of sec. 26 would become nugatory. 1929 S. 175. The ground on which the information received from an accused person is admitted in evidence under sec. 27 is that the fact discovered thereby is to some degree, which will vary with the circumstances of each case and the nature of the fact discovered, a guarantee of the truth of the information. A.I.R. 1942 Mad. 450. (1942) 1 M.L.J. 503.

**Sec. 28**—Confessions to the Magistrate made soon after inducements held out by certain Zamindars sent by the police are inadmissible. 12 Cr.L.J. 119=9 I.C. 718. A confession by an accused in police detention as a suspect made in the immediate vicinity of the police to a zaildar could not be proved unless made to a Magistrate though the accused may not have been handicapped, as, to all intents and purposes, he was in police custody. 26 P.R. 1916 (Cr.)=34 I.C. 642.

**Sec. 29**—The provisions of sec. 164 do not affect the provisions of sec. 29, and therefore a confession cannot be excluded from evidence as irrelevant merely because all the provisions of sec. 164 were not carefully complied with. 10 O.W.N. 937=1933 O. 404. See also 1937 M.W.N. 1325. Statements made by the accused to a Magis-

### 30. When more persons than one are being tried jointly for the same offence,

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

<sup>1</sup>[*Explanation*.—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.]<sup>2</sup>

#### LEG. REF.

<sup>1</sup>The explanation was inserted by Act III of 1891, sec. 4.

<sup>2</sup>Cf. Explanation 4 to sec. 108 of the Indian Penal Code (Act XLV of 1860).

trate when produced by the police for purposes of remand are admissible. 148 I.C. 1002=1934 R. 78. See also 1941 A.L.J. 86.

**Sec. 30: Scope and Applicability**—"May take into Consideration" points to necessity of there being other evidence on record to which the statement can lend assurance. 1928 N. 213. See also 177 I.C. 494=47 L.W. 139=1938 M. 675. It is not the law that the confession of one accused must be corroborated by other evidence before it can be accepted against a co-accused; the correct position is that there must be a basis of substantial evidence to which the confessional statement may be added. If there is substantial evidence against the accused and there is some lingering doubt, the confession of a co-accused may be taken into account to set that doubt at rest. 55 L.W. 263=A.I.R. 1942 Mad. 444=(1942) 1 M.L.J. 517. See also I.L.R. (1945) Kar. 419; 1945 A.W.R. (H.C.) 291 (Reference to antecedent circumstances, nature of). Under sec. 30, in order that a confession may be used against a co-accused, it is necessary that the admission or confession implicates the maker of the confession to the same extent as it implicates the co-accused, in the commission of the offence for which they are both being jointly tried. 42 Bom.L.R. 938=I.L.R. (1941) Bom. 27=1941 Bom. 50; 1941 Mad. 267. Where a statement by an accused person implicates the other accused, it would require the strongest independent evidence if any reliance is to be placed upon it at all. Under sec. 30 such a statement can only be taken into consideration; it is not evidence against the other accused. 52 L.W. 898=1941 Mad. 306. Statement of an accused made at the police station against the co-accused is inadmissible and cannot be used as evidence as against the co-accused. 34 P.L.R. 259=1933 L. 167. Sec. 30 applies to a proceeding under sec. 110, Cr.P. Code, against a number of persons, one of whom has made a confession implicating other persons whose conduct is also the subject of an enquiry. 1934 A.L.J. 1170=1934 A. 927. See also 1936 S. 236; 17 L. 547=38 P.L.R. 1018; 1937 N. 17 (F.B.); 1937 B. 31; 1937 M. 321; 1937 C. 39; 1936 O.W.N. 671. A confession by a co-accused may be taken into considera-

tion against another accused; confessional statements under sec. 27 come within the terms of sec. 30. But there must be admissible evidence to point to the co-accused's guilt. In assessing the probative value of the evidence, a co-accused's confession may be taken into consideration. But where the evidence against the co-accused is only that he was in the company of the other accused before the crime and after the crime, there is no sufficient basis to convict him. 52 L.W. 420 (2)=1940 M.W.N. 1045=1941 Mad. 238. See also 1942 Mad. 444=(1942) 1 M.L.J. 517. A statement of co-accused is not evidence and a conviction cannot, therefore, be based on such statement. If the prosecution wishes to rely upon such statement, it should ask for a separate trial and examine the co-accused as a witness. 43 Cr.L.J. 556=A.I.R. 1942 Cal. 426.

"Same Offence" means the identical offence and not an offence of the same kind. 32 C.W.N. 1004. See also 1937 Sind 218. A confession can be accepted by Court in part, after rejecting portions which are false. 6 O.W.N. 1017. [See also 1930 M.W.N. 785. But see 1930 A. 192. In cases where the sole evidence against the accused is that of a retracted confession, such confession, if it is relied on, must be relied on as a whole and not only in part. 121 I.C. 550 (2)=1930 A. 192. Sec. 30 does not refer to statements made at the trial but the statements made before and proved at the trial. 1929 M. 285. Before sec. 30 can be applied it must be proved that a confession has been made by one, of the persons who are being tried jointly for the same offence and that the confession affects the person making it as well as some other persons so jointly being tried. The section is new to the Indian Evidence Act as contrasted with the English Law and must be construed strictly. When there is no such confession as affects the person making it any statement made by one accused cannot be treated as evidence against the co-accused or be taken as affording corroboration of the evidence of the approver. 1929 M.W.N. 698. It would be far too dangerous to consider that a confession of a co-accused amounts to evidence against a person. It is not stated under sec. 30 and it has long been settled law that a conviction cannot be based on the confession of a co-accused. 150 I.C. 1056=35 Cr.L.J. 1180.]

"Confession" means confession of the very offence for which the accused are being tried, not a confession of any offence connected with that offence nor of any other

*Illustration.*

(a) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said : “*B* and *I* murdered *C*.” The Court may consider the effect of this confession as against *B*.

(b) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said : “*A* and *I* murdered *C*.”

This statement may not be taken into consideration by the Court against *A*, as *B* is not being jointly tried.

offence which may be disclosed by the evidence. 59 M.L.J. 471. The word “confession” in S. 30 of the Evidence Act cannot reasonably be interpreted to mean a confession of any offence for which the accused persons are being tried but only of the very offence for which they are being tried, offence always including abetments and attempts. When a number of accused are tried for an offence under S. 302, I.P.C. and one of them confesses to an offence under S. 201, I.P.C. such confession cannot be used in evidence against the other co-accused. 58 L.W. 625=1945 M.W.N. 722 (2)=1945 2 M.L.J. 479. A statement before the Court of the co-accused, where it is deprecating his own guilt, is a statement seeking to clear himself at the expense of the accused and as such is inadmissible under sec. 30. 152 I.C. 924=1934 C. 724. The word “confession” used in sec. 30, clearly means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot therefore signify any matter which comes on the record at the end of the prosecution evidence, namely, answers to questions put under sec. 342, Cr. P. Code. Hence the statement made by a co-accused confession, partially or wholly, his guilt when examined under sec. 342, Cr. P. Code, cannot be taken into consideration under sec. 30, against the other accused. 190 I.C. 273=41 Cr.L.J. 886=1940 Nag. 287. The statement of an accused person which does not amount to a confession cannot be used against his co-accused. 42 P.L.R. 378. See also 11 O.W.N. 1012=1934 O. 418; 176 I.C. 530=1938 P. 352. It cannot be said that a confession must be accepted as a whole. A confession must be accepted in its entirety so far as it affects the person making it. That is to say, anything which he puts forward in his confession by way of mitigation must be accepted, however improbable it may appear. 1945 A.W.R. (H.C.) 291. Where the accused makes a confessional statement part of which is inculpatory and part exculpatory, and there is evidence to show that the exculpatory portion is false, the Court can ignore that portion of the confession and use the rest of it against him. 47 P.L.R. 11=A.I.R. 1945 Lah. 91.

**Confession—Admissibility against Co-Accused.**—A statement of an accused must amount to a confession before it can be considered against his co-accused under sec. 30. 35 M. 247=22 M.L.J. 490=14 I.C. 849; 40 C.L.J. 551. See also 9 P.R. 1911 (Cr.)=10 I.C. 340; 1925 Sind 116; 1924 B. 445=26 Bom.L.R. 614=75 I.C. 701; 1924 N. 27; 1924 A. 511; 1924 M. 805; 1925 C. 406; 1929

Sind 250. The confession made by a person can be taken into consideration as against persons who are being tried along with him; such a statement however is always regarded as tainted and cannot be used to corroborate the testimony of the accomplice witnesses. 3 L. 144=68 I.C. 113. See also 13 A.L.J. 337=28 I.C. 663=37 A. 247; 10 O.W.N. 688=1933 O. 355; 11 R. 4=1933 R. 57; (1937) 2 M.L.J. 60 (F.B.); 1941 Mad. 267; 1941 Bom. 50; 1940 M.W.N. 1238=52 L.W. 898; 185 I.C. 205; 1939 N.L.J. 442=1939 Nag. 295. The principle on which the confession of one accused is used against another is that self-implication is supposed to provide some guarantee of the truth of the accusation made against the other. Where the statement is exculpatory so far as possible, there is no such guarantee. Further, the confession to be admissible must be a confession of the offence for which the accused persons are tried and not of some other offence. 1939 N.L.J. 469=1939 Lah. 309. It is not quite clear whether “tainted evidence” means that the person giving the evidence is tainted morally; or that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused, one cannot call this, tainted evidence, for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowledge that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed criminal offence. But all immoral persons are not necessarily and always liars. But it is not to be supposed that because the confession is admissible, it must be believed. In such case it has to be considered whether there are any circumstances which suggests that it is false or that some of the statements made therein are also false. The Court may take the confession of a co-accused person into consideration against the other co-accused, that is to say, the Court can only treat a confession as lending assurance to other evidence against a co-accused. 1938 Rang.L.R. 30=174 I.C. 947=1938 R. 92. See also 1939 Rang. 402. Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be

used against them, the prosecution must disclose the name of the officer who made the arrest and produce him or an other person who could speak to the circumstances, under which the confession was made so as to enable the defence to ascertain by cross-examination what inducements were offered to the accused to make it. 36 M. 501=25 M.L.J. 518=40 I.A. 193 (P.C.). The confession of an accused in a decoit case is not admissible in evidence against a co-accused in that case in a proceeding under sec. 110 of the Cr.P. Code. 61 I.C. 793=25 C.W.N. 239. The statement of an accused made after arrest and not amounting to a confession is not admissible in evidence against a co-accused either under sec. 10 or sec. 33 but only against himself. 46 C. 710=54 I.C. 53=30 C.L.J. 255.

**Test of Admissibility.**—This section introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed. Before any statement made by one of the accused persons, tried jointly with the others can be taken into consideration against such others, it must fulfil two conditions: (a) it must be a confession of guilt affecting himself equally with the others; and (b) it must be proved against those persons who are jointly tried with him. The word "proved" means proved before the prosecution case comes to an end, either proved in the course of the prosecution case or proved in some proceedings previous to the trial. 1935 L. 35. Whether the confession of an accused can be used against his co-accused should be determined on seeing whether the accused can be convicted on that confession of the crime with which he and the co-accused were charged. 60 I.C. 660=22 Cr.L.J. 260 (L.). See also 15 C.W.N. 592=38 C. 559; 50 B. 683; 9 N.L.J. 80=1926 N. 229; 178 I.C. 130=19 P.L.T. 801; 1938 Sind 94.

#### **Weight of Confession Against Co-Accused.**

—Self-implication is guarantee for truth of accusation against co-accused. 1930 A. 29. There is nothing in the terms of sec. 30 to suggest that a confession is not admissible in evidence against a person who is being jointly tried for the same offence with a man who has made the confession, if the confession minimises the guilt of him who makes it and exaggerates the guilt of the other. The section only requires that it must affect both equally. 1938 A. 91=1937 A.L.J. 1253. Where an accused does not implicate himself in his statement, in respect of the offence of murder, but implicates himself in respect of the disposal of the dead body, such a statement is not admissible against the co-accused in respect of the offence under sec. 300, I.P. Code, but is only admissible in respect of the offence under S. 201, I.P. Code. 1937 M.W.N. 1233; see also I.L.R. (1944) 2 Cal. 312. The confession of an accused should not carry the same weight as the evidence of the same person if he were examined as a witness. 21 I.C. 166=14 Cr.L.J. 566. The Court must, after the most careful consideration,

decide whether the degree of proof prescribed by sec. 30 has been reached or not. 21 I.C. 166. A confession made by a co-accused must be regarded with suspicion. 65 I.C. 561=1922 N. 146. See also 72 I.C. 497=24 Cr.L.J. 385; 1939 Mar.L.R. 19 (Cr.). It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused, the statement will not be admissible, the principles being that there is no guarantee that the maker of the confession is speaking the truth. All that is required is that the confession shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. 19 W.R. 67 (Cr.); 2 A. 444; 4 P. L.T. 503=75 I.C. 705; 72 I.C. 497=24 Cr. L.J. 385; 2 P.L.T. 125; in order that a confession may be used against a co-accused under S. 30, it is not necessary that it should implicate the maker substantially to the same extent as it implicates the co-accused. A confession is a statement which either admits in terms the offence or at any rate substantially all the facts which constitute the offence, and it is admissible in evidence under the section, whether the confessing accused ascribes to himself a major or minor part in the crime. Whether it has any value or not is a different matter. I.L.R. (1944) 2 Cal. 312. A conviction founded solely on the confessions of co-accused cannot be sustained. It must be corroborated in material particulars by independent evidence. 21 I.C. 673=38 B. 156; 170 I.C. 201=1937 C. 433 (S.B.). Court has discretion to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed. 1930 N. 242 (F.B.). See also 7 O.W.N. 980=1930 O. 502; 146 I.C. 17 (2)=1933 N. 249.

#### **Confession—Necessity for Corroboration.**

—The Indian Statute differs from the English Law and the effect of the former should not be whittled down. The question of what corroborative evidence is sufficient must depend on the circumstances of each particular case. 119 I.C. 474=1929 M. 498. The confessions of a co-accused implicating his co-accused in the crime are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under sec. 30 along with such other evidence as there may be. While such a confession may help the Court to decide whether the other evidence is or is not credible, it cannot supply the police of positive evidence regarding the commission of the crime. 52 L.W. 258=1940 M.W.N. 767=1941 M. 267. See also 1940 Rang.L.R. 104=1939 Rang. 402. When the substantive evidence is not sufficient to establish a prima facie case against the accused it is not permissible to use the confession of a co-accused under sec. 30 as if it were itself substantive evidence, which it is not. It may only be taken to lend assurance to any relevant evidence bearing on the accused's complicity in the crime. It can in no case be used to fill up the gap in the

prosecution evidence. 188 I.C. 146=41 Cr. L.J. 553=1940 Nag. 230; 1929 A. 928. Where the evidence of the approver is eliminated as against one of the accused whose name has been falsely substituted by the approver, it should not be accepted even against the other accused though to some extent it is corroborated by independent testimony. 34 P.L.R. 1010=1933 L. 871. See also 19 P. L.T. 801=178 I.C. 130. Confessional statement of accused cannot be used in corroboration of the evidence of the approver inasmuch as tainted evidence is not made better by being corroborated by other tainted evidence. 1930 N. 97. See also 144 I.C. 829=1933 R. 134. But see 11 R. 4=1933 R. 57. Confession of co-accused as against another accused stands on a lower footing than the evidence of an accomplice. 146 I.C. 1061=1933 L. 956; and it is still worse where not only did the confessing accused retract their confession but when pardons are offered to two of them with a view to their giving evidence as accomplice, they refused to accept such pardon 146 I.C. 303 (2)=1933 R. 320.

**Sessions Trial and Magisterial Trial—Distinction.**—In a warrant case, although the statement of a co-accused amounts to an unqualified confession, he need not be forthwith convicted and removed from the dock. The co-accused is still to be deemed to be jointly tried with the others and this confession can be used as against the others. A summons case is to be distinguished from a warrant case for the purpose. 1928 L. 880. See also 1937 N. 17=I.L.R. (1937) N. 315 (F.B.). In considering the question whether the confession of the co-accused who pleaded guilty can be used against the other co-accused under sec. 30, a distinction must be made between summons and warrant cases on the one hand and Sessions cases on the other. In Sessions cases if the accused pleads guilty the Court cannot try him but has forthwith to convict him. His conviction cannot be deferred so as to enable the Court to use his confession against his co-accused. But in warrant cases, it is discretionary with the Magistrate to defer conviction of the accused who pleads guilty and use his confession against the other co-accused under sec. 30. 166 I.C. 582 and 587=I.L.R. (1937) N. 315=1937 N. 17 (F.B.). It is the duty of the Judge to warn the jury that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness who has a strong motive for implicating some one else in the offence or crime. The jury must further be warned that confessions are not always true and that they must be checked, more particularly in a murder case, in the light of the whole evidence on the record in order to see if they carry conviction. 58 L.W. 523=1945 A.L.J. 511=A.I.R. 1945 P.C. 181 (P.C.).

**Secs. 30 and 114.**—A confession of an accused person implicating a co-accused under sec. 30 cannot be considered as the

same thing as "testimony of an accomplice" under sec. 113. Sec. 113 contemplates that the accomplice shall be examined as a witness. The provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under sec. 30. Therefore an accused person cannot be convicted solely on such a confession made by a co-accused. 1928 N. 213=109 I.C. 801. See also 1929 L. 338; 38 Bom.L.R. 1122=1937 B. 31; I.L.R. (1941) Nag. 506. The evidential value of a confession made by a co-accused is not very high. But the confession receives confirmation when it leads to the arrest and identification of the other accused. I. L.R. (1939) L. 67. Where, however, there is apart from the confessions a body of evidence and circumstances enough to support a conviction if the evidence is accepted as free from untruth or exaggeration on serious mistake or distortion the Court can take the confessions into consideration and consider together the evidence, the circumstances and the confessions. 43 B. 739=51 I.C. 657. See also 4 R. 45=1926 R. 127. Where the corroboration consisted of statements of witnesses which though giving rise to suspicion were consistent with the innocence of the accused, held, that the corroboration fell far short of what is required to support a conviction. 42 C. 789=19 C.W.N. 584=28 I. C. 657. As to what amounts to corroboration, see 95 I.C. 938=1926 A. 603. A conviction based entirely on statements contained in confessions of co-accused persons is not sustainable. 11 I.C. 1001=12 Cr.L.J. 465. See also 17 Cr.L.J. 156=33 I.C. 636; 73 I.C. 262=1923 N. 248; 1928 N. 213.

**Joint Trial.**—A statement made by one accused can only be used against another if provisions of sec. 30 of the Act are applicable. 20 A.L.J. 178=65 I.C. 849=1922 A. 24. As to joint trial, see also 45 A. 323=1923 A. 322; 2 Pat.L.T. 125. Persons, against whom proceedings are being jointly taken under sec. 117, Cr.P. Code, in one and the same enquiry cannot be said to be on their joint trial for the same offence within sec. 30. 41 A. 231=49 I.C. 654. A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under sec. 110 of the Cr. P. Code. 22 C.W.N. 408=49 I.C. 649. See also 167 I.C. 162=1937 C. 39. When two persons are jointly tried, one for the offence of rape of a girl and the other for the abduction of that girl, they are not tried for the same offence. Consequently a confession made by one of them affecting himself and the other is not admissible in evidence against the other under sec. 30. 176 I.C. 560=42 C.W.N. 814=1938 C. 479. A

confession of an accused not being declared relevant by the Evidence Act as against a co-accused cannot be treated as substantive evidence and a judgment cannot be based upon it so far as he is concerned. 65 I.C. 561=1922 N. 146. Confessions recorded in the manner provided by the Criminal Procedure Code, even though made to Magistrates outside British India, if proved against the persons who made them, may be taken into consideration against others who are being tried jointly for the same offence. 69 I.C. 257=17 N. L.R. 113. Where one of the accused pleaded guilty and was examined at the end of the prosecution case, and declined to call any witnesses, the trial was a joint trial, so that his confession could be taken into consideration against the other accused. A conviction under sec. 456, I.P.C., based on the confessions of a co-accused who was being tried along with the prisoner under sec. 411, I.P.C., is wrong. 20 I.C. 136=14 Cr.L.J. 376.

**Retracted confession, not of value against Co-accused.**—43 B. 739=51 I.C. 657. See also 1938 L. 252; 1938 P. 108=16 P. 612=173 I.C. 507; 17 Mys.L.J. 238, and cannot be used against the maker and the co-accused. 1927 L. 765. The very existence of sec. 30 postulates that a confession of a co-accused may be used in cases where the evidence afforded lacks the requisite volume and certainty to insure conviction. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—where a confession is self-inculpatory—in respect of the person who made it and the person implicated therein. The motive for making a self-inculpatory confession is the very simple one of an expectation of leniency in the matter of sentence and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not it is again not unnatural that persons who have made confessions should retract them under pressure and persuasion by their fellows who have not confessed. Retracted confessions must no doubt be used with caution but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in case, whether they are retracted or not. 193 I.C. 265=42 Cr.L.J. 363=1941 N. 145. See also 56 L.W. 737=(1943) 2 M. L.J. 634 (F.B.). The confession referred to in sec. 30 cannot be restricted to an unretracted confession and there is nothing to prevent a Court from convicting after considering the confession but the rules of practice of the High Courts in India are to be observed when exercising the discretion. 15 Bom.L.R. 975=21 I.C. 673=

38 B. 156. Where there is no real corroboration of the retracted confession, the accused are entitled to the benefit of the doubt and must be acquitted. 16 Cr.L.J. 469=29 I.C. 101. See also 41 I.C. 155; 26 P.R. 1916 (Cr.)=35 I.C. 642; 5 P.L.R. 1915; 16 Cr.L.J. 157=27 I.C. 221; 5 P.R. 1911 (Cr.)=10 I.C. 857; 1938 L. 252. Extra-judicial confession by boys cajoled or frightened but retracted before the committing Magistrate does not prove a case against persons jointly accused with the boys. 14 P.R. (Cr.) 1911=12 J. 973. As to value to be attached to a retracted confession of a co-accused, see 152 I.C. 275=15 P.L.T. 711=1934 P. 586; 148 I.C. 8=1934 Pesh. 11; 148 I.C. 1064=1934 R. 30. A retracted confession requires strong corroboration in all material particulars. 72 I.C. 497=11 L.W. 474; 45 L.W. 93=1937 M. 321=(1937) 1 M. L.J. 750; 1937 M. 755. The weight to be given to a retracted confession depends upon the circumstances under which it is made and on the intrinsic-value of the confession. 18 Cr.L.J. 774=41 I.C. 150; 19 I.C. 179=14 Cr.L.J. 179. Where a confession is made 14 days after arrest by the police but is retracted at the earliest opportunity before the trial Magistrate, its evidentiary value is negligible as against the co-accused. 1934 L. 718. The confession of one was admissible against the other because it was not self-exculpatory and the fact that the confession was subsequently retracted did not render it inadmissible but it merely diminished the weight to be attached to it. 32 C.W.N. 1004. A retracted confession of a co-accused cannot alone be sufficient evidence to justify a conviction, but if that confession is un rebutted it is admissible as a very strong piece of evidence. 114 I.C. 711=1929 O. 167. See also 1930 L. 667; 1930 O. 412; 1930 O. 335.

**Plea of Guilty.**—The plea of guilty of one co-accused who is removed from the dock while the other alone is tried cannot be taken into consideration against that other. 38 C. 446=16 C.W.N. 49=12 I.C. 87. See also 15 P.R. (Cr.) 1911=12 I.C. 981. It is for the prosecution to establish their case; because an accused loses his head or gets frightened and does not tell the truth, he cannot on that account be convicted. 20 A.L.J. 178=1922 A. 24.

**Self-exculpatory Statements.**—Self-exculpatory statement of the wife to the effect that a white substance was administered on the assurance by her paramour that it would bring about good feeling did not amount to a confession and could not be used against the paramour as criminal conspiracy was not proved. 21 I.C. 378=18 C.L.J. 590; 9 N.L.J. 80=1926 N. 229. See also 1941 O. W.N. 722=1941 O.A. 483. A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former but inadmissible



31. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions herein-after contained.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become

Cases in which statement of relevant fact by person who is dead or cannot be found etc., is relevant.

incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves

relevant facts in the following cases:—

ble as regards the latter. 1923 L. 293; 12 Cr. L.J. 562=12 I.C. 650. Confession of a co-accused must be of the very offence for which they are being tried. In a case of murder the confession of one accused that the co-accused committed the murder but that he helped him in throwing the body in a pit cannot be taken into consideration. 59 M.L.J. 479. A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person making the statement, but it may be unsafe to use it against a co-accused. 53 I.C. 691=20 Cr.L.J. 787. An accused's statement which does not incriminate him is not a confession and cannot be used against his co-accused. 16 Cr.L.J. 25=26 I.C. 329. See also 46 I.C. 842=19 Cr.L.J. 826; 45 A. 323=1923 A. 322; 59 I.C. 913; 14 Cr.L.J. 570=21 I.C. 171; 109 I.C. 351=1928 C. 416 (2); 1929 S. 250. Where a statement is volunteered by a co-accused to the effect that when he arrived on the scene of offence after hearing the cry of the complainant he noticed another accused in the act of assaulting the complainant, such a self-exculpatory statement is inadmissible in evidence. 1929 N. 350. See also 7 O.W.N. 980=1930 O. 506.

Sec. 31.—See 103 I.C. 34=1927 A. 659; 8 P. 776=1929 P. 245. What sec. 31 means is that an admission, unless it amounts to an estoppel is not conclusive as against the maker, as it is open to him to prove that it was made under a mistake of law or fact or that it was made under threat or inducement. 1939 Rang.L.R. 97. Admissions are not conclusive proof, and though they may operate as estoppel, it is open to a party to correct an admission made by him if it is shown to have been made under a bona fide mistake and has not caused any prejudice to the other side. 1937 A.M.L.J. 86. See also 1942 O.W.N. (B.R.) 535=1942 O.A. (Supp.) 430. Though admissions are not conclusive evidence of the matter admitted, where there is no rebutting evidence at all, the admissions are enough to establish the facts contained in them. 1941 O.A. (Supp.) 420=1941 A.W.R. (Rev.) 461=1941 A.L.J. (Supp.) 89. A compromise is tantamount to an admission, and although an admission is not conclusive it can still operate as an estoppel under sec. 31. 1942 O.W.N. (B.R.) 308=1942 A.W.R. (Rev.) 188. An admis-

sion of a father is not binding on the son because he did not claim through the father. It cannot bind third persons. 34 C.W.N. 944; 12 L.L.J. 187. An admission made by a party is a very strong proof against him and the fact admitted must be taken to be true unless the person making the admission explains that it was made under circumstances which does not make the admission binding on him. Inference as to partition drawn from admission of parties. 134 I.C. 888=53 C.L.J. 222. See also 131 I.C. 903=8 O.W.N. 306; 1939 R.D. 299.

Secs. 32 and 33: Relative scope of.—Secs. 32 and 33 give different instances where evidence is relevant. It cannot be said that sec. 33 governs sec. 32. 1941 Rang.L.R. 258=1941 Rang. 301. A previous statement by a person is not relevant. When it is not covered by secs. 32, 33 and 145 unless it is an admission in which case only it becomes relevant under sec. 21. 1941 A.W.R. (Rev.) 501=1941 R.D. 503=1941 O.A. (Supp.) 460=43 Cr.L.J. 125.

Sec. 32.—Section should be very liberally construed. See 104 I.C. 209=1927 O. 278. Before statements can be admitted under sec. 32 it must be proved that the makers of these statements are either dead or for any other reason are not available as witnesses. 1933 R. 212. A person may be said to have been not found when we know who he was and if in spite of search he was not found or was found to have been dead. But he may equally be said not to have been found if his identity cannot be traced or found and who therefore on account of the absence of his identity cannot be found. 45 P.L.R. 441. Sec. 32 speaks of statements both written and verbal, and a Court cannot refuse to admit oral evidence of a verbal statement which fulfils the requirements of the section, merely because the evidence offered is the testimony of a witness who is interested in the result of the litigation. 42 C. W.N. 359. The provisions of sec. 32 are in the nature of exceptions, and the onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by the section lies clearly upon that party which wishes to avail itself of the statement. 47 C.W.N. 332. There is a difference between the existence of a fact and a statement as to its existence. Sec. 11 makes the existence of facts admissible, and not statements as to such existence unless



- (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

When it relates to cause of death.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

the fact of making that statement is itself a matter in issue. Hence if a statement does not fall within sec. 32, it cannot be admissible even under sec. 11. 1934 A.L.J. 318=1934 A. 406 (F.B.). Generally speaking a declaration relevant under sec. 32 but not made by one in immediate expectation of death and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration. 35 Bom.L.R. 1021=1933 B. 479 (2). The value of the evidence admissible under Ss. 32, 49 and 60 depends on the characters of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. [23 A. 37 (P.C.) Foll.]; 1933 Sind 213.

**Scope of.**—A previous statement which is not made in Court and at the trial can be used only for the limited purpose of corroborating or contradicting a witness and does not become substantive evidence in the case. 127 I.C. 850=1930 L. 409. When the statement of a witness previously made is used as evidence under the provisions of secs. 32 and 33, then any other statement made by that witness can be used by virtue of sec. 158 for the purpose of contradicting that witness as if such witness had appeared in Court and was cross-examined on such previous statement and on question being asked had denied the facts mentioned in the same. 1930 L. 409.

**Date of birth—Certificate of Guardianship is not Admissible.**—71 I.C. 336=38 C.L.J. 186.

As to relevancy of entries in purohit's books to prove date of death, see 26 Bom. L.R. 563=46 M.L.J. 541 (P.C.).

Where the age of a witness is given in the paper containing the deposition of the witness and appears to have been recorded by the presiding officer, there is no reason either to presume that the presiding officer instead of following the usual course of asking age of the witness should have put down the age merely by guesswork. Similarly the entries in the registration endorsements are made by the Sub-Registrar himself and the presumption is that he also would follow the correct course of asking persons their age instead of guessing it. 178 I.C. 959=1938 O.W.N. 1267=1939 O. 17.

**Sec. 32 (1): Dying Declaration when Admissible.**—The recording of a dying declaration is a grave and solemn proceeding. The proceeding should be so conducted that the declarant is as free from personal influence in making his declaration as he

would be if he were giving evidence in a Court of law. 152 I.C. 741=1934 A. 908. The dying declaration being an important piece of evidence must be as exact and full as possible. 15 I.C. 308=22 M.L.J. 453. See also 1924 L. 12; 5 L. 205=1924 L. 581; 16 P. 593=1937 P.W.N. 897; 1937 M.W.N. 333. There is nothing in law to prevent the Court from regarding a dying declaration as sufficient to justify a conviction where the Court is entirely satisfied with regard to its truth, though there is no corroboration. I.L.R. (1943) Kar. 587. Although a portion of a dying declaration is untrue, it need not necessarily be rejected in toto. The Court would decline to believe the rest of it without corroboration. I.L.R. (1946) Nag. 235=1946 N.L.J. 241. A statement intended to be proved as a dying declaration under sec. 32 need not be recorded by a Magistrate. Law does not require such statements to be made necessarily under expectation of death. 190 I.C. 322. The value of a dying declaration altogether disappears when parts of it have obviously been supplied to the dying man by other persons, whether interested parties or police officers. A "touched up" dying declaration has no value. 36 P.L.R. 24=1934 Cr.C. 1126=1934 L. 805. See also 1941 Pat. 409. A dying declaration which names only one person where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant, is the very strongest possible form of evidence. But where a large number of people are implicated, it is a very different matter and in the absence of corroboration of the dying declaration, the accused should not be convicted. 43 P.L.R. 598=1941 Lah. 368. See also 47 Bom. L.R. 992. Under sec. 32 (1) the statement of a deceased person will not be admissible unless it relates to the circumstances of the transaction which resulted in his death. 47 C.W.N. 332. See also (1940) 2 M.L.J. 715. Statements by deceased as to the cause of his death are admissible, not only as against the person who actually caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death in cases in which the cause of that person's death comes into question. (35 I.C. 993 and 2 Weir 750, Foll.). 162 I.C. 491=1936 R. 187. The deceased had received numerous and very serious injuries on his head and it was very doubtful whether under such circumstance he would have been able to utter even a single word. There was no definite opinion of the doctor as to whether deceased would have been

then able to speak. Held, that the evidence of the prosecution witnesses in respect of the alleged oral dying declaration of the deceased should be discarded. 8 Luck. 570=1933 O. 333. As to mode of proving dying declaration, see 6 L.L.J. 115=1924 L. 12. Statement must relate to the injuries by which death was caused. Sub-cl. (1) applies to the class of statement made by a dying declaration as to the injuries which have brought him or her to that condition, or the circumstances under which these injuries came to be inflicted. 4 L. 481=1924 L. 253; 1929 S. 250. See also 29 N. L.R. 251=1933 N. 136. Evidence Act makes dying declarations relevant facts as written statements of deceased or written records of verbal statements which the deceased makes and which becomes substantive evidence of the cause of deceased's death. 31 I.C. 359=16 Cr.L.J. 759 (M.). See also 160 I.C. 597=1936 R. 42. An oral statement of the deceased about the cause of his death may be proved by any one who heard it as well as by the person who recorded it. Under sec. 521, Cr.P. Code, it is not necessary that the Magistrate recording the confession should be called and be asked to refresh his memory by referring to statements of witnesses under sec. 159, Evidence Act. 31 I.C. 359=16 Cr.L.J. 759 (M.) [8 C. 211; 6 C.W.N. 72, Diss.] The rule as to the admissibility of evidence under sec. 32 (1) has worked ill in India. 4 L. 481=1924 L. 253. On trial for forgery one of the accused who had made a statement before the enquiring Magistrate died before the commencement of the trial. The statement was admitted by the Sessions Judge under sec. 32, Cl. (3). Held, that the statement was inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made. 25 Bom.L. R. 248. Affidavit of a person who died subsequently and was not subjected to cross-examination is not admissible. See 1927 M. 507=52 M.L.J. 477. A dying declaration can be used as evidence even though the accused is not charged with the offence of homicide. 6 P. 747=1923 P. 162. Although the statement made by the deceased to the doctor just before his death is admissible in evidence as dying declaration, still in order to convict the accused of murder there must be independent corroboration of facts and circumstances to prove the offence. 1929 P. 249. See also 1935 N.L.J. 139; 1945 N.L.J. 139=1945 Nag. 153. A dying declaration made at the time which a person is in a precarious condition does not cease to be such and become inadmissible under sec. 32 merely because the declarant happens to linger for a few days more. 113 I.C. 177=1929 L. 64. Or because he was not aware that he was dying when he made it. 1935 L. 94=16 L. 589. First Information Report is admissible under sec. 32 (1) where it is the statement of a person who is since dead relating to the circumstances of the

transaction which resulted in death. 1930 L. 450. Statement by deceased before Third Class Magistrate not competent to record statement under Cr.P. Code, sec. 164, is yet relevant under sec. 32 (1). 1930 L. 60. The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. 52 C.L.J. 425. Where the case for the prosecution depends upon the deathbed statement of a man who was admittedly kept back from hospital in order to be instructed about his statement and it is also shown that his statement regarding witnesses to the occurrence was false, his declaration cannot be relied upon for convicting the accused named by him. 1930 M.W.N. 1211. See also 32 L.W. 940=59 M.L.J. 876. (A dying declaration is relevant evidence under sec. 32, but it is not entitled to any peculiar credit. A statement falling under sec. 32 (1) may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed. A statement by the deceased that he was proceeding to the spot where in fact he was killed later, or as to his reasons for so proceeding or that he had been invited by a particular person to meet him, or that he was going to such person would each of them be circumstances of the transaction, and would be so whether the person, was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The "circumstances of the transaction" must have some proximate relation to the actual occurrence, though, as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. The "circumstances" are of the transaction which resulted in the death of the declarant. 66 I.A. 66=43 C.W.N. 473=1939 P.C. 47=(1939) 1 M.L.J. 756 (P.C.). It is immaterial that the person who made the statement was not at the time when he made them under expectation of death. The nature of the proceedings in which the death comes into question also does not matter. It need not necessarily be a proceeding on a charge of murder or homicide. It may be even a civil action. 190 I.C. 849=1940 N.L.J. 459=1940 Nag. 340.

Under sec. 32 it is only statements made by the deceased as to the cause of his death or the circumstances of the transaction that resulted in his death which can be admitted. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death cannot be admissible. Statement by the deceased which provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed a relation of his in a civil suit which are in no way associated with the actual murder cannot be admitted

under sec. 32 and must be excluded. Even if the accused does not object to such evidence, it must be excluded. At any rate it is the duty of Public Prosecutor to see that such wholly inadmissible evidence is not placed before the Court. 1940 M.W.N. 937=52 L.W. 495=(1940) 2 M.L.J. 715. See also 1941 P.W.N. 255=22 Pat.L.J. 327=1941 Pat. 362; 1941 Mad. 101; I.L.R. (1941) Nag. 110; 47 C.W.N. 332.

A statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. Such a statement does not necessarily require corroboration. If the Court, after taking everything into consideration, is convicted that the statement is true, it is its duty to convict notwithstanding that there is no corroboration in the true sense. I.L.R. (1940) Mad. 158=1940 Mad. 196=(1940) 1 M.L.J. 124 (F.B.). See also 1940 M.W.N. 163. The danger of wrong identification has to be borne in mind in dealing with what are called dying declarations. Before acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply. Special caution is needed in dealing with a dying declaration when the prosecution evidence shows signs of attempt to improve and develop it at successive stages, or when there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders. 194 I.C. 186. Where the statement in question was said to have been made months before the alleged murder, held, that it could hardly come within the terms of sec. 32. 174 I.C. 36=66 C.L.J. 196=1938 C. 125.

**Dying Declaration—When not admissible.**—A statement by a dying person not about the circumstances of his death, but about a dacoity that was taking place at the time of his death is not admissible under sec. 32 (1) in a trial for the dacoity. Nor can those statements be admissible under sec. 32 (3) unless they would have exposed him to criminal prosecution. 20 I.C. 990=14 Cr.L.J. 510. See also 46 P.L.R. 135. A dying declaration which contradicts itself in its various parts is inadmissible. Even if it is admissible its evidentiary value is negligible. 108 I.C. 526. It is not safe to base a conviction on the dying declaration of the deceased, when the other evidence in the case is tainted and has to be rejected. 150 I.C. 819=11 O.W.N. 851=1934 O. 405. See also 164 I.C. 139=37 Cr.L.J. 990=1936 R. 324; 176 I.C. 633=1938 R. 282. A dying declaration which comes under sec. 32 (1) from the point of view of admissibility, should not be put on a different footing from any other piece of evidence, so far as the appraisal of its evidentiary value is concerned. Merely because a part of the statement is untrue, it does not follow that the rest

should be disbelieved. If a tribunal finds that a part of it is concocted, it would decline to believe the rest of it without corroboration; but the Court or the jury is not debarred from accepting the rest. 40 C.W.N. 1377=1936 C. 793; 1938 R. 282; 1941 Mad. 290; 1941 Pat. 409.

**Dying Declaration, Proof of.**—160 I.C. 597=1936 R. 42. A statement of a deceased person recorded in the absence of the accused is not admissible under sec. 33. Nor is it admissible under sec. 32 (1) unless it is proved by the Magistrate who recorded it or by some one who heard it made. 20 I.C. 220=14 Cr.L.J. 396. Where a dying declaration has to be proved by a Magistrate it is unnecessary for him to repeat the record serialim in his evidence if he is satisfied that it was correctly recorded; it is sufficient for him merely to refer to the record and testify to its correctness, and that it was made by the person and under the circumstances in question. 1941 Rang.L.R. 258=1941 Rang. 301. The only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to a farce. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness-box or no dying declaration could be proved in a satisfactory manner at all. 176 I.C. 471=1938 Pesh. 33. A dying declaration recorded by a Magistrate is not evidence unless proved by the statement of the Magistrate though he is himself the committing Magistrate in the case. A Court cannot be beyond the rule that every statement placed on the record must be properly proved. Dying declarations are not covered by the provisions of Chap. XLI of the Cr.P.Code. 18 I.C. 883=14 Cr.L.J. 131. See also 17 P.R. 1911 (Cr.)=14 I.C. 417. A dying declaration reduced to writing but not signed by the deponent is not admissible in evidence but must be proved by the oral testimony of the person who heard it. 23 I.C. 195=10 N.L.R. 19. Notes of police officer relating to a dying declaration are not admissible in evidence, unless signed by the deponent, but in testifying to it, he can refer to them to refresh his memory. (Ibid.) Where a statement is relevant under the provisions of sec. 32 (1), it is not inadmissible by reason of the fact that the magistrate who recorded it was not competent to record it under sec. 164, Cr.P.Code. 1941 Rang.L.R. 258=1941 Rang. 301. Witnesses should not be allowed to prove a dying declaration as if it is a substantive piece of evidence in the case. The relevant fact to be proved is the statement made and that statement is not the document made by the Magistrate. 67 I.C. 577=1924 L. 12. The only way of

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any or is made in course of entry or memorandum made by him in books kept in business; the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made. 1924 L. 12. See also 49 C. 358=71 I.C. 685; 1930 L. 450; 1930 C. 228. A dying declaration made after receiving extreme function should generally be believed to be true and acted upon. 12 I.C. 206=12 Cr.L.J. 528. See also 1941 Mad. 290; 1945 N.L.J. 139=1945 Nag. 153. The questions and the signs made in reply by a person unable to speak, taken together might properly be regarded as a "verbal statement" made by a person as to the cause of the death within the meaning of sec. 32 and are therefore admissible in evidence. 49 C. 600=26 C. W.N. 414=1922 C. 409. Gestures made before the death by the person murdered are admissible in evidence, but the opinion of the witnesses as to the meaning of such gestures is not evidence, the interpretation of the gestures being for the Court alone. 1 P. 401=71 I.C. 353. See also 38 Bom. L.R. 818; 173 I.C. 833=1938 P. 153. It is safer to rely on the dying declaration rather than on the first information report, for a great sanctity is attached to the former as it is expected that the person who is on the verge of death will tell the truth. 178 I.C. 348=1938 O.W.N. 1103. An injured man who is waiting to be operated on should not be subjected to anything like a third degree cross-examination, by the Magistrate who records his dying deposition; but the Magistrate should not content himself with merely recording the statement made by the injured man; he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value. 176 I.C. 683=1938 R. 282.

**Suicide.**—The accused were charged under sec. 330, I.P.C., with having, for the purpose of extorting a confession, caused hurt to one R, who committed suicide owing to the ill-treatment. Held, that ill-treatment was the cause though not the direct cause of the suicide and although the accused were not legally responsible for the suicide, the whole affair, ill-treatment, and subsequent suicide, being one transaction the statement of the deceased was admissible under sec. 32 (1). 20 P.R. 1916 (Cr.)=35 I.C. 998. Where a woman raped made a statement to her relative

shortly after and committed suicide about three days after the occurrence, rape not being the cause of her death, her statement is not admissible under sec. 32 (1). 1930 M.W.N. 702.

**Capacity of victim to make declaration.**—Where a deceased received a serious spear wound which penetrated the chest wall and injured the diaphragm liver and stomach. Held, that the deceased could not possibly have lived for two hours after receiving an injury of this description, much less could have been conscious. The probability of his ever living to make a dying declaration two hours later was too remote to be considered. 174 I.C. 973=39 Cr.L.J. 508=1938 L. 268. See also 174 I.C. 989=1938 L. 262.

**Sec. 32 (2).**—The expression "in the course of business" in sec. 32 (2) means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connection with a course of business, which suggests a series of acts of business; the section would therefore apply to an act or acts of a simple and private nature. 167 I.C. 30=44 L.W. 681=1937 M. 19. The expression means a statement made during the course not of any particular transaction of an exceptional kind, but of business or professional employment, in which the deceased was ordinarily or habitually engaged. 65 C.L.J. 603. Where it is proved that a writer of some accounts kept in the regular course of business is absconding and cannot be found, the entries in the accounts are relevant evidence under sec. 32 and sufficient to charge a person with liability. 1 L.W. 136=22 I.C. 627. Where the writers of the account books produced by a plaintiff are alive and in his service, but are not examined by him, the books cannot be said to have been duly proved as required by law, and are inadmissible in evidence. 152 I.C. 468=11 O.W.N. 1323. In case of death of attestators the written statement of deceased bond-writer as to signing by attestators is admissible. See 19 C.W.N. 1148=22 I.C. 654. Collection papers—Admissibility of. See 6 I.C. 369. "Course of business" meaning of. See 4 Bur.L.T. 185=11 I.C. 854; 13 C.W.N. 71=5 I.C. 376. See also 1941 Cal. 193. Value of an incomplete record of a deposition. See 22 M.L.J. 453. An endorsement on the cover of a registered letter that the cover had been tendered to the addresses on a cer-

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him in a criminal prosecution or to a suit for damages.

tain date and had been refused by him is at best a record of statement by the peon and would be admissible either under sec. 32 (2) or sec. 33 if the requirements of those sections are complied with. Otherwise the post peon must be called to prove the facts relied on as being evidence of the endorsement. 19 C.W.N. 489=26 I.C. 962. Statement of the deceased's grand-father as to age—Admissibility of. See 38 B. 61=12 I.C. 551. See also 20 C.L.J. 302. A statement made by a father before a Government Tahsildar as to the age of his son is relevant to prove the age of the son. 9 M.L.T. 220=9 I.C. 324. (25 M. 183=11 M.L.J. 379; 20 C. 758, Foll.) A deposition made by a Patwari of a village in the course of the enquiry relating to the Revenue Settlement under the Bengal Regulation does not come under the provisions of sec. 32 and consequently inadmissible in evidence. 9 P.L.T. 679=1928 P. 429. Where Jama Wasil Baki papers were proved to be 45 years old, the Court might presume that the writer was dead at the time they were produced and that the same might be admissible in evidence under sec. 32 (2). 55 C. 1216. See also 1941 Cal. 41; 44 C.W.N. 993=1940 Cal. 524=I.L.R. (1940) 2 Cal. 559. The Zemindari papers can be used as independent evidence, provided they are brought within sec. 32 (2) by showing that the persons who prepared them are dead or cannot be found, but the weight to be attached to them must depend on circumstances. 11 P. 701. Chowhuddibaudi or boundary papers of Zemindaries were filed by the zemindars in 1799 in pursuance of a duty. They are, therefore, admissible under sec. 32 (2), the persons making the statements contained in them being dead. 44 C.W.N. 935=1941 Cal. 193. A receipt executed by a deceased person who stood in the relation of cousin to the parties gave the boundaries of an adjacent plot. Held, that the document was admissible under sec. 32 as a statement made by a deceased person in the ordinary course of his business. 1928 O. 248. Entries made by the Amin in the Khatian and chitta must be taken to have been made in the ordinary course of business and admissible under sec. 32, sub-sec. (2). 55 C. 1070=1928 C. 448. Report submitted by a process peon who is dead regarding service of notice is admissible. 1933 P. 658. Evidence recorded under Fugitive Offenders' Act is admissible. 112 I.C. 673. Statements of living persons who had not been examined as witnesses are inadmissible. 5 O.W.N. 1111=1929 O. 113.

**Sec. 32 (3): Recital as to ownership.**—Recitals in document relating not to suit land but to neighbouring land—Not admissible. 8 I.C. 268=1910 M.W.N. 668; 16 C.W.N. 262=12 I.C. 149; 11 A.L.J. 139=18 I.C. 752. See also 99 I.C. 910=1927 C. 234. Part of statement against pecuniary interest—Entire statement, admissible. 42 C.W.N. 359. As to admissibility of recitals in documents between strangers regarding boundaries of lands, see 45 C.L.J. 55=1926 C. 948; 44 C.L.J. 582=1927 C. 230 and cases cited therein; 1928 C. 63; 1933 P. 636=145 I.C. 944; 152 I.C. 829=1934 P. 617; 30 L.W. 422 (not admissible.) A recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. This rule is subject to exceptions. Such a statement can, for instance, be admitted under sec. 32 (3), when it is contained in a document against the proprietary interest of the person making it, when the executant of the document is dead. So also when the executant of the document contained the recital as to boundary is himself a witness in the case, it can be admitted as a contemporaneous statement to corroborate his evidence under sec. 157. 1940 M.W.N. 80=51 L.W. 509=1940 Mad. 450. A road-cess return filed by a Hindu widow under sec. 95 of the Bengal Cess Act is admissible under this section. 18 C.L.J. 633=22 I.C. 594.

**STATEMENT AGAINST INTEREST.**—What is, and its admissibility. See (1911) 1 M.W.N. 368=11 I.C. 380; 100 I.C. 542=45 C.L.J. 138. See also 29 I.C. 607; 36 M. 19; 18 I.C. 989; 1929 N. 131. Under sec. 32 (3), in order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement is made. An assertion in a deed of gift by the donor that the subject-matter of the gift is his property can by no strength of reasoning be held to be a statement against the pecuniary or proprietary interest of the donor. 184 I.C. 246=12 R.P. 235=20 Pat.L.T. 877. See also 53 L.W. 731=1941 Mad. 666=(1941) 1 M.L.J. 754. The sanctity attaching to a statement by a person who is dead on the ground that it was against his interest to make it must depend upon the measure of that interest, and when it appears that the statement was probably to the immediate interest of the person who made it, the fact

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public right of custom, or matters of general interest; or gives opinion as to public or general interest, if it existed, he would have been likely to be aware; and when such statement was made before any controversy as to such right, custom or matter has arisen.

that more remotely it was against his interest does not afford much guarantee of its truth. I.L.R. (1939) Kar. 573=183 I.C. 67=1939 Sind 145. A statement in a sale-deed by the executant that he was liable for a particular amount is a statement made against the pecuniary or proprietary interest. 30 N.L.R. 192=1934 Nag. 106. In a divorce suit filed in India by the husband on the ground of adultery, a letter written to him by the co-respondent who lives in England admitting adultery with the respondent, is admissible in evidence, as the admission of adultery would have exposed him to a criminal prosecution. 150 I.C. 445=1934 A. 618 (S.B.). An isolated piece of paper or memorandum made by a person who is dead, for his own information, about his property, which is not made by him in the ordinary course of his business and which is not one of a continuous series of acts, and which contains nothing against his pecuniary interest and does not expose him to a criminal prosecution or a civil suit, is not admissible under sec. 32. I.L.R. (1940) Kar. 334=191 I.C. 111=1940 Sind 173.

STATEMENT AS TO RELATIONSHIP.—Prior statement by mother that she was the concubine of alleged father—Admissibility in evidence. 10 I.C. 188. Admission of one co-plaintiff or co-defendant, evidence against other. 33 M.L.J. 180=44 I.A. 201=40 A. 159 (P.C.). Although under sec. 32 (3) a confession made by a deceased conspirator after he had rendered himself liable to criminal prosecution is not admissible, yet when general evidence of the existence of a conspiracy of which the deceased was a member has been given, such a statement is admissible under sec. 10. 33 C.W.N. 1015. The principle upon which a statement made by a dead person against his pecuniary or proprietary interest is regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But a statement made by the deceased widow in proceedings to obtain mutation of names in the register in favour of the adopted boy was not against her pecuniary or proprietary interest and was not admissible under sec. 32 (3) of the Evidence Act. 57 I.A. 14=1930 P.C. 79=58 M.L.J. 446 (P.C.). See also 14 R. 11=16 I.C. 387=1936 R. 5. A statement by a deceased member of an undivided Hindu family resident in Bengal that he is governed by the Mitakshara school of Hindu Law is admissible in evidence under sec. 32 (3), being a statement against his proprietary interest in properties possessed by him.

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It necessarily implies that his rights were limited by the rights of the other co-parceners and that he had not the free and unrestricted power of disposal. 43 C.W.N. 395. See also 1939 Sind 145=I.L.R. (1939) Kar. 573. (Statement as to status in the will of the deceased). Where in a cancelled will the testator has made a statement in the interests of other persons, his sons, against his own interest it is admissible under sec. 32 (3). 1939 N.L.J. 421=1939 Nag. 274.

SEC. 32 (4).—Sec. 32 (4) allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge. In the case of the Mahants, even if they may have had knowledge by means of oral tradition handed down from Mahant to Chela, the opinion would be relevant but not particular facts. 12 L. 497=1931 L. 161. See also 16 P. 258=1937 P.C. 69=(1937) 2 M. L.J. 631 (P.C.). (Question of limits of a particular revenue *mahal* not in question of public right or general interest). Statements of deceased persons as to the existence of a family custom are admissible in evidence under sec. 32 (4). 8 Luck. 445=1933 O. 246. Where the question related to the local usage relating to the deep stream boundary rule, one of the witnesses who was the Ziladar for 36 years stated that such custom prevailed from time immemorial that he was told about it by the former Sarabarakar and a tenant, both of them, since dead. *Held*, that such evidence was admissible under sec. 32, Cl. (4). 146 I.C. 795=1933 A. 376. See also 1937 P. 463. (Custom of land tenure). Statement of deceased as to custom—Family custom made after controversy—Admissibility of. 42 C. 532=27 M. L.J. 373 (P.C.). Where the question was whether certain property was dedicated to a *wakf* and certain documents which related to the neighbouring lands and which contained recitals as to the character of the suit property were put in, *held*, that they were admissible in evidence under sec. 32 (4). 33 C.W.N. 439=1929 C. 533.

SEC. 32 (5).—Sec. 32 (5) only requires that the statement tendered must be made by a person who had special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. It is not further necessary that the statement in question should also be relevant to the matter in issue in respect of which it was made. It is also immaterial whether it was made in a judicial proceeding or otherwise. 167 I.C.



(5) When the statement relates to the existence of any relationship <sup>1</sup>[by blood, marriage or adoption] between persons as to or relates to existence of whose relationship <sup>1</sup>[by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

## LEG. REF.

<sup>1</sup>These words were inserted by Act XVIII of 1872, Sec. 2.

346=1937 P.C. 101=(1937) 1 M.L.J. 646 (P.C.). See also 1939 A. 61. The statement of a deceased person as to the family pedigree, which is admissible under sec. 32 has little evidential value when it relates to matters which occurred before his birth or in early youth, if the source of his information is not disclosed. 59 L.W. 268=50 C. W.N. 477=A.I.R. 1946 P.C. 59 (P.C.). Where the statement in question was made by an aged relation of the family it was held, that it was doubtful whether it was necessary for him to depose to any particular source of knowledge so as to render his statement admissible under sec. 32 (5) because he might, as a relation, be presumed to have been well acquainted with the pedigree of his ancestors. 1942 O.W.N. 657=1943 Oudh 91, Recital in deeds how far evidence. 25 M.L.J. 373 =19 I.C. 740. Illustration to sec. 32 shows that the relationship which may be proved by the statement of a deceased person may be relationship of the person making the statement. 25 M.L.J. 373. See also 163 I.C. 770=1936 O. 340. Witnesses should not be permitted by Court to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirements that the person making the statement had special means of knowledge. The evidence of a family hard as to the relationship of parties is *prima facie* inadmissible if it relates to events long before his birth, as it is hearsay. 176 I.C. 464=40 P.L.R. 162=1938 L. 303. See also 189 I.C. 325. A statement prepared and signed soon after a marriage ceremony, by the priest who officiated at the ceremony, that he performed the marriage according to rites prescribed by religious scriptures and that the essential ceremonies constituting a valid Hindu marriage were performed, does not fall within the ambit of sec. 32 (5) of the Evidence Act. Such a statement relates to the performance of the marriage ceremonies and to the existence of any relationship by marriage and hence not relevant under sec. 32 (5). 45 Bom.L.R. 924. Whether under sec. 32 (5) only statements of relevant facts are admissible and not statements of facts in issue. 45 Bom.L.R. 924. Where the question at issue is

whether a certain person died issueless, a statement of a deceased that that person died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether that person left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. The existence of any relationship within the meaning of sec. 32 (5) includes the non-existence of such relationship. If a statement relating to the existence of such relationship is evidence under that sub-section, any statement which implies that there is no existence of such relationship between two persons also comes under that sub-section. 191 I.C. 674=1941 Pat. 205. Statements of witnesses in a prior suit regarding the adoption of a party cannot be admitted in evidence in the subsequent suit in respect of the same question of adoption as they cannot be said to have been made before the question in dispute was raised. 55 M. 40=1932 M. 198 =62 M.L.J. 116; 49 L.W. 273=1939 Mad. 446=(1939) 1 M.L.J. 227. A statement by a deceased person that there was a marriage between him and a certain woman is admissible in evidence for the purpose of proving the legitimacy of his children under the provisions of sec. 32, sub-sec. (5) as a statement as to marriage. The doctrine of Mahomedan Law do not exclude evidence of this nature and the Evidence Act applies. 55 A. 139=1933 A. 329. Statement of deceased that his consent to adoption was purchased, how far evidence. 39 M. 12=18 I.C. 989; 160 I.C. 332=1936 C. 1. When a family migrated from one province to another years ago it is not possible to have in all cases anything but hearsay evidence which could be obtained from those having special means of knowledge (their ancestors) regarding the migration. Statements made to members of family by their ancestors are thus admissible in evidence to prove their relationship and their original place of residence where that relationship arose. 1943 N.L.J. 320. Statement of deceased members of a family regarding family history and seniority of members is admissible. 1 Luck. 97=1927 O. 278. See also 1941 Rang. L.R. 445=1941 Rang. 276. (Statement by a Burman Buddhist that his property would go to a particular person). Evidence of a mirasi, who is a hereditary family hard, is admissible to prove pedigree. 58 I.A. 188 =12 L. 336=60 M.L.J. 583 (P.C.). So also the evidence of a Hardwar purohit. 133 I.C. 874=32 P.L.R. 696. See also 176 I.C. 464=1938 L. 303. Entries in the



books of the priests at a place of pilgrimage should be accepted with care. The production of books before the trial Court is essential, and the probative value of such entries is considerably reduced, if they are not placed before the trial Judge. 141 I.C. 622=1934 Pesh. 78. *See also* 39 P.L.R. 370=1937 L. 599. A statement whether an ancestor of the person making the statement was related to him as an elder uncle or a younger uncle or an elder brother or a younger brother or an elder son or a younger son is a statement as to relationship within the meaning of sec. 32 (5). 1944 O.W.N. 83. Statement as to commencement of relationship—If, and when can be admitted. 20 C.W.N. 122=21 C.L.J. 96=27 I.C. 739; 1941 Lah. 73. Fosterage is not relationship within this section. Hearsay evidence of fosterage is not admissible under the section to prove the case of fosterage. 24 I.C. 643. *Pedigree—Admissibility.* *See* 30 A. 510=5 A.L.J. 701=13 C.W.N. 1 (P.C.). *See also* 37 A. 600; 1931 O. 177=8 O.W.N. 349. It is the duty of the party producing a witness on the question of pedigree to elicit from him, if it is a fact, that he heard from a person deceased so as to fulfil the requirements of sec. 32 (5); 1934 A. 117=151 I.C. 338. A pedigree in a Settlement Court is admissible in evidence upon proof that the person making the statement contained in the pedigree was dead and had special means of knowledge. 10 I.C. 199; 8 I.C. 727. *See also* 25 I.C. 823; 105 I.C. 26; I.L.R. (1941) Lah. 872. A pedigree filed for purposes of preparation of khewat more than 30 years before, when there was no controversy in respect of it, is admissible under sec. 32 (5) when all the signatories to it are dead. 148 I.C. 1041=1934 O. 210. Pedigree table relied on in a suit of 1864 was held to be not admissible under sec. 32. 15 L. 688=1934 L. 283 (2). Statement as to relationship made by a dead member of the family who had special means of knowledge in respect of the relationship of the parties at a time before the question in dispute was raised is admissible to prove correctness of the pedigree. 1941 Lah. 73. A horoscope prepared *ante litem motem* by an astrologer, dead at the time of suit, whose handwriting had been proved by a near relation of his and who used to prepare horoscope for others in the village and consequently must be taken to have special means of knowledge of the date of birth of a party is admissible. 36 C.W.N. 838. *See also* 174 I.C. 756=1938 C. 43. A horoscope which is not spoken to either by its writer or by one who had special means of knowledge as to its correctness is inadmissible in evidence. 38 M. 166=24 M.L.J. 517=19 I.C. 452; 174 I.C. 756=1938 C. 43. A settlement pedigree can be admitted in evidence either under sec. 32 (5) or under sec. 35. If the settlement pedigree is one

signed by the members of the family, it would be admissible under sec. 32 (5) as statements of deceased persons as to relationship since such statements would be considered to be of these persons having special means of knowledge. It must, however, be proved that statements were made by them at a time when there was no dispute as to the pedigree set up. If however, the pedigree is not signed by the members of the family, but is prepared by the settlement officer himself after proper enquiry and bears his signature, it can be admitted under sec. 35, as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties. 4 Luck. 39=1929 O. 129. *See also* (1937) 2 M.L.J. 772 (P.C.). Before a pedigree or table of relationship can be admitted in evidence, it must be shown that it is a statement made by a person having special means of knowledge and made before the question in dispute had arisen. 43 Mys. H.C.R. 21=16 Mys. L. J. 137. Statements made by a person who is dead as to the name of her mother and other relations (except her husband) are admissible under sec. 32 (5), in a charge under sec. 368, I.P.C. 120 I.C. 81=1929 S. 250. A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of the testator. 1929 S. 250. *See also* 165 I.C. 523=1936 O.W.N. 1167=1936 O. 170. But *see* 4 S.L.R. 225=10 I.C. 967 (25 M. 183; 20 C. 758; 24 M.L.J. 49, Foll.). An entry in the scholars' register made by the father, since deceased, as to his son's age would be admissible. 5 O.W.N. 1111=1929 O. 113; 165 I.C. 523=1936 O. 170. So also statements of deceased's father as to approximate date of birth of his son. 165 I.C. 523=12 Luck. 606=1937 O. 170. The words "relating to the existence of any relationship" are wide enough to include statements about the birth and death of relatives which events either commence or terminate the relationship. A statement in a guardianship petition made by a person's aunt that he was born on a certain day and that she was his aunt is admissible in evidence as it relates to the existence of relationship. 20 C.L.J. 621=28 I.C. 595. Statement as to age of adopted son by adoptive mother—Admissibility. 149 I.C. 781=1934 A.L.J. 318=1934 A. 406 (F.B.). A statement put in during the inam enquiry by a vakil on behalf of certain inamdars though not signed by them may be presumed to be authorised and is admissible as evidence of the genealogical table contained therein. 55 M. 40=1932 M. 198=62 M.L.J. 116. Statements of deceased relatives, servants, and dependents are admissible, for proving family relationship. In every case it is a question of fact if the person who made the statement had special means of knowledge. 55 M. 50. Statements after dispute arose are not admissible.

See 25 A.L.J. 861. On this clause, *see also* 22 A.L.J. 657=46 A. 665=1924 A. 575. A statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of a certain person was called in question, is admissible in evidence. 3 Luck. 416=1928 O. 233; 3 Luck. 326=1928 O. 307. *See also* 1939 Sind 145. Where the statement of witness giving the pedigree is found to be inadmissible under sec. 32 (5), but he deposes to facts which established such treatment as is contemplated by sec. 50, it should be admitted to that extent. 151 I.C. 338=1934 A. 117. Statement made in a suit in which the issue was the same. *See* 7 P. 90=1928 P. 113. Though a person cannot claim a title under an unprobated will, he can rely upon a statement contained therein indicating the relationship of the parties. 7 P. 733=1928 P. 459. The English Law with regard to evidence or matters of pedigree differs in some respects from the Indian Law. Under the Indian Law only, such evidence will be admissible which consists of (1) statements by a deceased person regarding relationship who had special means of knowledge when the statements were made before the question in dispute was raised, and (2) like statements in a will or deed relating to the affairs of the family when made before the question in dispute was raised. 110 I.C. 428 (2)=1928 P. 539. *See also* 163 I.C. 770=1936 O. 340. Under the English law the admission of hearsay evidence in pedigree cases is confined to the proof of the pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. The Indian law as laid down in sec. 32 is no so strict. 1934 A.L.J. 318=1934 A. 406 (F.B.).

SEC. 32 (5) AND (6): "FAMILY PEDIGREE."  
—Meaning of. 1 Luck. 700. As ordinarily understood, a pedigree is an ancient family record handed down from generation to generation and added to, as a member of the family dies or is born; but a statement drawn upon a particular occasion, for a specific purpose, by a member of the family, is not a pedigree in the sense in which it is used in sec. 32 (6) and has to be treated as a mere declaration made by the person who made or adopted it. 16 Mys.L.J. 137=43 Mys.H.C.R. 21. As to the presumption of genuineness of pedigree tables, *see* 105 I.C. 81; 1928 N. 20. Unless a family pedigree is shown to be a statement of some member of the family or maintained in the family as a family pedigree, it cannot be said to be admissible in evidence either under clause (5) or clause (6) of sec. 32. The word 'family pedigree' in the Act should not be understood according to the standard adopted by Courts of law in England in regard to English pedigrees. 1944 O.W.N.

83=20 Luck. 108. In cases of families of taluqdars governed by the custom of lineal primogeniture, importance is attached to seniority. Hence where members of such a family give pedigrees and indicate the persons by number, it is natural to consider that the numbers are given for the purpose of showing the order in which each of the persons stated therein was born. When genealogical tables are made by members of such a family, there is a natural tendency to proceed from the eldest to the youngest, because such family members by tradition and by necessity develop the habit of stating the names in order of seniority. Where in addition, a number of genealogical tables are dictated by persons who have personal knowledge, at different times and for different purposes, and they consistently mention the names in one unvarying order, that order must be ascribed to a design or a plan to state the name in order of birth. 1944 O.W.N. 83; 20 Luck. 108. Where there are a number of pedigrees put in by the direct ancestors of parties to the case and they are always the same, a fact which cannot be due to chance. There is a design in the way they are prepared and that design can only have been to give the correct order. 178 I.C. 950=1938 O.W.N. 1267=1939 Oudh 17. Entries in *Panda's* register or note books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication. 15 I.C. 625 [30 A. 510; 35 I.A. 166=18 M.L.J. 424=13 C.W.N. 1 (P.C.).] *See also* 178 I.C. 950=1938 O.W.N. 1267=1939 O. 17. Pedigree—Admissibility—Proof of—Person making the statement not known. *See* 37 A. 600=13 A.L.J. 817=50 I.C. 505. *See also* 30 A. 510 (P.C.); 8 I.C. 728; 21 I.C. 274; (1937) 2 M.L.J. 772 (P.C.). Objections to the admissibility of evidence taken at a late stage in litigation are not to be encouraged. The proper time to object is at the trial when the evidence is tendered. 37 A. 600=13 A.L.J. 817; 30 I.C. 505. *See also* 30 A. 510 (P.C.); 8 I.C. 274. Statements of deceased mortgagor in mortgage deed admissible to prove relationship. 29 I.C. 974. *Pandah's bahis* are admissible under sec. 32 (5) and (6) and sec. 90 only if evidence is led to prove the identity, signature and handwriting of the writer. The mere fact that such bahi is old is no justification for admitting it either under sec. 32 (5) and (6) or under sec. 90. 190 I.C. 597=1940 Lah. 245. A purohit's statement regarding relationship is admissible only if it comes within the four corners of sec. 32 (5) and (6) or under sec. 50 of the Act. 190 I.C. 597=1940 Lah. 245.

SEC. 32 (7).—Statements of facts contained in a will executed by a Hindu coparcener to the effect that the properties

(6) When the statement relates to the existence of any relationship <sup>1</sup>[by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or in document relating to transaction mentioned in section 13, clause (a) ;

or is made by several persons and expresses feelings relevant to matter in question.

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

#### Illustrations.

(a) The question is, whether *A* was murdered by *B* ; or *A* dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by *B* ; or The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A*'s widow.

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of *A*'s birth. An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended *A*'s mother and delivered her of a son, is a relevant fact.

(c) The question is, whether *A* was in Calcutta on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended *A* at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is whether a ship sailed from Bombay harbour on a given day. A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to *A* for certain land. A letter from *A*'s deceased agent to *A* saying that he had received the rent on *A*'s account and held it at *A*'s orders, is a relevant fact.

(f) The question is, whether *A* and *B* were legally married. The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day, the fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

#### LEG. REF.

<sup>1</sup> These words were inserted by Act XVIII of 1872, sec. 2.

dealt with in the will are his self-acquired properties are admissible in evidence under sec. 32 (7) to prove the character of the properties. But being a self-serving statement it will require and justify scrutiny in the light of other evidence in the case. I.L.R. (1937) M. 1012=45 L.W. 422=1937 M. 538. See also 1939 Sind 145. The recital in a deed of gift to the effect that the executant and her husband have made a gift of certain properties to the daughters as stridhanam at the time of her marriage and that she was executing a formal conveyance in pursuance of the oral directions of her husband is admissible in proof of the earlier gift in a case covered by sec. 32. 61 M. L.J. 887. See also 162 I.C. 999=1936 P. 315; 1940 M.W.N. 983=52 L.W. 440

(Statement as to age of testator written in will by scribe at the instance of persons present at the time—and not by testator—not relevant). Where the validity of an adoption made by a person who had two aurasa sons affected with leprosy is in question, the statement contained in the registered deed of adoption setting out that fact as the ground for the adoption is admissible in evidence under this clause. 54 M. 576=61 M.L.J. 19. Statements made before the sub-registrar by the deceased attestors to a will are admissible under sec. 32 (7) taken with sec. 158, but not under sec. 33. 1933 M.W.N. 1148. See also 165 I.C. 785=1936 O.W.N. 1203=1936 O. 133. (Statement as to separation and partition among brothers). A statement of a deceased person contained in a deed of family settlement to the effect that after the death of his father a partition was effected amongst the brothers is a statement which is not admissible in evidence under sec. 32 (7) or under

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased *Banya* in the ordinary course of his business, is a relevant fact.

(k) The question is, whether *A*, who is dead, was the father of *B*.

A statement by *A* that *B* was his son, is a relevant fact.

(l) The question is, what was the date of the birth of *A*.

A letter from *A*'s deceased father to a friend announcing the birth of *A* on a given day, is a relevant act.

(m) The question is, whether, and when, *A* and *B* were married. An entry in a memorandum-book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact.

(n) *A* sues *B* for a libel expressed in a painted caricature exposed in a shop window.

The question is as to the similarity of the caricature and its libellous character. The remarks of the crowd of spectators on these points may be proved.

33. Evidence given by a witness in a judicial proceeding or before any persons authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable

Relevancy of certain evidence for proving in subsequent proceeding, the truth of facts therein stated.

of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without any amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

any other provisions of the Act to prove separation. The statement is obviously in the interest of the person who made it, and he, if alive, could not have made use of such an admission in his favour nor could his sons do so. 165 I.C. 785=1936 O.W. N. 1203=1937 O. 133. Sec. 48 read with sec. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under sec. 32 are not admissible under sec. 48 or under sec. 32 (7). Statements cannot be called instances. 8 Luck. 445=1933 O. 246. Where the permanent character of a tenancy is in issue and the tenancy would be transferable only if it were permanent, every transaction of transfer will be relevant under sec. 13 (a) as a transaction by which such permanent right was asserted. Statements supporting such permanent right made by dead persons in the documents evidencing these transactions would, therefore, be admissible under sec. 32 (7). 45 C.W.N. 590.

SECS. 32 AND 33.—Relative scope of. 43 Cr.L.J. 123. Evidence in regard to a statement made to the complainant by a person who has not been examined as a witness, is not admissible either under S. 32 or S. 33. 79 C.L.J. 149=A.I.R. 1945 Cal. 360.

SECS. 32 (2) AND 34.—The term "book" as used in secs. 32 (2) and 34 implies a collective unity of sheets even at the time that the entries come to be made. It connotes an intention that it should serve as a permanent record. But beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. A number of sheets of paper stitched into a

book before the entries have begun to be made, each entry covering both the sheets, i.e., the entry beginning on the left page and running on into the right page, and kept by a creditor as an account of his cash receipts and disbursements is a "book" within the meaning of secs. 32 and 34, judged by the standards prevailing amongst Indians who keep private books of account not meant for trade purposes. Entries in such a book are admissible in evidence under sec. 32 (4); and the entries to be admissible need not necessarily be against the pecuniary interest of the persons making the entries. 44 L.W. 467=1936 M. 871.

SECS. 32 AND 35.—Charge of murder—Statement by wife of deceased made to Village Munsif charging accused—Deponent subsequently committing suicide—Statement not admissible against accused. 1942 Mad. 450=(1942) 1 M.L.J. 503.

SEC. 33: CONSTRUCTION.—Sec. 33 must be very strictly construed. 31 I.C. 354=17 Bom.L.R. 590. The requirements of sec. 33, must be carefully proved before the statement of a witness before the committing Magistrate can be transferred to the sessions record under the section. 46 P.L.R. 69. See also 46 P.L.R. 135. Affidavit of person who died subsequently and who was not subjected to cross-examination is not admissible. 1927 M. 507=52 M.L.J. 477.

CONDITIONS OF ADMISSIBILITY OF EVIDENCE.—Per *May Oung, J.*—The power given by sec. 33 requires to be exercised with great care and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. The Court must also in the judgment or preferably in a separate order, record the reasons for doing so. 1 R. 512=

Provided—

that the proceeding was between the same parties or their representatives in interest :

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceedings.

*Explanation.*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

76 I.C. 817=1924 R. 209; 1930 C. 756. *See also* 25 O.C. 142=74 I.C. 860=10 Lah. 837; 1929 L. 542. Sec. 33 sanctions the admission of the evidence of an absent witness only on certain specified grounds. It is well-established that before such evidence is let in, the Court must arrive at a finding, on evidence formally and regularly taken and recorded, that one or other of the grounds specified in the section exists. Accordingly, the admission in evidence of the deposition of a witness before a committing Magistrate without such a finding is illegal, when such witness is not called to give evidence at the trial before the Sessions Judge. I.L.R. (1944) 2 Cal. 76=46 Cr.L.J. 580=A.I.R. 1945 Cal. 137.

Under sec. 33 one of the conditions to be satisfied is "that the adverse party in the first proceeding had the right and opportunity to cross-examine". Two things must co-exist: right and opportunity. Whether the accused had the opportunity to exercise his right to cross-examine is a question of fact to be determined in each case. The condition will not be fulfilled merely because the accused was physically present in police custody at the time of the examination of a witness. The object of the section is to afford a genuine opportunity which would be effectively availed of and not for show only. 48 P.L.R. 39; 47 C.W.N. 271. Under sec. 33 before certain evidence given by a witness in a judicial proceeding can be admitted in a subsequent judicial proceeding, it must be established that the questions in issue were substantially the same in the first as in the second proceeding. It is not necessary, however, that any specific issue need have been raised regarding any particular matter in issue between the parties, but the matter must have been in issue between them. 49 L.W. 273=1939 Mad. 446=(1939) 1 M.L.J. 227. *See also* 1939 Rang. 225. The fact that the counsel for accused gave his consent does not make any difference. 1929 L. 542. The provisions of this section are not in any way affected by sec. 350 of the Cr.P. Code. 101 I.C. 483=1927 L. 332 (5 L. 115, Doubtful). The statement of a witness as recorded before the committing Magistrate cannot be transferred to the Sessions file under sec. 33 merely because it would be expensive to retain the assessors until that witness is served with a summons. 45 P.L.R. 151. The transfer of the statement of a witness as recorded by the committing Magistrate to the Sessions record under sec. 33 without examin-

ing him; is improper when summons was not issued for his attendance in good time as it is impossible in such circumstances to say that the witness could not be found or his presence could not be obtained without delay or expense. 45 P.L.R. 82. Where it is desired to have recourse to sec. 33 on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It cannot be laid down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness. But the evidence of a police officer who served the witness with a summons thirteen days before the trial that he found that the witness was ill is not sufficient to prove that the witness was incapable of giving evidence on the day of the trial, as the officer was not a proper person to prove from what disease the witness was suffering. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence, and the consent of the accused to the evidence being read does not do away with the necessity of the Court being satisfied by proof. It may be that there are some matters as to which it would be possible for an accused to consent to be taken as proved though no strict evidence was given; if there are, they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused. Great care must be exercised before admitting a statement made before the committing Magistrate at the Sessions trial. In very many of these cases, the accused is not represented at that stage, so while he has the opportunity to cross-examine it is not often that this would be effectively done. 72 I.A. 270=59 L.W. 92=50 C.W.N. 201=A.I.R. 1946 P.C. 1=(1946) 1 M.L.J. 125 (P.C.). The principal evidence against the accused in a sessions trial on a charge of murder was the deposition of a witness in the Court of the committing Magistrate. The deposition was admitted as direct evidence at the sessions trial under sec. 33 on the ground that the witness could not be served as he had joined the army and his address was not known. There was no evidence as to what steps had been taken by the prosecution to discover his address. Subsequently his address was also ascertained. *Held*, that in the circumstances

of the case the sessions judge was not justified in applying sec. 33 and that any delay or expense which might be involved in the case could not be said to be unreasonable having regard to the public interests involved in examining in the box and in the presence of the trial judge and the assessors, the principal witness in so serious charge as murder. 57 L.W. 108=(1944) 1 M.L.J. 137. If the Public Prosecutor gives up a witness examined before the committing Magistrate but the statement of that witness is transferred to the Sessions record at the request of the defence counsel, that statement should be brought on the record not as that of a prosecution witness but as that of a defence witness or Court witness. 46 P.L.R. 69. Death of witnesses before completion of cross-examination—Admissibility of deposition in evidence. 25 A.L.J. 775=50 A. 113. See also 1944 O.W.N. 71=1944 A.L.J. 264; 31 C.W.N. 908. On this section, see also 1924 A. 85; 1925 R. 89. It is the duty of the Court to satisfy itself that the presence of the witness cannot be obtained without an amount of delay or expense with it considers unreasonable before the statement of the witness in a previous judicial proceeding can be admitted. The mere statement of the public prosecutor to that effect is not sufficient. There must be independent evidence. *Prima facie* the consent of the accused or his counsel is presumptive evidence of the absence of prejudice. 28 M.L.J. 329=28 I.C. 518=39 M. 449. See also 1930 C. 756; 1930 L. 1041; 1929 L. 542 (the consent of the accused counsel is immaterial). Where a witness available before Magistrate whose whereabouts not known at the sessions trial—Evidence tendered before Magistrate can be taken into account. 33 C.W.N. 918=1929 C. 765; 35 C.W.N. 143 (witness absconding). See also 45 P.L.R. 82. Evidence taken in trial for dacoity is not admissible in a trial under the Arms Act. 36 I.C. 480=10 Bur.L. T. 121. Evidence taken before Magistrate without jurisdiction is inadmissible in a subsequent trial before competent Magistrate. 7 L. 396=97 I.C. 752=1926 L. 582. As to statement made before enquiring Magistrate, see 1926 P. 58. See also 35 P.L.R. 75=1934 L. 212; 1934 C. 766; I.L.R. (1944) 2 Cal. 76; (1946) 1 M.L.J. 125 (P.C.).

**ILLUSTRATIVE CASES.**—No proceeding is a 'judicial proceeding' within the meaning of the section if it is conducted by a Court which has no jurisdiction to undertake it. 54 M. 561=61 M.L.J. 120. Where the Munsiff, after the examination of a witness, returned the plaint subject-matter was above his pecuniary jurisdiction, the evidence of the witness so examined is not admissible in evidence in the subsequent trial before the Sub-Judge even though the witness died in the interval and so could not be examined afresh. 54 M. 561. As the person against whom proceedings have been instituted under sec. 476 of the Cr. P. Code, has no right to cross-examine

witnesses during that enquiry, the evidence of witness in that enquiry, who is not forthcoming at the trial started on the result of such inquiry, is not admissible. 34 I.C. 969=17 Cr.L.J. 249=18 Bom.L.R. 284; also evidence given in proceedings under sec. 145, Cr. P. Code, by one defendant for another. 30 C.W.N. 254=93 I.C. 115=1926 C. 705. The deposition of a material witness which was relied upon by the Judge in his summing up the jury, who resided within the jurisdiction and could be procured without unreasonable expense and delay is not to be admitted as justice requires that such a witness should be examined in the presence of the accused. 31 I.C. 354=17 Bom.L.R. 590. A mere statement of a police officer that a witness is a man of another district and cannot be found is not a sufficient ground for the reception of evidence under sec. 33. 41 C. 601=26 I.C. 161. At a sessions enquiry an approver was examined in chief but the accused were not asked then and there to cross-examine him and he did not in fact dare to cross-examine and he died before trial in the Court of Sessions. *Held*, that it was doubtful whether his evidence was admissible and that in any case its value was small. 18 I.C. 406=17 C.W.N. 230. Consent of parties to treat evidence in another case as evidence in the case—Legality. See 1914 M.W.N. 930; 1927 M. 1107=104 I.C. 518. See also 17 C.W.N. 230=18 I.C. 406. In the absence of proof of the circumstances mentioned in the section the importing in bulk in a civil suit of deposition of witnesses recorded in a criminal trial is a serious irregularity. 39 B. 441=29 M.L.J. 34=42 I.A. 135 (P.C.). See also 106 P.R. 1915. Where the interests are identical and the object of litigation is to advance a common claim, evidence given in former judicial proceedings can be received in evidence under this section in a subsequent proceeding even against persons not parties to the previous litigation. 28 M.L.J. 669=24 I.C. 519. Suit to enforce registration of will—Judgment based on evidence adduced before the registering officer and treated as evidence in the suit by the consent of parties—Judgment unsustainable. 41 M. 731=34 M.L.J. 526=46 I.C. 849. See also 35 M.L.J. 657=42 M. 103. Neither the findings nor the evidence in ejectment proceedings in Revenue Court are admissible in a civil suit to recover possession by a person ejected in consequence of the proceedings in the Revenue Court. 106 I.C. 313=1928 L. 43. Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings and so statements made therein as to the existence of a custom are not admissible in a subsequent civil suit between the parties. 4 A.W.R. 1208=1935 A. 187. A and B were jointly tried. The depositions of witnesses in previous criminal proceedings between B and the complainant are not admissible even with the consent of the accused's counsel. 1928 R. 284. In a warrant



## STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. <sup>1</sup> Entries in books of account, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Entries in books of account when relevant.

## LEG. REF.

<sup>1</sup> Cf. Sec. 240, Companies Act (VII of 1913) and Sch. I, O. VII, R. 17, Civil Procedure Code, 1908. As to admissibility in evidence of certified copies of entries in Bankers' Books, see sec. 4 of the Bankers' Books Evidence Act, 1891.

case until the stage provided for in sec. 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible. 1929 Cr.C. 669=1929 C. 822. But see *contra* 1935 N. 8. Reservation by Committing Magistrate of cross-examination of witness *suo motu*—Evidence cannot be admitted in Sessions Court. 1930 Sind 54=120 I.C. 524. Evidence recorded for the purposes of proceedings under the Fugitive Offenders Act is admissible under secs. 32 and 33 in proceedings under Penal Code against the same accused. 1928 Sind 161.

Sec. 33, Proviso.—Object—"Representative in interest"—Meaning of. 60 I.A. 336=1933 P.C. 202=65 M.L.J. 479 (P.C.). The term "representatives in interest" includes persons having the same interest in the subject-matter of the litigation and comprises all persons on whose behalf, though not in their names or as representing them, the previous litigation was carried on. 16 Mys.L.J. 77=43 Mys.H.C.R. 113. Representatives in interest are persons who derive their title through or claim under them, or, shortly, are their privies. Sec. 33 cannot be applied without any reference to the subject-matter of the two suits. The interests involved in each case must be the same or similar. 102 I.C. 713=1927 M. 733. Such as partners and joint contractors. 5 P. 777. The phrase may not for all purposes be synonymous with the expression "persons claiming under" in sec. 11 of the Civil Procedure Code. 55 M. 40=62 M.L.J. 116. In seeing whether a person is the legal representative under sec. 33, regard must be had to the state of affairs, when the evidence is sought to be admitted. Where the defendant in a subsequent suit was the natural son of the plaintiff in previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person, held the depositions in the previous suits were not admissible. 51 M. 893=55 M.L.J. 894 (F.B.). A deposition on which there was no opportunity at all to cross-examine, is not admissible. 39 L. W. 34=1934 M. 100. But sec. 33 does not require that the adverse party should have actually exercised his right to cross-examine the witness. (8 C.W.N. 838, Ref.) 151 I. C. 683=1934 P. 413. The true reading of sec. 33 is that the adverse party in the first

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proceeding had both the right and the opportunity of cross-examining and not "the right of opportunity to cross examine." 57 I.A. 14=52 A. 1=58 M.L.J. 446=1930 P.C. 79 (P. C.). Where the party was not allowed to cross-examine in a prior proceeding the previous statement is not admissible in the later suit. 58 M.L.J. 446.

EXPLANATION.—The inquiry before the Coroner, although it may be a judicial proceeding is not a proceeding between the prosecutor and the accused and therefore the deposition of a witness taken in an enquiry before the Coroner cannot in the event of the death of the witness, be taken into account at the trial before the High Court. 35 Bom.L. R. 1020=1933 B. 479 (1).

PROCEDURE.—Before the evidence of a person who cannot be found can be admitted under sec. 33, there must be a finding by the Court that reasonable exertion had been made to find him. The mere report of the process-server that the witness cannot be traced is insufficient for enabling the Court to base its finding upon such evidence. 1939 M.L.R. 12 (Cr.). It cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted. Difference between English and Indian conditions regarding facilities for obtaining qualified doctors pointed out. 31 C.W.N. 908=1927 C. 679. "Where an entry appears in a book of account it comes both under sec. 32, cl. (2) and sec. 34. The only material difference as between an entry relevant under sec. 32 (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not". Per *Mukerji, J.*, in 55 C. 1167=32 C.W.N. 580. Evidence otherwise inadmissible cannot be made admissible by consent of parties. 1942 Mad. 528=(1942) 1 M.L.J. 485.

SEC. 34: BOOKS "REGULARLY KEPT IN THE COURSE OF BUSINESS"—MEANING OF.—14 Cr. L.J. 262=19 I.C. 534. As to what constitutes "regularly kept" accounts and as to the effect of irregularity in keeping accounts, see 95 I.C. 128=1926 N. 407; 136 I.C. 716; 9 O.W.N. 932. See also 4 B. 576; 13 C.L.J. 139=8 I.C. 81; 13 I.C. 678; 7 I.C. 1011. Sec. 34 cannot be read as meaning that there should be independent evidence, besides the entries in books of account, that such and such articles valued at such and such amount were supplied on such and such date. What is necessary to be seen in each case is whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in the entries actually took place. In the case of transactions which are numerous and which extend over some length of time



*Illustration.*

A sues B for Rs. 1,000, and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence, to prove the debt.

it is not reasonable to expect independent evidence to be given to prove each and every particular transaction. In such case the genuineness of the account books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books would not be enough. There must be some evidence to corroborate those entries. The evidence of the person who wrote the account books and in whose presence the transactions took place would be the best corroboration. Since he cannot possibly have independent recollection of the various transactions, he may, as provided in sec. 159, refresh his memory by referring to the account books. But, it is not necessary for him to prove that such and such articles valued at specified amounts were supplied on specified dates. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect would be the same. Where however, the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon to prove those particular transactions. Mere general evidence to prove that the account books were regularly kept is not enough. 20 Pat. 273=22 Pat.L.T. 383=1941 Pat. 430. See also 49 C.W.N. 308. The rule that plaintiff's own statement on oath in support of entries can be sufficient to support the entries in his *Bahies* so as to fix if it is not with liability is applicable only if it is found that the plaintiff's books are regularly kept in the course of business and free from any doubt. It is essential that entries of all the available *Bahies* (e.g.) *Rokar*, *Pakki* and *Kachi*, *Nakal* and *Khata* relating to the money claimed should be filed along with the plaint. The tendency on the part of creditors to base their claim solely on entries in *Khata Bahi* is to be strongly deprecated. 1939 M.L.R. 216 (Civ.). It is only the account books that are properly kept that are admissible in evidence as relevant. 51 A. 519=27 A.L.J. 115=1929 A. 170. A book of account may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transactions take place. 38 C.W.N. 861. Account prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate although they may be useful in cases where they corroborate other evidence. 51 M. 291=45 M.L.J. 703. It is a matter of intrinsic evidence as to whether the books in question were books of account and kept regularly in the regular course of business. The only limitation imposed by the statute is that the statement, contained in the account books "shall not alone be sufficient to charge any one with liability". The value of the entries is corroborative and they cannot be used as independent evidence to charge any

person with liability. 51 A. 864=1930 A. 38. See also 1930 A.L.J. 987; 1936 O.W. N. 582; 16 Luck. 36. Entries in account books unless corroborated not sufficient to fasten liability. 1930 A.L.J. 987. Proof of accounts, see 100 I.C. 863=1937 N. 177; 49 C.W.N. 308; 16 A. 161; 18 A. 92; 1 M. I.A. 47=5 W.R. (P.C.) 29. They would be good corroborative evidence. 23 W.R. (P.C.) 27. Such entries must be corroborated by other evidence in order to find a liability upon. 22 W.R. 549; 23 W.R. (Cr.) 27. Under sec. 34, the production of account books alone is not enough to make a person liable. But it is a question of fact as to how much evidence is required to create the liability when taken together with books of account. Every case shall have to be decided on its own merits. In a case where the witness, who produces the account books, is reliable and has personal knowledge, the Court may accept his statement as enough proof combined with the books of account. In cases however in which the witness is not reliable at all, the Court would require more proof. 1937 Pesh. 103. If in addition to the production by the plaintiff of account books regularly kept in the course of business, there is evidence of witnesses who prove a number of items claimed by the plaintiff, the requirements of sec. 34 are fulfilled. 35 P.L.R. 539. Mere production without more of account books, does not prove anything. There must be proof, not only of the books, but of each entry and item of account. 23 L. W. 272=1926 M. 955. See also 1927 L. 903; 1930 A.L.J. 987; 1933 L. 384=34 P.L.R. 46; 176 I.C. 99=1938 A.L.J. 449=1938 A. 353. Where the plaintiff produces account books and deposes that they are regularly kept and are correct, and he is not cross-examined on the point, his testimony supported by the account book is legally sufficient to establish his claim. 1933 L. 212=145 I.C. 157. "Account" implies reckoning and totalling and balancing. Where these are not done there is no account. 1933 L. 212. See also 10 N. L.R. 44=23 I.C. 193. Books of account, if no balances have been struck in them may be inadmissible under sec. 34, but they are however admissible under sec. 32 (2) as entries or memoranda, made by persons who are dead, in books kept in the ordinary course of business. 30 N.L.R. 192=1934 N. 106. "Books" mean sheets of paper permanently bound. Unbound sheets are not books of account. 15 Cr.L.J. 241=23 I.C. 193. It is hardly proper to stigmatise the books of a respectable firm as books which it is not difficult to fabricate, without coming to a specific finding that the books produced were as a matter of fact fabricated and without giving reasons therefor. 14 P.L.T. 61=1933 P. 145. Where a number of blank spaces are left in the *rokar bahi* in different places, the conclusion by the Court that it is unreliable is

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public

Relevancy of entry in public record made in performance of duty.

servant, in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

fully justified. 41 P.L.R. 295=184 I.C. 858=1939 Lah. 438.

RELEVANCY OF ENTRIES IN BOOKS OF ACCOUNT.—See 5 M.I.A. 432; 4 Beng.L.R. (P.C.) 31; 13 M.I.A. 365; 16 Luck. 36; 3 N.W.P. 308; 5 W.R. 242. Such books can be used to refresh memory of witness. 29 C. 774. Such entries need not be made by or at the dictation of a person who had a personal knowledge of the truth of the fact stated. 1 B. 610. Entries in account books are relevant as admissions against the party even when the entries are written by his agent. 38 C.W.N. 861. The noting of the items in an account book kept regularly by a *munim* in whose presence the money was not paid is no evidence. 1923 L. 431 (1). As to what constitutes being kept in the regular course of business, see 4 B. 576. Although the actual entries in books of account are relevant, the book itself is not relevant to disprove an alleged transaction by the absence of any entry concerning it. 10 C. 1024; 30 C. 24. But see *contra* 1924 N. 22 in which it was held that the absence of an entry in an account book is relevant fact admissible in evidence. (4 C.W.N. 207, Foll.) *Jama-wasil-baki* papers—Admissibility of. See 5 W.R. 243; 7 W.R. 533; 27 C. 118; 32 C. 582; 46 C.L.J. 253=1927 C. 855. *Jamabandi* papers—Admissibility of. See 6 B.L.R. App. 62; 14 W.R. 473; 9 W.R. 451; 1 N.W.P. App. 65; 22 W.R. 256; 22 W.R. 207; *Ibid.* 540; 23 W.R. 456; 20 W.R. 142 (171); 1928 P. 429 are in the nature of account books and admissible). As to zamindari papers, see 19 Pat. 398=1940 Pat. 622. *Jabaki* papers, not admissible, unless party sought to be bound was shown to have agreed thereto. 9 W.R. 274. As to *Bahi* entries, see 41 P.L.R. 373=1939 Lah. 438.

OBJECTION TO ADMISSIBILITY.—An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complied with the requirements of being kept regularly and in the ordinary course of business. 1932 L. 417=33 P.L.J. 745. See also 1940 O.W.N. 555=1940 Oudh 385. Where entries in certain books of account are proved to be in the handwriting of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business ought to be taken at the time of trial. 32 I.C. 665=17 Cr.L.J. 73 (M.). Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident. 1928 P.C. 39=54 M.L.J. 208 (P.C.). As to the effect of failure to produce account books, see 176 I.C. 675=1938 N. 254.

SECS. 34 AND 35: BATWARA KHASRA is admissible. 1932 P. 447. (39 I.C. 491, Foll.); 15 P. 584: 1944 Sind 176=I.L.R. (1944) Kar. 14 (Evidentiary value of entries in Revenue records); *Batwara* papers; see 1923 C. 261; 59 I.C. 963. Purohit's books—Entries in purohit's books as to the relationship of the pilgrims are admissible in evidence. 30 P.L.R. 1922. See also I.L.R. (1945) Mad. 194=(1945) 2 M.L.J. 56 (Inam Register—Entries in Wallace's Registrar). *Ism-navasi* papers, i.e., returns submitted by the police in respect of lands held by *Gharwats* are admissible. 9 W.R. 158; 8 B.L.R. 504; 14 M.I.A. 259; 8 W.R. 232. Settlement *behari* and *aware gha* papers how far admissible, see 9 W.R. 239. As to entries in Settlement Register, see L.R. 5 A. 116 (Rev. 3; 1936 L. 114. As to *hastabad* papers, see 9 W.R. 105. As to *Kanungo* papers, see 7 W.R. 533; 2 W.R. (Act X Rul.) 13; 8 W.R. 517. Record-of-rights and *jamabandi* papers. 31 N.L.R. (Supp.) 202=163 I.C. 179=1936 N. 71. *Sarikam* papers. 1936 P. 400. See also 1936 P. 142. As to *hat chitta* books, see 1 Jur. (N.S.) 358. As to *Hudabandi* papers, see 55 C. 1167=1928 C. 854. Register of pargana watandars. 39 Bom.L.R. 288. Entry in the register of powers of attorney. 43 C.W.N. 907. The Jail Registers are official records kept by public servants in the discharge of their official duties and as such admissible under sec. 35. 1942 O.W.N. 530=A.I.R. 1943 Oudh 1. As to income-tax papers held admissible against and not in favour of the person whom they may concern, see 9 W.R. 275. As to *hawacima* papers, see 2 B.L.R. App. 37. See also 6 M.I.A. 88. An entry made a considerable time ago by the patwari in village papers, would be treated as an entry in a public document maintained in the course of business. 1939 R.D. 325=1939 A.W.R. (B.R.) 277. As to Bankers' Books, see Bankers' Books Evidence Act (XVIII of 1891). As to books of Post Office Savings Bank, see Act I of 1893.

SEC. 35: SCOPE.—See 43 Bom.L.R. 432=1941 P.C. 21 (P.C.). An entry in an official record is admissible if it states a relevant fact. It is not necessary for the admissibility of the entry that it should relate to a fact known to the public officer recording it. 27 S.L.R. 101=1933 Sind 317. As to admissibility of statement contained in public document, see 1925 P.C. 170=50 M.L.J. 120 (P.C.). Document neither shown to be prepared by public servant nor shown forming the act or record of public officer is admissible. 1930 A. 26. Orders of detention passed under r. 26 (1) (b) of the Defence of India Rules are not public records and therefore sec. 35 has no application. A.I.R. 1944 Lah. 33 (F.B.). The words "an entry" in sec. 35 are not in-

tended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of enquiries conducted under sec. 202, Cr. P. Code, or under O. 26, C. P. Code, 1934 L. 890. See also 165 I.C. 626=1936 L. 37. The mere fact that a public servant when making an entry in an official record acts under a misconception about his official duty, is not sufficient to take such entry by such an official out of the class referred to in sec. 35. 1946 O.W.N. 26=1946 A.L.W. (C.C.) 26=1946 A.W.R. (C.C.) 32. Upon the question whether a talukdar was a convert to Islam or was a chief of a Rajut clan, it is permissible to prove that the fact of such conversion was unknown to the district and local officers and was not ascertainable from anything to be found in official publications. 1939 O.L.R. 553=183 I.C. 662=44 C.W.N. 66=1939 P.C. 249 (P.C.). A book of copies of communications sent by the Collector to various subordinate officers, maintained in the Collector's office, that being the prevalent official practices is itself an official register within the meaning of sec. 35, and a public document under sec. 74. A certified copy of such a document is clearly admissible in evidence, and should not be rejected as being a copy of a copy. 1939 M.W.N. 841. An entry in the register of powers-of-attorney maintained by the registering officers under the Registration Act, is undoubtedly relevant under sec. 35 to prove the contents of the power-of-attorney. The abstract of the power which appears in the entry is made by the Sub-Registrar in the discharge of his official duty, and the Court is entitled to presume its correctness. 43 C.W.N. 907=70 C. L.J. 5=1939 Cal. 569.

**LETTERS PASSING BETWEEN OFFICIALS BEFORE FINAL DECISION IS REACHED—ADMISSIBILITY.**—The very wording of sec. 35 conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. In further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character; and in so far as they do not incorporate the result of personal inquiries they are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which constitute the final word in the matter. Hence letters which have passed between the various officials cannot be admitted under sec. 35 so as to make the remarks made therein as legal evidence in the case; and if the final conclusions arrived at are recorded in the settlement papers, those are the only documents which can be admitted in evidence. 38 P.L.R. 748=1936 L. 37. See also 1939 M.W.N. 841.

**ILLUSTRATIVE CASE-LAW.**—Entries in public records consequent upon a decree are admissible under sec. 35. 16 P. 258=18 P. L.T. 257=41 C.W.N. 577=1937 P.C. 69= (1937) 2 M.L.J. 631 (P.C.). The depositions of witnesses in an heirship inquiry under sec. 71 of the Bombay Land Revenue Code are inadmissible as substantive evidence relating to title but they might be used as corroborating or contradicting the witnesses examined in the case. 35 Bom.L.R. 118=144 I.C. 442=1933 B. 126. So also family traditions recorded by settlement officer. 163 I.C. 770=1936 O. 340. R. 72 of the Madras Registration Rules requires the Registrar to place on record a summary of the evidence taken by him when enquiring under sec. 41 (2), Registration Act, into the execution of a will or authority to adopt. This summary would be admissible, *quantum valeat*, under sec. 35. 1933 M.W.N. 1148. Where a deposition of a witness had been recorded in the ordinary way, that record and not an abstract of the evidence in the judgment, is the proper evidence of the statement, but where the Court has acted upon an oral admission and recorded in its judgment which constitutes the only official record of it, it is admissible. 1933 M. 184=142 I.C. 548; 40 L.W. 310. The report of a Municipal overseer as to when the construction of *chaiya* took place is inadmissible. 26 I.C. 670=12 A.L.J. 740. As to Municipal register of births and deaths, see 159 I.C. 190=1936 A.L.J. 404=1936 A. 218; 1939 R.D. 80=1939 A.W.R. (B.R.) 4; 1940 Mad. 285. Where the copy produced is that of an entry in the register of births and deaths kept by the Circle Registration Officer under para. 306 of the Police Regulations, it is a copy obtained from a public office and is a copy of a public document within the terms of the Evidence Act and is hence admissible in evidence. 1940 R.D. 6=1940 A.W.R. (B.R.) 15=1940 A.L.J. (Supp.) 1. Municipal register containing entries as to ownership of property. 163 I.C. 867=1936 L. 965. A recital in the order of a President of a Union Board is not admissible under sec. 35 or sec. 13 unless such President has been examined with regard to the fact mentioned in his order. 131 I.C. 654=1931 M. 487. A letter of the Government of India in which *Anaesthesine* is included in the list of recognised preparations is not admissible. 42 I.C. 166=32 P. W.R. 1917 (Cr.). Entries in an official book made by a forest guard and checked and initialled by the officer responsible for the correctness of the marking are entries in an official record which is admissible. 1943 N.L.J. 130. The Municipal register in which births and deaths are registered is admissible as it is kept by a public servant in the discharge of his duties. 148 I.C. 418=11 O.W.N. 416=1934 O. 167; 177 I.C. 517=1938 C. 120; 1939 A.W.R. (B.R.) 4. See also I.L.R., (1937) N. 382=1937 N. 264; 54 L.W. 411=175 I. C. 263=1938 A. 242. An entry made in a Chaukidar's register of births and deaths is not admissible if it neither purports nor is

proved to be signed by the station writer, the register not being one directed to be kept by any law. 22 O.C. 250=54 I.C. 166; 23 L.W. 688=95 I.C. 1005=1926 M. 985 (Birth register). The *Hathchita* of the Chaukidar containing the date of birth of a person is admissible to prove the age of a person though the entry was made by the defadar, the Chaukidar being illiterate. 14 P.L.T. 441=1933 P. 273; see also 26 Pat.L.T. 225=1945 Pat. 489. As to value of entries in *fahrist-tabdilat*, see I.L.R. (1945) Nag. 331. Register of information at pargana watandars. 39 Bom.L.R. 288. Entries in village crime book. I.L.R. (1937) N. 315=1937 N. 17 (F.B.). Entries in public record consequent on a decree are admissible. 16 P. 258=41 C.W.N. 577=1937 P.C. 69 (P.C.). See also 1939 P.W. N. 577=1939 Pat. 591. Police records. 1937 N. 17 (F.B.). Entry in death register proved to be prepared in a somewhat casual way is of little value. 1930 C. 636. Entries in a death register are at best reliable only with regard to the date of death and the fact of death. It is not safe to rely on them for the purpose of proving the religion of a particular person in a case in which there is much conflicting evidence as to his religion. 1934 M. 630=67 M.L.J. 389. An entry in the scholars' register made by the father since deceased as regards his son's age is admissible as one made in a public register made by a public servant in the discharge of his official duty. 114 I.C. 801=1929 O. 113; 28 N.L.R. 127=152 I.C. 1042; 12 Mys.L.J. 133=39 Mys.H.C.R. 406. School certificates duly prepared according to authority are admissible. 149 I.C. 660=1934 N. 44. Evidentiary value of entry as to age in School Register, and the same in Birth Register, compared. 14 L. 473=34 P.L.R. 820=1933 L. 601. See also 164 I.C. 751=38 P.L.R. 69=1936 L. 598; 194 I.C. 824=1941 Cal. 41=I.L.R. (1941) 1 Cal. 234; 148 I.C. 418; 1934 O. 167; I.L.R. (1938) 2 C. 457=42 C.W.N. 855=1938 C. 641. A school register containing an entry as to the age of a student is admissible to prove his age but much value cannot be attached to it if it is not clear on whose statement the age was recorded. 1941 Cal. 41=72 C.L.J. 208; 1941 Pesh. 38. The entries as to the age of pupils in the High School registers though they might have been merely copied from the Secondary School registers are admissible as entries made by a public servant in public or official register in the discharge of his official duty. Whether he had any special means of knowledge so as to make the entry relevant under sec. 32 (5) does not affect the admissibility of the entry under sec. 35 though it may affect its value. Sec. 35 stands by itself independently of sec. 32 (5). 186 I.C. 613=1940 N.L.J. 150=1940 Nag. 217. See also 1941 Pesh. 38. An employee in a school other than a Government or a State school is not a public servant and any entry in its register made by him is not one made in a public or official register by "a public servant" in the discharge of his official duty. Hence entries in registers

of schools other than Government or State schools are not admissible. (1935 Oudh 41 R.); 1940 Rang.L.R. 481=191 I.C. 21=1940 Rang. 191. See also I.L.R. (1941) 1 Cal. 234. As a certificate of guardianship is neither a book nor a register nor a record kept by an officer in the discharge of his duties, it is not admissible under sec. 35 to prove the age of the minor. 199 I.C. 10=A.I.R. 1942 Cal. 438. See 112 I.C. 834 as to admissibility of settlement pedigree. The family pedigree which accompanied a statement by certain members of the family in an inam enquiry of 1865 and two of which were enclosures to reports by the Collector to the Board of Revenue under the Court of Wards Act are relevant and admissible in a later proceeding. 55 M. 40=139 I.C. 684=62 M.L.J. 116. See also 1939 R.D. 20=1939 A.W.R. (B.R.) 127. A statement made by the father of the child in the Vaccination Register, which is given three years after the birth of the child is not admissible for the purpose of proving the paternity of the child. 1929 M.W.N. 696. Entry of records in native State. See 99 I.C. 307=1927 B. 11=28 Bom.L.R. 716. Mutation register, see 1 Luck. 529; 1926 O. 594. The entry in a survey record or *khewat* raises a presumption that the particulars recorded therein were right but such presumption may be rebutted. 13 P. 589=39 C.W.N. 41=1934 P.C. 182=64 M.L.J. 450 (P.C.). See also 1933 P. 671. Entry in record of rights prepared for *deara* purposes, value of. See 50 C.W.N. 382. Survey register. 98 I.C. 166=1926 R. 204; 31 C.W.N. 419=1927 C. 345; 40 C.W.N. 821. Admission of parties recorded in settlement proceedings. 12 Pat.L.T. 929. As to two inconsistent survey entries, see 199 I.C. 144=1942 Pat. 372. A *Khasra Paimash* prepared under the orders of Government is relevant under sec. 35. 40 P.L.R. 298=1938 L. 751; 1938 L. 440. A *batwara khesra* is not a public document within the meaning of sec. 35; but if it had been prepared under the provisions of the Estates Partition Act by the Deputy Collector in the discharge of his official duty it is admissible as a public document. 7 P. 85. See also 1938 P. 333=170 I.C. 187; 1937 P. 463; 18 P.L.T. 464=171 I.C. 732=1937 P. 567; 40 P.L.R. 693=1938 L. 440. *Butwara* record is not conclusive evidence but merely evidence under sec. 35, as an official record. It is of weak evidence when it conflicts with the record of rights. 61 C. 320=38 C.W.N. 268=1934 C. 488. As between *Thakash map* and *Revenue Survey map*, the latter is more accurate and should be relied on to determine boundaries. 96 I.C. 1027=1926 P. 385. See also 1937 P. 463; 17 P. 120=1938 P. 81 (S.B.). (Appraisal record). Where the *Thak* and revenue survey maps differ and the *Thak* map agrees with the local landmarks, the *Thak* map and the boundary shown in it can be accepted in preference to the revenue survey map and the boundary ascertained by the pleader commissioner upon its basis. 73 C.L.J. 47; 1939 P.W.N. 700=1939 Pat. 591 (Decision in settlement proceedings); 1937 P.

561 (Road cess return); 1939 R.D. 325 (Patwari papers); 30 C.W.N. 689=1926 C. 862 (Record-of-rights); 1926 N. 161 (*Parepat-raka*); 1929 L. 328 (Katardhar paper); 1920 C. 290 (Map prepared for the purpose of partition); 1926 O. 88; 1930 O. 97; 1929 O. 134. See *contra* 1928 C. 893 (Guardianship certificate). See also 1934 A.L.J. 318=1934 A. 406 (F.B.). Remarks made by survey officer at the time of inspection of a village. 2 Luck. 4=98 I.C. 876. See also 43 Bom.L.R. 432=1941 P.C. 21 (P.C.) (answers to questions given in Wilson's Manual). A canal *parcha* is very good evidence of possession and is admissible to prove khas possession. The canal authorities grant *parcha* for irrigation of the land to those persons whom they find in possession of land and the *parcha* has therefore great evidentiary value. 1941 P.W.N. 428. See also 23 Pat.L.T. 42=1942 Pat. 346. Entries in revenue documents are not conclusive but their importance in a case for possession cannot be denied. 8 R. 556=1931 R. 40. As the law does not require valuation to be given in the register of record-of-rights the entries as to valuation are irrelevant and therefore inadmissible. 146 I.C. 152=1933 N. 310. A register of rent suits would be admissible as written by a public servant in the discharge of his official duty. 71 C.L.J. 504=1940 Cal. 539. Where a hand-written pedigree is prepared under a form prescribed by rules framed under the Court of Wards Act, it is admissible in evidence under sec. 35. 189 I.C. 757=1940 A.W.R. (H.C.) 300=1940 Ail. 353. Printed copy of index register of lands granted on lease in city is admissible in evidence. See 44 Bom.L.R. 295. An entry in the order-sheet recording that a notice of a proceeding had been served is admissible under sec. 35 as evidence of the fact of service of the notice. 46 C.W.N. 967=1943 Cal. 114=I.L.R. (1943) 1 Cal. 22. Prescription register in Government hospitals is admissible though handwriting of the entry is not proved. 1 Luck. 203=103 I.C. 512=1927 O. 310. Entry in *wajib-ul-ars* is admissible in proof of custom—Admissibility does not depend upon verification of *wajib-ul-ars* by proprietors. 1927 O. 608. See also 101 I.C. 820=1 Luck. 73. An entry as to ownership in "*fard baghat*" is admissible, but is not admissible when it does not appear who made the entry. 14 R.D. 444. An entry in Mouzawari Register is admissible as regards title to land. 58 C. 858=60 M.L.J. 142=35 C.W.N. 173=1931 P.C. 1 (P.C.). See also 1937 P. 463 (Sifton's Settlement Report). Report of Government Offices, nature of. 13 P. 517. Police records of levy of punitive tax—Value of, as record of title. 1934 L. 885. *Khasra Paimash* of Municipality—Value of, as record of title. (*Ibid.*) Discrepancy between Gangaetic Survey Map and later Cadastral Survey Map—Preference. 1933 P. 671. *Panchnamas*, containing confession, how to be used. 144 I.C. 772=1933 Sind 220. See also 1939 M.W.N. 465. First information report taken down by police officer—Admissibility and use of. 11 Mys.L.J. 475=39 Mys.H.C.R. 75; I.L.R. (1937) N. 315=1937 N. 17 (F.B.)

(Entries in village crime note books). Judgment not *inter partes*. 9 N.L.J. 215=1927 N. 19; 18 M. 73, Entry in order sheet that notice has been served. 1933 P. 658. Report by Process peon who is dead regarding service of notice. 1933 Pat. 658; 191 I.C. 45=42 P.L.R. 288=1940 Lah. 312 (Process-server's report as to giving possession in execution of decree). The Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case, evidence of the fact in another case when the parties are not same. A recital therefore in a judgment not *inter partes* of a relevant fact is not admissible in another litigation, though the judgment may be used in certain circumstances as a fact in issue or as relevant fact or possibly as a transaction. 121 I.C. 509=1930 L. 237. Any entry in a register of previous convictions where the conviction is relevant is admissible and can be proved by a certified copy under sec. 65 and upon it accused might be asked if he admitted the conviction. On this section, see 1922 C. 654; 1925 A. 79; 1924 R. 135. Report of Kanungo on criminal complaint is admissible. 1 Luck. 259=1927 O. 323. See also I.L.R. (1937) N. 315=1937 N. 17 (F.B.); 1936 R. 479 (Patwari papers). Statement as to relationship made by Kanungo Settlement Officer if admissible. 3 Luck. 326=1928 O. 307. Official reports—Facts stated in—Reports valuable and in many cases the best evidence. 55 I.A. 45=55 C. 403=54 M. L.J. 397 (P.C.). But the opinion as to nature of estate—Partible or impartible is not conclusive. (*Ibid.*)

The following are examples of books registers and registered records in India which come within the purview of this section:—Log books (see secs. 103-108, Act I of 1879 and secs. 280-285 of the Merchants Shipping Act 17 & 18 Vict., c. 194); Marriage registers, see secs. 28, 32 and 54 and Schedules III and IV, Act XV of 1872, 14 & 15 Vict., c. 40; Act XV of 1865 (Parsees); and Act II of 1832; sec. 44, Act V of 1865; sec. 6 and Schedule of Act Registers directed by Part XI of the Indian Registration Act, 1908; Registers of printing presses; newspapers and books published in India, Act XXV of 1867; of Copyright Act, Act XX of 1947; Act III of 1914 of new inventions, designs, patterns, etc.; sec. 11 Act XV of 1859; Act XIII of 1872 of literacy, scientific and charitable societies, Act XXI of 1860; of joint stock companies, etc., under the Indian Companies Act VI of 1882 (9 A. 366); of British ships, sec. 4, Act X of 1841; 17 & 18 Vict., c. 104; registers prescribed by the various Municipal Acts, Proceedings of Registered Companies and Municipal Committees recorded in accordance with the provisions of the particular Act applicable thereto of vessels on the river Indus, Act (1 B.C.) of 1863, Record-of-right; (see 23 Pat.L.T. 343=1942 Pat. 466); sec. 14 of the Punjab Land Revenue Act XXXIII of 1871, and secs. 94-106 of the North-Western Provinces Land Revenue Act XIX of 1873; the settlement record prescribed by cl. 9; sec. 9, Bengal Regulation VII of 1822; Registers of Chakeran land, W.R. 1864, 358; Quin-

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of <sup>1</sup>[any Government in British India,] as to matters usually represented or stated in such maps, charts or plans are themselves relevant facts.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the <sup>2</sup>[Central Legislature], or of <sup>3</sup>[any other legislative authority in British India constituted] by any laws for the time being in force or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact.

<sup>4</sup>[\* \* \* \* \*]

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> Substituted for "Governor-General of India in Council" by A.O. 1937.

<sup>3</sup> Substituted by *ibid*.

<sup>4</sup> Last para. of S. 37 which was added by Act V of 1899 has been omitted by Act X of 1914, Sch. II as being unnecessary.

quennial registers in the Bengal Presidency, 7 W.R. 14; Registers of tenure under the Chota Nagpur Tenure Act II of 1869 (B.C.), 19 C. 21; Register of Mahomedan Marriages Act, I of 1876 (B.C.); 10 C. 60; Revenue registers in the Madras Presidency, 15 M. 19; Rennels Maps; 191 I.C. 824; 72 C.L.J. 320 = 1941 Cal. 193; 1941 Cal. 520; Khewat entry. 1926 O. 427; Register under the Bengal "Land Registration Act" VII (B.C.) of 1876. Entry is no evidence of title though it may be of possession. 8 C. 853; 9 C. 401; 12 C.L.R. 12. Entries in canal papers are admissible in evidence of possession, but the value of the evidence is entirely a matter for the Court of facts. 24 Pat. 379 = A.I.R. 1945 Pat. 453.

Sec. 36.—Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made (30 I.A. 44, followed). 68 C. L.J. 293. See 77 I.C. 1048; 7 C.L.J. 415 = 2 I.C. 648; 44 Bom.L.R. 295 = 1942 Bom. 161. Where the Thak and revenue survey maps differ and the Thak map agrees with the local landmarks, the Thak map and the boundary shown in it can be accepted in preference to the revenue survey map and the boundary ascertained by the pleader commissioner upon its basis. 73 C.L.J. 47. As to evidentiary value of Thak map, see 31 C.W.N. 472 = 1927 C. 403; 68 C.L.J. 293.

As to reliability of Rennel's map, see 56 C.L.J. 369; The maps of Rennel published in 1914 were withdrawn and the sale of copies printed in 1914 were stopped under orders of Government. They are, therefore not admissible. 72 C.L.J. 320 = 1941 Cal. 193 = 44 C. W.N. 935; 191 I.C. 824; 46 C.W.N. 218. So far as river surveys and road surveys are concerned, Rennel's maps (1769-71) are scientific and accurate ones, only the village sites shown in his map are approximate. Rennel's maps can be made the basis for adjudication of land revenue. 197 I.C. 5 = 1941 Cal. 520; 46 C.W.N. 218. Maps prepared under Calcutta Survey Act. 31 C.W.N. 419 = 102 I.C. 370 = 1927 C. 345; 68 C.L.J. 293. Entry in Revenue Survey Map, see 98 I.C. 166 = 1926 R. 204; 1928 P. 36 = 8 P.L.T. 817; 68 C.L.J. 293. *Ex parte* statements in survey maps should be regarded not as primary proof merely corroborative proof—but if they relate to distant times or no direct evidence is available, their value assumes greater proportion. 113 I.C. 703. Site plan prepared for a case has very little probative value on question of title. 1930 A. 26. An entry in the current settlement record carries with it a strong presumption of correctness unless it is rebutted. 22 Pat.L.T. 699 = 1941 Pat. 260.

SECS. 36 AND 83: PROOF OF MAPS.—A map which is not a published map generally offered for public sale nor one made under the authority of Government, is not within sec. 36. It is on the contrary within the provision of sec. 83, that maps made for the purposes of any cause must be proved to be accurate. 16 P. 258 = 41 C.W.N. 577 = 1937 P.C. 69 = (1937) 2 M.L.J. 631 (P. C.). See also 1941 Cal. 193 = 44 C.W.N. 935. Printed maps prepared by Government of the different wards of a city and coming from the office of a Government Officer are admissible in evidence. I.L.R. (1942) Bom. 357 = 44 Bom.L.R. 295 = A.I.R. 1942 Bom. 161. Where the diara operations extend over a very wide area and the diara map is not prepared with reference to any particular survey tri-



38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Relevancy of statements as to any law contained in law-books.

*How much of a statement is to be proved.*

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.

*Judgments of Courts of Justice, when relevant.*

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

Previous judgments relevant to bar a second suit or trial.

junction of certain mouzahs named, the presumption of correctness of the diara map is in no sense rebutted by the mere fact that that particular trijunction has not been located. 1937 C. 574. A map by itself is nothing but statements made by the maker by means of lines and pictorial representation instead of by word of mouth as to the state or configuration of a particular site and the objects standing thereon. To admit in evidence a map without calling the maker thereof is the same as admitting in evidence statements made by a third party who is not called as a witness. In other words, it amounts to admitting hearsay. The Evidence Act having repealed all rules of evidence not contained in any statute or regulation, the party seeking to put any document in evidence must show under which section of that Act such evidence is admissible. A map prepared in connexion with a previous suit between the defendant and another in which there was no dispute as to the lands in dispute in the present suit, is not admissible in evidence under sec. 13 or sec. 32 or sec. 36. 49 C.W.N. 791=1945 Cal. 492.

Sec. 39.—Sec. 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by secs. 24, 25 and 26, has not been removed by sec. 27. 10 L. 283=1929 L. 344 (F.B.). Only pertinent and not all recitals in the admitted document are admissible. 1930 A. 299. Although the entries in books of account are relevant to the extent provided by this section, yet such a book is not by itself relevant to raise an inference from the absence of any entry. 3 I.C. 291 (10 C. 1024; 7 C.L.R. 256; 30

C. 231 at p. 247, Ref. and Foll.).

SEC. 40.—See 18 Bom.L.R. 185=41 B.

1. Sec. 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before. 6 C. 171, held no good law in view of. 23 C. 533 (P.C.); 19 A. 277 (P.C.) and 25 C. 522 (P.C.); 33 C.W.N. 795=1929 C. 374 (F.B.). The actual decision and the findings arrived at in a previous judgment cannot be used as evidence to decide the points which are at issue in a different case except in cases coming under secs. 40 to 42. 1933 P. 690. Sec. 40 does not lay down that the judgment must prevent the Court from taking cognizance of the entire suit as against all the parties. If the judgment prevents the Court from taking cognizance of the suit so far as it relates to some of the parties thereto, then also sec. 40 would apply. Accordingly a judgment passed in a previous suit against some of the defendants is admissible in evidence under the section in a subsequent suit filed against them as well as others. 45 C. W.N. 420. As to evidentiary value of judgments, see 19 S.L.R. 376; 43 C.L.J. 135=1926 C. 698 (decision in previous rent suit admissible); decision as to age in guardianship proceedings—Admissibility in suit by ward for property, see 7 I.C. 505; as to admissibility of decision of Probate Court upholding adoption, 38 B. 272; judgment of Probate Court on question of status, see (1910) 1 U.B.R. 61=10 I.C. 987; 8 P.L. T. 510; judgment of Probate Court—Effect—Refusal to grant probate. See 38 B. 309=16 Bom.L.R. 5. The decision in prior pro-



41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

ceedings under sec. 9, Specific Relief Act, is admissible in a later suit for possession between the same parties. 60 C. 1171=37 C.W.N. 1148=1933 C. 923. As to relevancy of judgment not *inter partes*, see 97 I. C. 282=1926 P. 577; 93 I.C. 321=1926 Sind 161; 202 I.C. 203=1942 P.C. 40 (P.C.); 72 C.L.J. 320=1941 Cal. 193, and notes under sec. 13. It is relevant though not conclusive. 8 P. 783=1929 P. 739. See also 1938 Sind 198 (Binding nature of finding of fact in previous judgment). An award or compromise made in a Criminal Court assigning certain property for maintenance is not admissible in a later Civil suit to prove title. 21 Pat. 601=23 P.L.T. 354=A.I.R. 1942 Pat. 432.

SECS. 40-43.—Decree for confirmation of possession not conclusive proof of actual possession. 15 P. 336=165 I.C. 289=1936 P. 537. See also 19 N.L.J. 285. On a question whether a judgment passed by the British Indian Association in 1859 which had not been filed in the Court of the Financial Commissioner within 6 months after passing of the Oudh Estates Act was admissible it was held, that secs. 40 to 43 are not applicable so as to make it relevant. 1942 O.W. N. 657. Acquittal in trial on charge of attempt to murder—Judgment—Relevancy in subsequent trial on charge of murder. See 1944 P.W.N. 115.

SECS. 40 TO 43.—FINDINGS ON SAME FACTS BY CIVIL COURT IF RELEVANT BEFORE CRIMINAL COURT.—A finding on certain facts by civil Court in action in personam is not relevant before the criminal Court when it is called upon to give a finding on the same facts and *vice versa*. To hold that when a party has been able to satisfy a civil Court as to the justice of his claim and has got a decree which is finally binding upon the parties it would not be open to criminal Courts to go behind the findings of the civil Court is to place the latter without any valid reason in a much higher position than what it actually occupies in the system of administration and to make it master not only of cases which it is called upon to adjudicate but also of cases which it is not called upon to determine and over which it has really no control. There is no reason why the decision of the civil Court particularly in an action in personam should be allowed to have greater sanctity. 217 I.C. 284=46 Cr.L.J. 296=A. I. R. 1945 Lah. 23 (F.B.). A previous judgment between the same parties even if it does not operate as *res judicata* is good evidence which cannot be ignored. 48 P.L.R. 195.

SEC. 41.—On this section, see 2 M.H.C. R. 276; 14-M.I.A. 367; 6 B. 703; 7 W.R. C.G.M.—295

338 (F.B.). The section applies to the foreign judgments of a competent Court no less than to domestic judgments. Secunderabad is for the purpose of insolvency, a foreign Court and an order of adjudication passed by the Court at Secunderabad is operative in British India. 54 M. 727=61 M.L.J. 774. See also 43 L.W. 75=1936 M. 197. A declaration of a legal right is a different thing from a declaration of a legal character. The word "character" means status, it is something more than a mere right. The declaration of a person's right operates as against a particular person or group of persons against whom the right is claimed, whereas a man's status is something which defines his position not in relation to any particular person or group of persons but in relation to the rest of the world; his status distinguishes him from the rest of the world. To say that a person is not a partner of a firm is not to declare his status or legal character, it is merely to declare his position with respect to the particular firm. Therefore, a finding of the insolvency Court that a certain person is not a partner of the insolvent firm does not confer upon or take away from him any legal character within the meaning of sec. 41 and hence is not a judgment *in rem*. 190 I. C. 537=1940 Cal. 225. What the law or custom in a foreign state is, is a question of fact to be proved by evidence, and there can be no better evidence as to the state of the customs prevailing in that foreign country than a judgment of the highest tribunal in that state. Though the judgment as a judgment cannot bind the parties to a suit in British India, it is sufficiently cogent evidence against the parties who are governed by the law of that state. I.L.R. (1942) Bom. 467=44 Bom.L.R. 358=A.I.R. 1942 Bom. 185.

JUDGMENT IN REM AND IN PERSONAM.—There is a board distinction between the effect of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in a judgment *in rem* is always as to the status of the *res* and is conclusive against the world as to that status, whereas in a judgment *in personam* the point whatever it may be, which is adjudicated upon (it being as to the status of the *res*), is conclusive only between the parties or privies. 22 S.L.R. 165=1928 Sind 121.

JUDGMENT IN REM.—No Court can pronounce a judgment *in rem* outside the state in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled, within such state. Where the Court of a state gives a

Such judgment, order or decree is conclusive proof—  
 that any legal character, which it confers, accrued at the time when such judgment, order or decree came into operation ;  
 that any legal character, to which, it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree]<sup>1</sup> declares it to have accrued to that person ;  
 that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree]<sup>1</sup> declared that it had ceased or should cease ;  
 and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree]<sup>1</sup> declares that it had been or should be his property.

## LEG. REF.

<sup>1</sup> The words "order or decree" wherever they occur in the section were inserted by Act XVIII of 1872, sec. 3.

judgment affecting the status of a person domiciled within its territory, such judgment is treated by the comity of nations as analogous to a judgment *in rem*. There is no rule of international law which requires a British Indian Court to accept the judgment of the Supreme Court of His Britannic Majesty, Alexandria, as the law of domicile of a deceased, which is the domestic law of British India, as binding outside the limits of that Court's jurisdiction. Sec. 41 cannot be read as going further than the rule of international law applicable elsewhere. The section clearly deals with what are known as judgments *in rem* though that expression is not used in the section. The words "competent Court" in sec. 41 mean the Court of any country which is competent to pass a judgment *in rem*. I.L.R. (1938) B. 529=1938 B. 394. *Wadia, J.*—In order to be a judgment *in rem* binding on the world, there must be a finding on status which is not only the foundation of the judgment but is necessary for it. It cannot be conclusive if it relates to a matter which need not have been controverted or which was not material or which only came collaterally into question or which was only incidentally cognizable. The only judgment *in rem* as to status absolutely is the judgment pronounced not only according to the law of domicile by the Court of domicile. I.L.R. (1938) B. 529=40 Bom.L.R. 571=1938 B. 394. See also (1939) 1 M.L.J. 499. No judgment except that passed by a Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction upon any matters indicated in sec. 41, can have the effect of a judgment *in rem* and therefore a judgment holding that *A* is not the adopted son of *B* is not conclusive against the whole world. 26 A.L.J. 797=1928 A. 395. In order that declaration of title to specific thing should have the conclusive character as against the whole world, it is not enough, to show that under the judgment of the Insolvency Court, one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A decree declaring that *A* is entitled to a debt is not

an absolute declaration but only made against a specified person; so it is not conclusive proof of title to a debt. 54 M. 601=1931 M. 541=61 M.L.J. 229 (S.B.). The legal characters that can be conferred or taken away in the exercise of the jurisdiction mentioned in sec. 41 do not include the state of being a partner. 22 S.L.R. 105=110 I.C. 730 (2). A decree granted by a Court not exercising matrimonial jurisdiction, in a suit under sec. 42 of the Specific Relief Act, that the plaintiff in that suit was no longer the wife of the defendant is not a judgment *in rem* to which sec. 41 of the Evidence Act will apply. Such a decree is one which falls under sec. 43, Specific Relief Act. 36 Bom. L.R. 1021. So also a decision in a suit for restitution of conjugal rights. 11 R. 198=1933 R. 250. So also an order in lunacy. 56 M. 904=1933 M. 624=65 M.L.J. 279. But it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. 65 M.L.J. 279. A judgment *inter partes* in a heirship proceeding is not a judgment *in rem* so as to be binding on a stranger. 1933 B. 126=35 Bom.L.R. 118. Decision as to custom—Relevancy. See 40 P.L.R. 29=1938 L. 309.

PROBATE AND ADMINISTRATION.—Judgment in Probate Court is a judgment *in rem* and binding on all parties and is final. 9 P. 698. As to the finality of order granting letters of administration on condition of appellant executing bond, see 43 C.W.N. 824. A judgment of the Probate Court is inadmissible in a proceeding under sec. 193, Penal Code, for perjury committed in a testamentary suit. 76 I.C. 417=1924 C. 104; 8 P.L. T. 510=1927 P. 61; 5 Mys.L.J. 107. Grant of probate of will, value of, as proving execution of will. 5 P. 777. As to the legal effect of grant of letters of administration, see 4 R. 251=1926 R. 202. Such grant is no bar on matters not in issue in administration proceedings. 1924 C. 104.

The decision of the Admiralty Court restoring the certificate of an officer of a ship which had been suspended is a judgment *in rem* so far as the status and certificate of that officer is concerned. The decision is not binding on a person who was not a party to that suit. 1939 Sind 349.

ORDER OF INSOLVENCY COURT.—An order adjudicating a person as an insolvent and vesting his property in the Official Receiver

Relevancy and effect of judgments, orders or decrees other than those mentioned in sec. 41.

42. Judgments, orders, or decrees other than those mentioned in sec. 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

*Illustration.*

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Judgments, etc., other than those mentioned in sections 40 to 42 when relevant.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some

other provision of this Act.

no doubt operates as a judgment *in rem* but the grounds on which the order is based have no such effect. 110 I.C. 730 (1)=1928 Sind 121. Refusing to adjudicate a person a bankrupt is not a judgment *in rem*. See 46 M.L.J. 589=1924 M. 622. So also order vacating order of adjudication against one partner. 1928 Sind 121. But an order of adjudication is a judgment *in rem*. 46 M.L.J. 589. A foreign judgment declaring that a person is the adopted son of a Hindu widow is binding on the Courts in British India in a suit relating to immovable property in British India belonging to that widow. It is true that the judgment of the foreign Court declaring the party to be the adopted son is not a judgment *in rem* under sec. 41 but inasmuch as the Courts of British India recognise the validity of the declaration of status by a foreign Court in a matter of succession to movable property in British India, because the personal law applies, the same should be recognised in a matter of succession to immovable property where the law requires the personal law to be followed. Treating the personal law as the *lex situs*, the Courts of the country of domicile are best able to decide questions of status. The comity of nations treat such a declaration by a Court affecting the status of a person domiciled within its territory as being analogous to a judgment *in rem*. 49 L.W. 287=1939 M.W.N. 180=(1939) 1 M. L. J. 499. See also I.L.R. (1938) B. 529.

SEC. 42.—On this section, see 23 C. 533 (P.C.); 25 C. 522 (P.C.); 19 A. 277 (P.C.) and 1929 C. 374 (F.B.); 163 I.C. 924. When a question of status is in issue, judgments and orders between the parties in mutation proceedings, succession certificate cases, rent suits for possessions, etc., are admissible in evidence. They are of high evidentiary value and constitute proof sufficient to shift the burden. 1924 N. 387. A judgment in which a custom has been judicially recognised is admissible as evidence of the custom. 3 S.L.R. 5=1 I.C. 937 (16 A. 379, R.). Previous judgment relating to wakf property is relevant in a suit bearing on the property though not between the same parties. It is true that it is not conclusive proof but it can be used to add to the probative value of the evidence led in the suit.

36 P.L.R. 106. Judgments are not under sec. 42, relevant evidence of the facts mentioned in them. 1940 R.D. 402=1940 A. W.R. (B.R.) 214. The probative value of a finding in a previous suit between the parties depends upon the nature of the finding and of the issues involved in that suit and in the subsequent suit. 19 Pat. 172=185 I.C. 685=1940 P.W.N. 317=21 Pat.L.T. 577=1940 Pat. 341. The judgment of a Criminal Court and the depositions of the witnesses therein are inadmissible in a civil suit, to prove the liability of defendants. 106 P.R. 1915=32 I.C. 18. See also 117 P.R. 1912=16 I.C. 491. On a question as to the caste of a particular family, evidence of members and decisions in previous litigation are relevant. 93 I.C. 705=1925 M. 497. A previous judgment is relevant under sec. 42 for the purpose of proving a custom. 190 I.C. 35=1940 Pesh. 31. Judgments not between parties are inadmissible. See 12 A.L.J. 837=25 I.C. 30. Also 4 I.C. 997 and 8 I.C. 897; 25 B. 433 (a copy of a judgment of a Swiss Court was held inadmissible against third party). The decision of the coroner under the Coroner's Act is not a decision, but a *prima facie* opinion and stands on no higher footing than an order of commitment to the Sessions. It is not a judgment, much less a judgment *inter partes*; nor can it be admitted as an opinion since it represents the opinion of laymen often arrived at even before the police investigation is complete. It is therefore a piece of relevant evidence admissible under S. 42, or any other section. 47 Bom.L.R. 997. It is settled law, so far as the Patna High Court is concerned, that the judgment of a Magistrate under S. 144, Cr P. Code, is not evidence of the possession of the party in whose favour the proceeding terminated. The report of a Magistrate deputed by the Court to make a local inquiry is only evidence of the fact that the Magistrate was deputed to make the inquiry and that, on his inquiry, he came to the conclusion that a certain party was in possession. The report itself is not evidence of possession. 24 Pat. 379=A.I. R. 1945 Pat. 453.

SEC. 43.—168 I.C. 109=1937 P. 86. Judgment in a previous suit not *inter partes* is not admissible as evi-

*Illustrations.*

(a) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

*A* obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is irrelevant as between *B* and *C*.

(b) *A* prosecutes *B* for adultery with *C*, *A*'s wife.

*B* denies that *C* is *A*'s wife, but the Court convicts *B* of adultery.

Afterwards, *C* is prosecuted for bigamy in marrying *B* during *A*'s lifetime. *C* says that she never was *A*'s wife.

The judgment against *B* is irrelevant as against *C*.

(c) *A* prosecutes *B* for stealing a cow from him. *B* is convicted.

*A* afterwards sues *C* for the cow, which *B* had sold to him before his conviction. As between *A* and *C*, the judgment against *B* is irrelevant.

(d) *A* has obtained a decree for the possession of land against *B*. *C*, *B*'s son, murders *A* in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

<sup>1</sup>[ (e) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.]

<sup>2</sup>[ (f) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.]

## LEG. REF.

<sup>1</sup>Illustrations (e) and (f) were added by Act III of 1891, sec. 5.

dence of an admission said to have been made by one of the parties in the course of that suit. The judgment is no better than any other hearsay evidence of the admission. 20 C.W.N. 648=30 I.C. 821. See also 101 I.C. 774; 41 Bom.L.R. 561=I.L.R. (1940) Nag. 699; 202 I.C. 203=1942 P.C. 40 (P.C.); I.L.R. (1945) Kar. 40. An order of the Board of Revenue is not evidence in a case before the High Court but the latter should not make decree in dissonance with a decision of the Board without fully considering the reasons advanced in the making of that decision. 3 P.L.J. 188=43 I.C. 393. A judgment in land registration proceedings is no evidence of the facts mentioned therein, more particularly when the proceedings were not between parties to a subsequent suit, in which the judgment is sought to be admitted in evidence. 16 P. 84=167 I.C. 152=17 P.L.T. 769=1937 P. 73. As to judgment in guardianship proceedings, see 1941 M.W.N. 237=(1941) 1 M.L.J. 492. A judgment is not admissible to prove the truth of the fact which it states, nor is any fact stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. But in cases where the right of a party has already been concluded by previous judgment, that fact can be proved by the production of the judgment, since the existence of that judgment itself is relevant. 1938 N.L.J. 466. Though the recitals and findings in a judgment not *inter partes* are not admissible, such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed. 44 C.W. N. 935.

**QUESTION OF LIABILITY—DECISION OF CIVIL COURT.**—Where a person is charged with criminal breach of trust as regards certain items and the question of civil liability about the same items has been determined by a competent Civil Court, the judgment of that

Court would be the best evidence of the civil rights of the parties and hence a relevant fact. 41 B. 1=33 I.C. 633=18 Bom.L.R. 195.

**ADMISSIBILITY OF JUDGMENT "INTER PARTES."**—See 1 C.W.N. 146; 7 P.R. 1895 (Cr.); 11 B.H.C.R. 90; 9 C.P.L.R. 8. Previous judgment in main suit—Admissibility in subsequent execution proceedings. 1934 R. 212. Where all the persons who are parties to a present case were parties to a former litigation, the judgment in the former proceedings is certainly evidence of what were the points in issue between the parties in that suit and of what was the result of the suit. 168 I.C. 109=1937 P. 86.

**ADMISSIBILITY OF JUDGMENT NOT "INTER PARTES."**—In a suit to contest a notice of ejectment the only evidence of a lease was a judgment in a suit not *inter partes*. Held, that the lease could not be held binding between the parties to the ejectment suit. 54 I.C. 574. On this section, see also 9 C.P. L.R. (Cr.) 8; 9 Bom.L.R. 1134; 72 C.L.J. 320=1941 Cal. 193; 9 C.W.N. 402; 1939 R.D. 162=1939 A.W.R. (B.R.). 161 (Rent suit). Previous judgment not *inter partes* though not *res judicata* is valuable proof of title and admissible in evidence. 101 I.C. 774. Findings in previous judgment are not admissible. 96 I.C. 998=27 Punj.L.R. 544. See also 16 P. 84=1937 P. 73. Judgments in previous suit as regards the value of entries in revenue papers are admissible. 7 L.R. 10 (Rev.). Judgment of Criminal Court not admissible in subsequent suit for damages. 2 R. 549=1925 R. 143. Judgment in civil suit giving rise to criminal trial—not legally admissible in a trial for the offence. 6 C. 247. Record and judgment in a trial in which the principal was convicted of breach of the peace, if admissible against surety. See [25 C. 440, Dis.] 32 P.R. 1903 (Cr.); 12 Cr.L.J. 404=11 I.C. 588. It is not satisfactory to examine an expert witness on commission and not in presence of the accused. The evidence of an expert has always to be carefully weighed but when given on commission its value is considerably reduced. 108 I.C. 369=1928 L. 533,

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

OPINIONS OF THIRD PERSONS, WHEN RELEVANT.

45. When the Court has to form an opinion upon a point of foreign law or

Suits not *inter partes*—Finding of fact in one of—Admissibility in evidence of, in another in which that fact is in issue. 56 M. L.J. 562=56 I.A. 119 (P.C.). In a suit for damages for malicious prosecution, the judgment of the Criminal Court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The grounds upon which that acquittal was based are inadmissible. 56 M. 641=1933 M. 429=65 M.L.J. 146. See also 41 Mys.H.C.R. 283. Sec. 43 excludes all judgments as irrelevant in a former suit if they are not *inter partes* unless the existence of such judgment is a fact in issue or is relevant under some other provision of the Act. The existence of the judgment may be relevant but not the decision of the judge or the opinion expressed by him. It is immaterial if the defendant in both cases is the same and the decision of the Privy Council in 22 C. 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. (56 I.A. 119, Ref. to.) 34 C.W.N. 1113. See also 59 C.L.J. 320=1934 C. 788. The decision of an Income-tax Officer holding that an assessee was separate from his joint family and had separate business is a mere opinion and is irrelevant in a civil suit involving a dispute as to whether particular property is separate property or joint family property. 19 N.L.J. 287.

SECS. 43-44.—Judgment appointing guardian for minor is not open to attack collaterally. 1941 M.W.N. 237=(1941) 1 M.L.J. 492=53 L.W. 352=1941 Mad. 569.

SEC. 44.—Principle of sec. 44 cannot be extended to cases of gross negligence. 64 I.A. 17=I.L.R. 1937 M. 263=(1937) 1 M. L.J. 113 (P.C.). (45 M.L.J. 324, overruled). Sec. 44 would apply in any proceeding, civil or criminal, if the decree sought to be challenged is proved by the adverse party. It cannot be said that it applies only in a suit for revocation. A judgment in a probate suit is no doubt a judgment *in rem*, but it can be contested on the ground of fraud or collusion. A stranger to a suit in which a decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. Under sec. 44 it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside; he may show in suit or proceeding in which it is set up against him that it was obtained by fraud. It would be open to a party offering evidence of forgery of a will to prove that the probate decree was obtained by fraud if it were set up against him by the

other side, instead of admitting the probate and the title of the executor. I.L.R. (1940) Bom. 403=42 Bom.L.R. 231=1940 Bom. 131. See also 49 C.W. N. 354. A grant of a probate is not a decree. It is not a judgment or order and hence S. 44 has no application. The grant cannot be revoked except by the Court which granted it. Therefore it is not open to a party to adduce evidence to show in another proceeding that the grant of probate was obtained by fraud and that the will in respect of which it was granted is a forgery. 22 Pat. 75=24 Pat.L.T. 390. Sec. 44 empowers Courts to ignore orders issued by Courts without authority. 57 B. 456=35 Bom.L.R. 630=1933 B. 398. Collusive decree binds parties thereto and their representatives. It is not a nullity. 101 I.C. 765=1927 A. 494. Judgment—Validity of adoption—Evidence of. 1924 P. 298. Applicability and scope of section. See 34 A. 150=13 I.C. 80; 18 C.L.J. 264=21 I.C. 938; 6 I.C. 98; 37 B. 563=20 I.C. 530. Under this section a party to a compromise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a fresh suit to set it aside. 30 I.C. 63. See also 1 L.W. 208; 18 C. W.N. 601; 93 I.C. 385=1926 C. 1. Entry in record of rights procured by fraud—Separate suit to set aside—Necessity for. See 18 C.W.N. 27. A party cannot plead his own collusion to avoid a decree to which he was himself a party. 6 N.L.R. 177=8 I.C. 1179. See also 1927 A. 494. Right of stranger to a decree affecting his right to show in a subsequent suit that the decree was invalid on the ground of fraud—Maintainability of subsequent suit without setting aside decree. See 21 C.W.N. 594=40 I. C. 607; see also 49 C.W.N. 354. Where the existence of certain evidence was stoutly denied and was afterwards discovered, it is ground for setting aside decree. 29 Bom.L.R. 1046=1927 B. 510. The plea that a decree passed by a Court was made without jurisdiction is open to the objector under sec. 44 and can be raised at any stage of the proceedings unless there is a bar of *res judicata* or any rule of equitable estoppel against him. 1931 A.L.J. 652=1931 A. 689. Sec. 44 does not enable an individual creditor to bring a suit for his benefit alone to set aside a transaction contained in a decree on the ground of its being a fraudulent transfer or preference. I.L.R. (1940) Bom. 526=190 I.C. 606=42 Bom.L.R. 486=1940 Bom. 289.

SEC. 45: JEWISH LAW—EXPERT EVIDENCE.—Although S. 112 of the Government of

Opinions of experts. of science, or art, or as to identity of handwriting [or finger impressions]<sup>1</sup>, the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting]<sup>2</sup> [or finger impressions]<sup>1</sup> are relevant facts. Such persons are called experts.

## LEG. REF.

<sup>1</sup> The words "or finger impressions" were added by Act V of 1899, sec. 3 (1) and as to whether these words include thumb impressions, see discussion in Council, *Gazette of India*, 1898, Part VI, p. 24.

<sup>2</sup> The words "or in questions as to identity of handwriting" were inserted by Act XVIII of 1872, sec. 4.

India Act of 1915 made it obligatory on the High Court to administer the Jewish Law in matters specified therein, the Jewish Law did not cease to be foreign law and did not become part of the law of this country. So under S. 45 of the Evidence Act expert evidence is admissible in respect of such law. 48 C.W.N. 513.

SECS. 45 AND 46: EXPERT EVIDENCE.—Who are experts. See 32 C. 759. The fact that an expert is not acquainted with the characters of the language and can neither read nor write them will not make him incompetent as an expert in handwriting. 160 I.C. 264=1936 A.L.J. 317=1936 A. 165. How differs from ordinary evidence. See 3 N.L.R. 1. When evidence. 1924 N. 183. The basis of the expert's opinion should be placed before the Court. 56 A. 428=1934 A. 273. Value of experts' opinion when one expert is contradicted by another. 34 P.L.R. 788 (2)=1933 L. 885. But depositions of expert witnesses as to the result of their opinions and as to the effect of them, does not come within the domain of expert evidence at all. 1933 P. C. 26=64 M.L.J. 193 (P.C.). Value to be attached to such evidence, see 11 Bom. 89; 29 Cal. 32; 15 Cal. 589; 34 P.L.R. 719=1933 L. 561. Expert evidence not based on well-defined inexorable laws of nature cannot be taken as decisive—Especially when there is direct evidence opposed to it. 96 I.C. 641=1926 L. 313. See also 29 O.C. 1=1925 Oudh 497. As to admissibility of opinion evidence of persons not experts. See 18 P.R. 1915 (Cr.); 12 P. R. 1915 (Cr.); 1930 A. 589 (not admissible). As to Government experts, see 147 P.L.R. 1912=13 Cr.L.J. 563. The opinion of the *Imperial Serologist* is entitled to great weight. 34 Cr.L.J. 1009=1933 O. 265. Validity of conviction based on expert evidence. 2 A.L.J. 444; 39 C. 245; 39 M. 169=22 M.L.J. 270; 18 P.W.R. 1912. "Expert"—Meaning of. See 1930 A. 587. The evidence of an expert witness has to be tested like that of any other witness, for even expert witnesses are liable to make mistakes. At the same time, if a person with special professional qualifications, such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked

to give the results of his examination as evidence in Court, it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence nor is it necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications. 1940 Lah. 505. Generally speaking, it is not permissible to call a witness to explain to the Court what a document means unless such witness is an expert. It is for the Court to ascertain what the document means though, no doubt, a witness may suggest methods by which an intelligent meaning can be given to the document. I.L.R. (1939) Bom. 434=41 Bom.L.R. 548=1939 Bom. 339. The opinion of an expert that one document has been typewritten on the same machine as another document is not admissible. The Court may ask the witness points in favour of the view whether the two documents have or have not been typewritten on the same machine but must come to its own conclusion and not treat such assistance as an expert opinion a relevant fact in itself. 1935 A. 162. But evidence as to the fact that the typewriters used in the typing of the various exhibits have certain defect which are clear from the typing of these exhibits can be competently given by an expert who has had an opportunity of examining the documents, though the Court is entitled to draw its own conclusion as to the source and authenticity of the documents from the whole evidence in the case. 1933 A. 498. See also 1933 A.L.J. 799=1933 A. 690. Where the expert is not examined and the other party has had no opportunity of cross-examining him, the report of the expert cannot be admitted in evidence. 141 I.C. 767=1933 P. 159; 1935 A. 142. But where the lower Court had based its decision on the opinion given sworn testimony in support of the report, held, that the objection to the evidence being received could not be taken for the first time in revision. 35 P.L.R. 109=1934 L. 230. See also 11 P. 782=1932 P. 352. Where the so-called "expert witnesses" give no data in support of their opinions their evidence should be rejected. 1931 L. 364. See also 131 I.C. 771=1931 P.C. 189 (P.C.). The evidence of experts must be given in the ordinary way. Subject to certain exceptions—those exceptions being amongst others the certificates of the *Imperial Serologist* touching the matter of blood stains and of the *Chemical Examiner*, which are made admissible in evidence by themselves—the opinion of an expert must be given orally and a report merely or certificate by him cannot possibly



be evidence. Unless he goes into the witness-box and gives oral evidence, there can be no cross-examination of the expert at all. The opinion of the Director of Agriculture is certainly the opinion of an expert, but the evidence, being only documentary is clearly inadmissible. I.L.R. 1937 M. 764=1937 M. 407=(1937) 1 M.L.J. 341. Telephony is a science or art and witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally. The evidence of these witnesses is relevant and admissible as opinion of experts and the expert evidence of those witnesses is entitled to very considerable weight if they hold diploma in telephony and engineering and also have a great experience. 184 I.C. 36=12 R. S. 83=1939 Sind 245. Though a doctor is in a better position to form an opinion about the age of a person than a layman, his statement is no more than an opinion and could not amount to legal proof of the age of the person concerned. 1939 A.L.J. 98=1939 All. 708.

**CROSS EXAMINATION OF EXPERTS.**—The cross-examination of a witness is 'acting' and not 'pleading' and hence there is no objection in specific cases for an expert being allowed under special power of attorney to be employed for the cross-examination of an expert in the same line of business on the other side. 1942 N.L.J. 449.

**ILLUSTRATIVE CASES — COMPARISON OF HANDWRITING.**—To make the evidence of a hand-writing expert admissible, it is not necessary that the handwriting should be actually compared in Court. It is enough if the documents admittedly in the accused's hand-writing are shown to him in open Court and he expresses his opinions thereon. 16 Cr.L.J. 703=30 I.C. 751 (M.); 16 C.W.N. 812=39 C. 606. See also 2 A.L.J. 444; 39 C. 245; 2 Weir 759 (Sub-Registrar not expert. 2 Weir 760). There is nothing in the Evidence Act which requires the evidence of an expert in any particular case, e.g., the evidence of a handwriting expert on disputed signatures, to be corroborated before it can be acted upon as sufficient proof of what the expert has stated. The question as to how much reliance a Court may place on the statement of any witness depends on the facts and circumstances of the particular case. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court should be careful not to delegate its authority to a third party, and should itself be satisfied about the genuineness or otherwise of a disputed signature and not hold it genuine or forged merely because an expert has given his opinion. I.L.R. (1944) Kar. 305=1945 Sind 4. A comparison of handwriting is to be used with great care and caution and especially in a criminal case when a large quantity of apparently different hand-

writing is under comparison. 39 C. 606=16 C.W.N. 812; 1926 P. 575 (thumb-impression); 29 C. 1; 1925 O. 413. See also 45 C. 60=21 C.W.N. 1076=42 I. C. 484. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. A comparison of writing has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution. 49 C. 235=26 C.W.N. 113=65 I.C. 774. The rejection even *in toto* of an expert's opinion would not exonerate the Court from the duty of coming to an independent finding on the question of an authorship of handwriting; the Court has to examine the opinion and come to its own decision. The most important things are to examine the general characteristics, formation of letters, fixed pen habits and mannerisms, and discern the identity of the writer. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual characters and idiosyncracies which have been embodied in technical language of experts. 169 I.C. 977=38 Cr.L.J. 818=1937 C. 99 (S.B.). The evidence of persons acquainted with the handwriting of a person by whom the document is supposed to be written is admissible, though they are not experts. 18 P.R. 1915 (Cr.)=28 I. C. 722. See also 147 P.L.R. 1912=15 I.C. 979; 7 P.L.T. 507=1925 P. 787. In the case of a disputed handwriting or signature a Court is not incompetent to use its own eyes for the purpose of deciding whether certain hand-writings or signatures placed before it are similar or not. A Court should not be deprived of the function for which it exists, namely, of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence, but the opinion of the judge is the decision in the case. A judge has to be satisfied that he is entitled to take such assistance upon evidence as is available in the circumstances of the case. I.L.R. 1937 N. 382=20 N. L. J. 139. Value of expert opinion as to signature in *language which expert cannot read or write*. 1933 P. 559. See also 1936 A.L.J. 317=1936 A. 155. In a case of forgery the only chief evidence being an expert's examination of the forged documents as compared with the other documents alleged to be in the handwriting of the accused, the other documents must be strictly proved to be in his handwriting. 36 M. 159=22 M.L.J. 270. A mere statement therefore by a witness that it is in the handwriting of the accused is no evidence if he is not able to say how long ago they were written. 36 M. 159. In arriving at a conclusion of the authorship of the forged document, the expert should show marked peculiarities in the handwriting of the accused, which are re-produced in the



forged document and when the writing has no such peculiarities, the comparison is of no consequence and cannot be relied on. Also the fact that the disputed samples are put separately from the standard ones for the examination lessens its usefulness. 36 M. 159. A conviction cannot be based on an expert's comparison, if it is not supported by corroborative evidence. 36 M. 159. Where the statement of a person does not show that he is an 'expert' in the art of handwriting, his evidence can be ruled out as being inadmissible. 31 Punj.L.R. 109=1930 L. 336. Where a handwriting expert was privately consulted by a party before he was produced in Court and he was produced as his opinion was favourable to that party much importance cannot be attached to his evidence. 39 P.L.R. (J. & K.) 54.

**FINGER-PRINT.**—If a finger-print expert has not been cross-examined as to the grounds, of his opinion and as to the test to which he had put a particular finger-print, the weight to be attached to such witness's evidence cannot be diminished by applying to it, considerations to which the witness's attention was never directed. 21 Cr. L. J. 257=55 I.C. 273 (P.); 35 C.W.N. 863=1931 C. 441. See also 97 I.C. 335=1926 P. 575; 30 C.W.N. 373=1926 C. 531. A court is not bound to accept the evidence of an expert, such as a finger-print expert; even though there are no special reasons for not accepting it. The expert, however, must be given an opportunity of explaining to the Court the reasons for his opinion, as it is only after hearing the expert's reasons and elucidation that the Court would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory. 53 L.W. 396=(1941) 1 M.L.J. 475. The value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general, it cannot be the basis of conviction unless it is corroborated, by other evidence. 1936 A.L.J. 317=1936 A. 165. If in a case of denial of the execution of a document the direct evidence of the witnesses is of a very unsatisfactory nature, the Court can rightly rely on the opinion of a finger-print expert. 42 P.L.R. (J. & K.) 343. Conviction based on the sole testimony of finger-print expert though not safe yet legal. 1928 P. 129=6 P. 305. It is going too far to say that the Court must insist upon corroboration of the evidence of a finger-print expert. The Court cannot hold a person guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court has to rely on the expert upon two distinct points, first of all, on the question of similarity between the marks; and secondly on the point which is one for expert opinion, whether it is possible to find the finger-prints or thumb-impressions of two individuals corresponding in as many points of resemblance as are shown to exist

between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics identical in the finger-prints of two persons as are found in the case, and when that statement entirely agrees with what one has read on the subject in scientific books, the Court need not hesitate in accepting the opinion. 60 B. 187=38 Bom.L.R. 160=1936 B. 151. Where the defendant is illiterate and the genuineness of a paper said to have been executed by him in dispute and the decision of the question depends upon the genuineness of the finger-print the parties should be allowed if they want to examine experts. 141 I.C. 767=1933 P. 159. It is quite clear that the science, if it could be so called of *foot prints* has not yet progressed very far. But there is no doubt whatever that evidence of similarity of the impressions of the foot, shod or unshod, given by a foot-print expert is admitted by the Courts. Such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the Court, and from his evidence the Court draws its own conclusion. 1937 M. W.N. 874=46 L.W. 477=1937 M. 951.

**FOOT-PRINT EXPERT.**—The opinion of a *foot-print* expert should not be taken as conclusive. The Judge must form his own opinion with regard to the identity of the foot-print. The expert's opinion is valuable but it must be supported by statements of facts, the accuracy or otherwise of which can be verified by the Judge. 1940 M.W.N. 761=52 L. W. 198=1941 Mad. 88. See also 1942 Sind 11. Experts in foot-prints are not recognised by the Evidence Act; but a Magistrate is undoubtedly entitled to take into consideration the evidence of a person who has seen a foot-print and taken the foot-print of the accused and found that they are very similar. Such evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another. 55 L.W. 231 (1)=1942 Mad. 452 (2). In a criminal trial if the Court is to attach importance to evidence of footmarks alleged to be those of the shoes of the accused, it is not enough to show that the footmarks tally with the accused's shoes. The evidence must go further and show that the marks have some peculiarity which is found in the shoes of the accused and which would not be found in most other shoes; unless this is shown, the evidence is inadequate. Further, unless the circumstances in which the footmarks were discovered are known or disclosed, evidence of the marks must be held to be unreliable. 45 Bom.L.R. 884.

**THUMB-IMPRESSION.**—The question of identity of thumb-mark is a question of fact and the evidence of the expert is only a guide to

*Illustrations.*

(a) The question is, whether the death of *A* was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(b) The question is, whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

Facts bearing upon opinion of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

*Illustrations.*

(a) The question is, whether *A* was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time is, relevant.

47. When the Court has to form an opinion as to the person by whom any

the discretion of the Court. 9 Mys.L.J. 444. If the *finger-prints* are clear enough to sustain an argument, there is no reason why an argument by way of deduction should not be as sure a foundation for a conclusion and it may be a better one than any based on direct evidence. There is nothing in the so-called science of finger-print or the qualifications of an expert in it which need deter a Court from applying its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. 46 M. 715=69 I.C. 374; 9 P.R. (Cr.) 1914=27 I.C. 203. If a Court wishes to admit in evidence a report of a thumb-impression expert, then the Court should insist on the production of the expert as a witness in the case. Else, the report does not by itself become evidence. 1935 A.W.R. 76=1935 A. 142. Taking thumb-impression of accused in Court for purpose of comparison is legal. 50 M. 462=53 M.L.J. 597.

**PALM IMPRESSIONS** are akin to finger-impressions and expert evidence relating thereto should on the whole be admitted rather than excluded. 52 B. 223=1928 B. 158.

**PHOTOGRAPHS.**—Where the question of legitimacy arises, photographs of the putative father and son to prove resemblance are admissible. 13 I.C. 678=15 C.L.J. 621 (On appeal 47 I.C. 513=45 C. 878). As to admissibility of photographs in evidence, see 131 I.C. 771=1931 P.C. 189 (P.C.).

**SECS. 45 AND 49: GAMBLING.**—Gambling cannot be considered to be either an art or a science within the meaning of sec. 45 so as to entitle a police officer to go into the witness-box and speak as an expert that in his view, based on experience in other cases, certain harmless documents such as slips, which he calls betting slips are instruments of gaming. Under section 49 a police officer might give evidence that he had had a long experience amongst people who indulged in *satta* gambling in a particular district,

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and from that experience supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But he is not entitled merely to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents mean. 39 Bom.L.R. 613.

**TECHNICAL WORKS.**—Technical works cannot be used to refute an expert witness's opinion unless the passages to be used are put in cross-examination to the witness for him to explain them if he can. 22 C.W.N. 745=46 I.C. 593 [23 C. 1 (P.C.) Ref.].

**OPINION ON MEDICAL MATTERS.**—Expert medical opinion of a Surgeon who conducted *post mortem* examination is relevant. 12 I.C. 98=12 Cr.L.J. 485. A doctor's opinion on the point of a person's age is entitled to greater weight than that of any other person. 10 O.W.N. 1273=1934 O. 32.

**TRADE MARK.**—Similarity of trade-mark is a matter for the Court. 49 A. 92=99 I.C. 353.

**FOREIGN LAW.**—Expert opinion on matters of foreign law. See 92 I.C. 112=1926 M. 218. Expert opinion on foreign law, where it is elaborately laid down in a Code, need not be called for—Court should itself interpret such law. 123 I.C. 600=1930 M. 146. The evidence of translators or interpreters of Hindu Law texts is not admissible. 12 P. 359=1933 P. 306.

**SEC. 47.**—See also Notes under secs. 45 and 46. As to sufficiency of evidence, see 1934 N. 204. Where a witness deposes that a certain document is in the handwriting of the accused, the degree of his acquaintance

Opening as to handwriting when relevant.

document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

*Explanation.*—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

*Illustration.*

The question is, whether a given letter is in the handwriting of *A*, a merchant in London.

*B* is a merchant in Calcutta, who has written letters addressed to *A* and received letters purporting to be written by him. *C* is *B*'s clerk, whose duty it was to examine and file *B*'s correspondence. *D* is *B*'s broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him thereon.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C* or *D* ever saw *A* write.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

*Explanation.*—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

with that handwriting will affect the value, though not the admissibility of his evidence. 1936 A.L.J. 317=1936 A. 165. When a witness says that a particular document is in the handwriting of a certain person whom he knows, it is evidence of a fact. The fact that the witness does not also say that he knows and is acquainted with the handwriting of the person concerned does not render that evidence inadmissible. That is legal evidence of the handwriting of that person. The witness need not say in the first instance that he knows the handwriting. It is the duty of the opposite party to explore in cross-examination the sources of his knowledge, if he is not satisfied with the testimony of the witness as it stands. Nor would the fact that the document is not before the Court render such evidence inadmissible. 178 I.C. 324=1938 P.W.N. 403=1938 P. 497; 198 I.C. 711=1942 Pat. 449. Although it is true that under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value, the opinions of those who have not carefully studied the art of caligraphy is not a rule of very great utility. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied, the onus of proving it is on the party relying on its genuineness. 64 I.C. 234 (P.). As to admissibility of opinions of persons not experts, but acquainted with the handwriting of the persons concerned, see 18 P. R. 1915 (Cr.); 12 P.W.R. 1915 (Cr.); 18 B. 66; 22 C. 313; 28 I.C. 722=16 Cr.L.J. 338; 147 P. L.R. 1912=15 I.C. 979; 16 C. W. N. 812; 29 O. C. 1=1925 O. 413. It is not impossible for a person unable to read and

write certain characters to know and to recognise and prove the handwriting of another in those particular characters, if he had had the occasion to see the latter write. 4 A.W.R. 676=1934 A. 990. When a question has to be decided as to the person by whom any document was signed or written, then according to sec. 47 the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is a relevant fact. But the section contemplates only the production of the original document and not a copy of it. 1939 R.D. 105=1939 A.W.R. (B.R.) 167.

SEC. 48.—See 1937 P. 463. The answers to the questions given in Wilson's Manual are clearly admissible under sec. 48, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence, if it existed. They are also admissible under sec. 35 as entries relating to a relevant fact contained in what may be regarded as a public record made by a public servant in the discharge of his official duty. I.L.R. (1941) Lah. 154=43 Bom.L.R. 432=1941 P.C. 21 (P.C.).

SEC. 48 AND 49.—Where all that the Court has to ascertain is the rate of interest chargeable on hundies as is fixed by usage, the evidence of three persons familiar with that usage is sufficient particularly when it stands uncontradicted on the record. 1932 L. 582. See also 39 Bom.L.R. 613. The words "usages of any body of men" in sec. 49 do not cover inferences or conclusions that may be drawn on the basis of past experience. 13 P.R. 1914 (Cr.)=20 I.C. 625. On this section, see also 7 I.A. 63=5 C. 744 (P.C.); 23 C. 427; 26 C. 148; 49 I.C. 743; 39 Bom. L.R. 613. As to proof of custom opinions of persons likely to know of its existence are admissible. 8 O.W.N. 6. And the weight

*Illustration.*

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Opinion as to usages, tenets, etc., when relevant. 49. When the Court has to form an opinion as to the usages and tenets of any body of men or family,—the constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon, are relevant facts.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed, by conduct as to the existence of such relationship, of any person who as a member, of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.

*Illustrations.*

- (a) The question is, whether *A* and *B* were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.
- (b) The question is, whether *A* was the legitimate son of *B*. The fact that *A* was always treated as such by members of the family, is relevant.

of their evidence would depend on their position and character and of the persons on whose statements they have formed their opinion. (*Ibid.*). See also 1933 Sind 213. A living witness may state his opinion on the existence of a family custom and may state as grounds thereof information derived from deceased persons but it must be the expression of independent opinion based on hearsay and no repetition of hearsay. 8 Luck. 445=10 O.W.N. 268=1933 O. 246. Sec. 48 read with sec. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under sec. 32 are not admissible under sec. 48 or under sec. 32 (7). Statements cannot be called instances. 1933 O. 246. Where a deed of gift contains an agreement transferring one ghumaon of land to the donee and also relinquishment of reversionary rights by a reversioner, the deed, although it is inadmissible in evidence, for want of registration so far as the gift is concerned, can be admitted in evidence under sec. 49 for the collateral purpose of proving the relinquishment of reversionary rights. 1939 Lah. 414.

Sec. 50.—Difference between English and Indian Law. 91 I.C. 462=1926 M. 475. Under sec. 50 the opinion of a person is relevant only when the following requirements are fulfilled:—(1) The person whose opinion is sought to be given in evidence must be proved to have special means of knowledge on the subject; (2) (a) The opinion alone is evidence, (b) the opinion as expressed by conduct alone is evidence, or, in other words, (i) conduct only can be given in evidence, (ii) from the conduct given in evidence the Court is to see whether it is the result of any opi-

nion held by the person; (3) The opinion which is relevant must be the one as to the existence of the relationship. The negative opinion, or the opinion as to the non-existence of the relationship may not be relevant. Under the section, the opinion of a person is only a relevant piece of evidence. It still remains for the Court to weigh such evidence and come to its own opinion as to the "*factum probandum*"—as to the relationship in question. I.L.R. (1942) 2 Cal. 299=75 C. L.J. 301=46 C.W.N. 729=1943 Cal. 76. Sec. 50 is limited to opinion as expressed by conduct and there is no provision in the Act making general reputation receivable in evidence as in English Law. 1926 M. 475. The evidence of witnesses that a certain man and a woman were regarded as man and wife by the members of the community does not come within the purview of sec. 50, not being an opinion expressed by conduct as to existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, and there is no other statutory provision under which the evidence can be let in to prove marriage. 1933 A. 130=143 I.C. 815. See also 1937 Sind 126=31 S.L.R. 71. On a question of the legality of the form of marriage, conduct of parties is admissible. 93 I.C. 705=1925 M. 497. Proof of paternity in case of a person claiming as illegitimate son. See 27 M. 32. In case of adultery and enticing away a married woman, fact of marriage must be strictly proved. 5 C. 566 (F.B.); 13 C.L.R. 125; 5 A. 233; 20 A. 166; 17 Bom.L.R. 75; 100 I.C. 535=1927 O. 140. The doctrine that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives

51. Whenever the opinion of any living person. Grounds of opinion when is relevant, the grounds on which such opinion is based relevant. are also relevant.

*Illustration.*

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

### CHARACTER WHEN RELEVANT.

52. In civil cases the facts that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases character to prove conduct imputed, relevant.

In criminal cases, previous good character relevant.

53. In criminal proceedings the facts that the person accused is of a good character is relevant.

and an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage is a wrong doctrine regarding proof of marriage. The evidence on this subject should not be allowed as it is without competence. 56 I. A. 201=10 L. 725=1929 P.C. 135=57 M. L.J. 366 (P.C.). Where the statement of witness giving the pedigree is found to be inadmissible under sec. 32 (5), but he deposes to facts which establish such treatment as is contemplated by sec. 50, it should be admitted to that extent. 151 I.C. 338=1934 A. 117. Evidence of notoriety of an adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what was the attitude of the alleged adoptive parent is towards the claimant. A mere statement that an opinion does not come within the scope of sec. 50, the only provision of Evidence Act, under which evidence of repute is admissible. 1936 B. 518. See also 1940 Rang. 181.

SEC. 51.—The Exercise Sub-Inspector is an expert in his own department, and is able to distinguish liquors, but the Court should under sec. 51 ascertain the grounds on which his opinion is based so as to test it. 1935 Cr.C. 80=1935 N. 13. Chemical Examiner's report—Value of. 144 I.C. 357=1933 A. 394.

SECS. 52-54: SCOPE—ENGLISH AND INDIAN LAW.—The wording of sec. 54 is no doubt wide but the object clearly is to lay down that evidence of bad character including a previous conviction is a rule irrelevant to help to establish an accused person's guilt but that is not to lay down that it may not be taken into account in passing sentence. (39 B. 326, Foll.); 52 M. 358=56 M.L.J. 595.

ADMISSIBILITY OF EVIDENCE.—General evidence of bad character cannot in the first instance be given against accused. 7 W.R. 7 (Cr.); 6 W.R. 92 (Cr.); 59 I.C. 560=2 L.L.J. 658. Unless evidence has been given that he has a good character in which case it becomes admissible. But the section does not apply to cases in which the bad character of the person is itself a fact in issue. 1928 O. 430. See also 1930 B. 157. Such evidence not generally admissible to prove com-

mission of offence. 1 C.W.N. 146; 1928 O. 215. But see also 27 C. 139. But if the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved *aliunde*, the evidence of bad character is admissible. Evidence of previous conviction is admissible not as proof of bad character but as evidence to prove habit and association. 9 Luck. 22=1933 O. 355. Proper object of proof of previous conviction is to determine amount of punishment if the accused be found guilty of offence charged. 11 B.H.C.R. 90. See also 32 M. 526; 1928 O. 215.

USE OF PREVIOUS CONVICTION.—Where a previous conviction is relevant with reference to the question of the applicability of sec. 562, Cr. P. Code, and also on the question of punishment, it may be taken into consideration in giving punishment after the accused is found guilty. 39 B. 326=26 I.C. 995. On this point see also 5 C. 768; U.B.R. (1908) 2nd Qr. Evidence 1=8 Cr.L.J. 411; U.B.R. (1892-1906) Vol. I, 82; 26 P. W.R. 1910; 14 Bom.L.R. 934=16 Cr.L.J. 83; 7 P.R. 1895 (Cr.); 1886 A.W.N. 47; 5 Bom.L.R. 1034; 14 C. 74; 2 Weir 760; 28 P.L.R. 313=1927 L. 549.

ILLUSTRATIVE CASES.—The fact that an accused is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for a charge under sec. 401, I. P. Code. 13 P.R. 1914 (Cr.)=26 I.C. 625. See also 60 I.C. 331=5 P.L.J. 706. In a proceeding under sec. 110, Cr. P. Code, a list of crime which a Police Officer has suspected the accused to have committed, is inadmissible to establish the reputation of the accused. 13 I.C. 102; 62 I.C. 543=22 Bom. L.R. 1274. The past history of a gang of dacoits would be significant only if an offence under sec. 400, Penal Code, has been made out. 13 I.C. 279=16 C. W. N. 69. Statement by a prosecution witness in a prosecution for riot that he had brought a case under sec. 107, Cr. P. Code, against some of the accused who had been bound over is admissible not for proving the bad character of the accused but as part of the *res gestae*, the events which had transpired before and which led up to the riot with which the accused were charged. 17 I.C. 565=40 C. 367.

Previous bad character not relevant, except in reply. <sup>1</sup>[54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

*Explanation (1).*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

*Explanation (2).*—A previous conviction is relevant as evidence of bad-character.]

Character as affecting damages. 55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

*Explanation.*—In Ss. 52, 53, 54 and 55, the word “character” includes both reputation and disposition; but, <sup>2</sup>[except as provided in sec. 54] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

## PART II.

### ON PROOF.

#### CHAPTER III.

##### FACTS WHICH NEED NOT BE PROVED.

Fact judicially noticeable need not be proved. 56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice. 57. The Court shall take judicial notice of the following facts :—

##### LEG. REF.

<sup>1</sup> This section was substituted for the original section by Act III of 1891, sec. 6.

<sup>2</sup> These words and figures were inserted by Act III of 1891, sec. 7.

As to evidence of conduct as affecting character, *see* 25 S.L.R. 55=1927 Sind 22. *See* 1928 L. 647 as to the value of past good character.

SEC. 54.—Evidence of bad character of accused is admissible to prove the motive for crime. 5 P. 63=93 I.C. 884; 1928 O. 430. Sec. 54 does not relate to the manner of proof of previous convictions, and relates only to the proof of previous convictions in certain cases. I.L.R. (1941) Kar. 308=1941 Sind 173. In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of similar character to the suggested crime, before the jury, the intention of sec. 54 is not infringed and evidence pointing to directly similar conduct is admissible. Sec. 54 refers to specific evidence of bad character not confined to acts similar to the crime, which was being investigated which may influence the jury on the question of motive which is dealt with in the same conviction. Such a motive must be the same kind of motive that in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried. 1936 C. 469. A statement elicited from a prosecution witness in a sessions trial by way of cross-examination, as to the opinion of another witness about the bad character of the accused, does not amount to evidence of bad character, when the statement was not elicited for the purpose of proving what sort of character the accused bore but with the collateral object of showing that the other witness

was resiling from the evidence which he gave before the committing Magistrate, and the admission of that statement does not, therefore, contravene the provisions of sec. 54. I. L.R. (1939) 1 C. 337. *See also* 1939 P.W. N. 627=1940 P. 14.

SEC. 54, EXPL. (1).—*See* 7 O.W.N. 862 =1930 O. 455.

SEC. 55.—*See* 10 C.W.N. 522=3 C.L.J. 349; 2 C.P.L.R. 198; 41 I.C. 696; 1932 N. 158.

SEC. 56: JUDICIAL NOTICE—NOTORIOUS FACTS.—Judges are entitled to take judicial notice of any notorious fact without requiring actual positive evidence. 24 M.L.J. 211 =18 I.C. 257. A Court can take judicial notice of facts transpiring in Court. 121 I. C. 337.

SEC. 57: SECTION NOT EXHAUSTIVE.—The list given is far from complete; and Anglo-Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any other Act to notice, such as in Bengal, lists of landholders who have not made road cess returns (Beng. Act IX of 1880, sec. 19); in Madras, by-laws framed by the Commissioners of Police (Mad. Act III of 1866, sec. 4); in Bombay, notifications in the Gazette (Bom. Act X of 1866, sec. 4); in Oudh the list of talukdars and grantees published by the Chief Commissioner (Act I of 1868, sec. 10) (Whitley Stokes', Vol. II, p. 837). *See also* 1937 P. 463 (Sifton's Settlement Report). In 10 C.L.R. 469, the Court refused to take judicial notice of the seal of a Kazi or Sudr Amin whose appointment said to have made about 1820, was not proved. Though Courts take judicial notice of judgments, it does not follow that all statements of facts contained in judgments



- (1) <sup>1</sup>[All Indian laws ;]
- (2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed ;
- (3) Articles of war for Her Majesty's Army <sup>2</sup>[Navy or Air Force] ;
- (4) the course of proceeding of parliament and <sup>1</sup>[of the legislatures established under any laws for the time being in force in British India.]

*Explanation.*—The word "Parliament" in clauses (2) and (4) includes—

- (i) the Parliament of the United Kingdom of Great Britain and Ireland ;
  - (ii) the Parliament of Great Britain ;
  - (iii) the Parliament of England ;
  - (iv) the Parliament of Scotland ; and
  - (v) the Parliament of Ireland ;
- (5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland ;
- (6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established, by the authority of the <sup>1</sup>[Central Government or the Crown Representative] ; the seals of Courts of Admiralty and Maritime jurisdiction and of Notaries Public, and all seals which any person is authorised to use by any Act of Parliament or other Act or Regulation having the force of law in British India ;
- (7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in <sup>1</sup>[any Official Gazette] ;
- (8) the existence, title and national flag, of every State or Sovereign recognised by the British Crown ;
- (9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette ;

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> These words were substituted for the words "or Navy" by sec. 2 and Sch. I of the Repealing and Amending Act, V of 1927.

must be taken judicial notice of. 19 S.L.R. 576=1926 Sind 161. The Courts cannot take judicial notice of theft on Railways. 1928 L. 837. The Court can take judicial notice of the fact that "the present political movement" is in fact a movement prejudicial to the public safety or peace. 36 C.W.N. 1158.

**REGISTERED LETTER.**—Court may take judicial notice of the fact that a registered letter takes at least 24 hours longer than ordinary letter. 99 I.C. 622=1927 A. 215.

**CUSTOM OF RIGHT OF PRIVACY.**—In Oudh see 13 O.L.J. 512. See also 93 I.C. 332=1926 O. 352. As to judicial notice of the existence of a local custom, see also 91 I.C. 583=1926 O. 101.

**SIGNATURE OF A GAZETTED OFFICER.**—The Court can take judicial notice of the signature of gazetted officer of the British Government and therefore the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved. The applicability of the sub-section is not contingent on the exhibition of a copy of the *Fort St. George Gazette* containing a notification of his appointment as such officer. 44 M.L.J. 557=72 I.C. 515=1923 M. 600. As to judicial notice of power-of-attorney given under seal of notary public, see 41 Bom.L.R. 530=I.L.R. (1939) Bom.

347. Honorary Magistrate's signature is taken judicial notice of only when made in his official capacity. 5 I.C. 537. Courts take judicial notice of attestation and signature of such Registrar. 105 I.C. 422. As to signature of Justice of the Peace, see 1 Beng. L.R. 15 (Cr.). It is not correct to say that a lease because it is executed by the special manager of the Court of Wards is entitled to be taken into consideration by Courts even if they are not proved. 1942 O.W.N. (B.R.) 152. Judicial notice of Agra division records being destroyed during the Great Indian Mutiny. See 22 A. 224. For cases where appropriate books were referred to, see 17 A. 456 (P.C.) ; 12 C.L.R. 86 ; 22 C. W.N. 745 ; 32 C. 1 (P.C.) ; 1 B. 369. Law Reports, 23 C. 289 ; 12 C.L.R. 86 ; 10 C. 140 ; 24 A. 445 ; 15 B. 452 (457) ; Medical works, 12 C.L.R. 86 ; 10 C. 140 ; 14 A. 445 ; 15 B. 452 (457) ; 23 C. 604 (608). Mill's History of India, Mill's Political Economy. Harrington's Analysis, Sanads Treaties. See 3 W.R. (Act X Rul.) 29 ; 7 B.L.R. 63 ; 15 W.R. (Cr.) 25 ; 15 M. 241. As to other histories (as) Menon's History of Travancore, see 12 M. 495. Vernacular histories which have never received any recognition as historical works of value and reliability relating to matter of public or general interest are inadmissible in evidence. 1942 O.W.N. 657=1943 Oudh 91. Books dealing with custom of communities by public officer. 49 A. 848 (Production of a gazette is sufficient proof of Court notification). 1928 A. 355. Before judicial notice could be taken of passages in books relating to an alleged tradition something more than the mere exist-



(10) the territories under the dominion of the British Crown ;

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons ;

(12) the names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorised by law to appear or act before it ;

(13) the rule of the road <sup>1</sup>[on land or at sea.]

In all these cases<sup>a</sup> and also on all matters of public history, literature-science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse, to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which,

Facts admitted need not be proved. before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

#### LEG. REF.

<sup>1</sup> Inserted by Act XVIII of 1872, sec. 5.

<sup>a</sup> For an additional case, see Civil Procedure Code, 1908, sec. 84 (2).

ence of the passages would have to be proved before the passages could be regarded as evidence of the existence of the tradition. It must be shown that the writer had special knowledge of the alleged tradition or the tradition is a repetition of that given in the history. 1937 L. 529. A Court may take judicial notice of the course of proceedings in the Legislative Assembly but there should be some indications on the record when and in what circumstances, the specified statements were made. The Court should also be careful to avoid the impression of mixing up proof of the making of the statements and of the truth of such statements themselves. 1943 Lah. 298.

Sec. 58.—Under sec. 58 no fact need be proved in any proceedings which parties thereto or their agents agree to admit at the hearing. Hence where a counsel of a party admits a fact, it need not be proved against that party. 1942 O.W.N. (B.R.). 180=1942 O.A. 274. Section applies to criminal trial as well as criminal cases. 91 I.C. 233=27 Cr.L.J. 57=1926 O. 245. See Rat. 769; 5 B. 143; U.B.R. 1907, Evid. 1; 6 M.I.A. 521 (proof of will); 6 B.L.R. App. 49 (proof of documents not disputed); 1924 R. 155 (Partition admitted—Unregistered deed—If admissible). Admission made in course of examination—No necessity to prove. See 8 Bur.L.T. 18. Mortgage unregistered—Effect of an admission. See 6 Bur.L.T. 131=20 I.C. 666. When an agreement sued upon is admitted by the defendant proof of it is dispensed with. A Court cannot dismiss a suit based on an admitted document on the ground that the document was not sufficiently stamped. 4 Bur.L.T. 171=11 I.C. 810. Admission of mortgage in

ten. statement—Proof of loss of original or contents of certified copy—Not necessary. 1934 L. 898. Admission of mortgage in pleadings—Attestation by one witness—No proof required. See 4 Bur.L.T. 182=11 I.C. 850. See also 20 N.L.J. 21=169 I.C. 323; 13 N.L.R. 121; 42 B. 352=20 Bom. L.R. 354=45 I.C. 555; 42 M. 41=35 M.L.J. 555. Sec. 58 cannot be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to registration. 1935 Pesh. 12. In spite of waiver of proof by an admission under sec. 58 a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it, unless apart from the note, there is an independent cause of action for the loan. 1933 M. 117=164 M.L.J. 79. Suit on promissory note—Defendant admitting execution and pleading discharge—Promissory note subsequently discovered to be insufficiently stamped—Objection to suit—Sustainability. 1932 M. 693=63 M.L.J. 303. Fact alleged in plaint and not denied in written statement may be established as admission. See 4 Bur.L.T. 26=9 I.C. 470. Pleader consenting to admit inadmissible evidence in criminal case—Conviction on such evidence—Propriety. 28 M. L.J. 329. Accused's pleader admitting possession of cocaine—Court acting on the same is irregular. 30 Bom.L.R. 646=52 B. 686=1928 B. 241. An admission in pleadings as to the execution of a document dispenses with the necessity of proof of execution even though such document is one required by law to be in a certain form or proved in a certain way. But such an admission does not dispense with the proof of the right of the plaintiff to sue on such mortgage when he is only a transferee of the mortgage right and when

## CHAPTER IV.

## OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents may be proved by oral evidence.

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved, by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

## CHAPTER V.

## OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

there is a denial of the transfer in plaintiff's favour. I.L.R. (1943) Kar. 420.

Sec. 59.—Proof by oral evidence (a) of adjustment of accounts. See Beng.L.R. (Supp. Vol.) (F.B.) 3; (b) of payment of money. 1 A. 442. Value of documentary evidence. When there is conflict of oral evidence, see 4 M.I.A. 403; 2 Beng.L.R. (P.O.) 8. See also 1 M.I.A. 43.

Sec. 60: SCOPE OF SECTION.—See 12 Beng.L.R. (App.) 18; 1924 R. 363. Sec. 48 read with sec. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under sec. 32 are not admissible under sec. 48 or under sec. 32 (7). Statements cannot be called instances. 8 Luck. 445—1933 O. 246. See also 41 C. W.N. 1103. As to persons, who can give opinion evidence, see 25 M. 209; 23 A. 37. As to evidence of admission, see 5 M. 239; 4 L.B.R. 121; 2 Weir 762. Where, on a charge of plying a car for hire without permit, the constables only deposed to what a passenger told them (and that passenger was not examined). Held, such evidence was excluded by sec. 60. 1933 M.W.N. 1424. When hearsay relevant evidence. See 6 Bom.L.R. 762; 52 M.L.J. 376 (P.O.); 24 L.W. 227; 41 C.W.N. 1103 (evidence of family tradition). The evidence given by persons who say that they recognised after some time a particular person as the son of so and so cannot be excluded. That evidence really relates to their own perception when they saw

that particular person after his appearance and the recollection of their past perception of the said person before his disappearance. 47 C.W.N. 9—1942 Cal. 498 (S.B.). Statement by person as to what another reported to him, how far evidence, see 97 I.O. 785—1926 M. 1003. Circumstantial evidence not excluded. 1927 C. 498. Reliance on textbooks without expert evidence. See 22 C.W. N. 745; 38 M. 466. Certified copy of translation of judgment. 4 I.O. 579. The value of the evidence admissible under secs. 32, 49 and 60 depends on the character of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. 1933 Sind 213.

SECS. 60 AND 67: PRIOR STATEMENTS.—MODE OF PROOF.—Secs. 60 and 67 deal respectively with the proof of oral and written statements. These two sections do not lay down that such statements can be proved only by calling the deponents. 1941 R.D. 503—1941 O.A. (Supp.) 460.

SECS. 60 AND 118.—Evidence of statements made by a child to other people, or of conduct amounting to a statement, is not admissible in a criminal trial, when such child is not examined as a witness by reason of incompetency to depose. I.L.R. (1941) 2 Cal. 180—1942 Cal. 214.

Sec. 61.—The fact that the man producing a document used the same to settle disputes between the villagers, and that before

## Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

*Explanation (1).*—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counter part being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

*Explanation (2).*—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary, evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

*Illustration.*

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

## Secondary evidence.

63. Secondary evidence means and includes—

him the document was in the possession of his father, does not make the document a true copy of the original (chitta). 49 O.L.J. 546 = 1929 O. 459.

SEC. 62.—One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counterpart originals, each being primary evidence of the contents of the rest. 1930 L. 371. To bring document under Expl. II to sec. 62, the whole document, together with the signature thereto, if any, must be made by one uniform process. Where a letter together with several copies are prepared by one process, namely, typing on a typewriter, and one of them alone is afterwards signed separately, but the rest were only initialled, it cannot be said that the signature of the one and the initials on the rest have been made by one uniform process. The copies therefore cannot be held to be a primary evidence of the letter. 1937 M. 806 = (1937) 2 M.L.J. 381. An agreement to pay rent for house property does not require to be attested and can, therefore, be proved under sec. 62 by the production of the document itself from proper custody. It is only when a document is required by law to be attested that it shall not be used as evidence in view of sec. 68 until one attesting witness at least has been called for the purpose of proving its execution. 1943 R.D. 117 (2).

SEC. 63.—The question whether secondary evidence was in any case rightly admitted depends largely on the discretion of the Judge of first instance and his conclusion should not be overruled by the Court of appeal except in a very clear case of miscarriage. 55 B. 103 = 32 Bom.L.R. 1385 = 1931 B. 105. See also 1945 A.W.N. (Rev.) 124 = 1945 R.D. 264. Counterfoils of original receipts are admissible only on proof of loss of originals. 39 P.L.R. 702 = 1937 L. 370.

Copy of a copy is not evidence. 7 A. 738. But it may be admitted in evidence by con-

sent of parties. 1928 M. 1255. Proof of copy being correct copy is not proof of the original (i.e.) of its execution, genuineness, etc. 22 W.R. 208. Secondary evidence—Absence of evidence of comparison with original—Objection on scope of—When to be taken—Copies admitted in appeal without objection in second appeal—Competency. 17 P.L.T. 709. See also 45 C.W.N. 654 = 1941 Cal. 506. Newspaper copy of a letter not proved to have been written by the accused is not evidence. 8 A.L.J. 302 = 10 I.C. 832. Secondary evidence of a document which has not been proved to have been written by accused or even existed, cannot be admitted. A copy of a newspaper publishing a defamatory letter cannot be used as secondary evidence to prove a letter which has not been found or even proved to have existed. 10 I.C. 832. A copy of a copy, in the absence of proof of comparison with the original is not good secondary evidence of the original, in the absence of consent. 48 L.W. 650 = (1938) 2 M.L.J. 883. Where the production of a certified copy of a document is otherwise justified by the law, the fact that the witness called in to prove the due execution of the original by the executant had not as a matter of fact seen the original, does not affect the legal proof of the document produced which is admissible under sec. 63 (1). 1943 A.L.W. 116.

CLA. (3).—See 1924 N. 375; 20 L.W. 719. A printed copy of the deposition of a party in English, which deposition came up to the Madras High Court in 1900 on appeal, is admissible in evidence, as it is the practice of the Madras High Court since 1900 after Government Press took up the printing of the High Court papers, that before giving the final order for striking off, it would be compared with the original. (1927 P. 61, Bel on.) 115 I.C. 147 = 1929 M. 187. Sec. 63 is exhaustive of the meaning of 'secondary evidence.' An 'abstract translation' which does not purport to be a 'copy' or even a full and complete translation of the document, but is merely a summary of its terms, is inadmissible. 39 P.L.R. 602 = 1937 L. 370.

- (1) certified copies given under the provisions hereinafter contained<sup>1</sup>;
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies.
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

*Illustrations.*

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

- (a) when the original is shown or appears to be in the possession or power—

**LEG. REF.**

<sup>1</sup> See sec. 76, *infra*.

An uncertified copy of a deposition can be used as secondary evidence only if it can be regarded as a copy made from or compared with the original. Where the man who is alleged to have made the copy is dead and so also the man who compared it with the original, and their signatures only have been proved by a clerk who was acquainted with their handwriting, it cannot be accepted as evidence as it is not sufficiently proved that it was made from or compared with the original. 73 C.L.J. 159=45 C. W.N. 654=1941 C. 506.

CL. (5).—See 22 A.L.J. 864=80 I.C. 939=1924 A. 792. Survey and Settlement Report which was based on a jamabandi, the original of which was not produced and which itself was not exhibited in evidence, cannot be treated as secondary evidence of the contents of the jamabandi statement under cl. (5), sec. 63 or under any other section. (1928 P. 284, reversed.) 32 Bom.L.R. 515=59 M. L.J. 731=1930 P.C. 45 (P.O.).

“PERSON WHO HAS BEEN”, MEANING OF.—Evidence that witness saw the document and heard it read out if admissible. See 54 I.A. 61=5 R. 18=52 M.L.J. 376 (P.O.). Under the section the evidence of the contents of a document must be given by a person who had seen those contents, i.e., who had read the document. The evidence of a person not knowing the language of the document is inadmissible. 12 R.D. 500=112 I.C. 310.

SEC. 65: APPLICABILITY.—Secondary evidence should not be allowed unless the circumstances are a sufficient justification under the Evidence Act, for reception of secondary

in lieu of primary evidence. 1933 P. 468. An income-tax return is not a document or a public record of a private document within the meaning of sec. 74 and so sec. 65 does not apply. 56 B. 324=34 Bom.L.R. 236.

Where a party has taken all the necessary steps for the production of an original document but the document is not produced by the person in whose possession it is, he being alleged to be in collusion with the opposite party, the former is entitled to offer secondary evidence as to the contents of the documents in question. 22 P.L.T. 200. The discretion exercised by the trial Court in admitting secondary evidence on the ground that the original is lost should not ordinarily be interfered with in appeal. It is true that in a case where the admissibility of the document is not challenged, the erroneous omission in the trial Court to object to the admission of the evidence would not make that evidence relevant; but this principle applies only where the evidence or document is *per se* irrelevant or inadmissible and no objection was taken to its admissibility. Where evidence is admitted in the trial Court without any objection to its reception and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof. But if the evidence is irrelevant or inadmissible, omission to take objection to its reception does not make it admissible and objection may be raised in appeal for the first time. 47 Bom.L.R. 962.

CL. (a).—Effect of section. See 49 A. 78=24 A.L.J. 964. Any secondary evidence is admissible here. 16 I.A. 125=16 C. 753 (P. C.). “Produce” means only procure the production or give it in evidence. 1930 A. 550.

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or,

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it ;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own, default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily moveable ;

(e) when the original is a public document within the meaning of section 74 ;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

A statement of a witness abstracted in a judgment is not even secondary evidence of the statement and cannot be made use of in lieu of the original statements itself. 53 M. 952=60 M.L.J. 14. It is doubtful whether a copy of a list attached to a plaint obtained from some record in the Revenue Court is admissible in evidence. 7 O.W.N. 1079=14 R.D. 664. Secondary evidence is necessary before any presumption under sec. 90 can be made. 1930 A. 550. Oral evidence cannot be given to prove the contents of a letter which was neither produced nor called for. 26 C. 53. The copies of the letters from the accused to his co-conspirators which were intercepted and re-posted are admissible in evidence. It is not necessary that the prosecution should go through the formalities of making a formal application to his associates to produce the original letters. 1933 A. 498. Where a lease deed is in the possession of the defendants, and they failed to produce it though summoned twice to do so, secondary evidence of the same is admissible. L.R. 3 A. 8 (Rev.). Where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under sec. 65 (c) and sec. 66, proviso (2). 32 Bom.L.R. 1435=1931 B. 33; 34 P.L.R. 929=1933 L. 945. See also 206 I.O. 126=1943 Pat. 218. Certified copy of a registered deed is sufficient proof when the original of that deed is in the possession of the opposite party. 1928 A. 394. Also when the original is filed in another Court and could not be got without delay. 1930 C. 479. Where the original of a document cannot be admitted in evidence on the ground of privilege under sec. 124 no secondary evidence of its contents can be given. 1937 M.W.N. 746=1937 M. 807=(1937) 2 M.L.J. 381. Under sec. 65 (a) secondary evidence of the contents of an income-tax return would not be admissible. The Income-tax Officer is subject to every process of the Court. 1939 M. 546=(1939) 1 M.L.

J. 791. A profit and loss statement and a statement showing the details of net income filed by an assessee in support of his return of income furnished under sec. 22 of the Income-tax Act, are public documents with reference to sec. 74 of the Evidence Act of which certified copies would be admissible under sec. 65 (e) of the Evidence Act. There is nothing in sec. 54 of the Income-tax Act which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document. It would be putting an unwarranted restriction on the words "documents forming the act or records of the acts" in sec. 74 (1) of the Evidence Act to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents, which he has himself called for or which have been admitted to the record for the purposes of the assessment. I.L.R. (1940) Mad. 450=1940 M. 768=(1940) 2 M.L.J. 257 (F.B.). But see also I.L.R. (1940) M. 329=50 L.W. 815=1940 M. 161; 1940 C. 187=43 O.W.N. 1169. Registered private receipt is not a public document. 47 O.W.N. 607 (P.O.). An order of a District Magistrate under R. 56 of the Defence of India Rules is a public document within the meaning of sec. 71 of the Evidence Act, and hence the only manner in which such a document may be legally proved is by production of the original or by a certified copy of the original. 24 Pat. 143=A.I. R. 1945 Pat. 210=1945 P.W.N. 65.

LOST DOCUMENT.—If it is found that a document has been lost, secondary evidence may be given and whether proof is sufficient in a case is a question of fact. L.R. 4 A. 201 (Rev.). The law requires proof of the existence of certain circumstances before secondary evidence by production of a certified copy of a document would be permissible, and when there is no attempt whatever to establish the necessary circumstances, secondary evidence cannot be admitted. In order

to enable a party to offer secondary evidence of the contents of a document under the proviso to cl. (e) of sec. 65, it must be established that the document had actually been lost or destroyed, or shown to the satisfaction of the Court that the non-production of the document does not arise from his neglect or default. I.L.R. (1943) Kar. 420. Agreement to relinquish unregistered but enforceable under the doctrine of part performance—Secondary evidence of its contents may be given if it is lost. 1929 R. 181. Loss of original of documents produced merely as evidence should be proved. 122 I.C. 751. Entries in Patwari's list made after inquiry and inspection of receipts are only secondary evidence and they are inadmissible unless the conditions laid down in this section are satisfied. 12 R.D. 398=111 I.C. 843. Sec. 65 (a) is inapplicable to the case of previous conviction and secondary evidence could be admissible to prove previous convictions in cases where the records of the previous trials and convictions have been destroyed and are not available. But a mere conviction slip is not such secondary evidence. I.L.R. (1941) Kar. 308=1941 S. 173=43 Cr.L.J. 212. On this clause, *see also* 5 P. 777, referring to 6 M. 80; 27 C. 639 (P.C.); 24 L.W. 227; 105 I.C. 502; 8 P.L.T. 510=1927 P. 61. (Original of public document destroyed—Secondary evidence admissible); 1926 O. 161 (Original telegram destroyed). *See also* 1937 R.D. 119; 14 I.A. 71; 8 W.R. (1864) 301 (Decree destroyed during mutiny); 22 W.R. 303; 5 C. 885; 7 C. 98; 6 O.L.R. 199 (Document destroyed by fire); 1937 R.D. 119; 11 P. 569=138 I.C. 419=1932 P. 157 (Record room burnt during mutiny.) As to evidence of search before document can be considered to be lost, *see* 19 C. 438; 49 I.C. 1006. Document—Lost in Court—Secondary evidence admissible. 144 I.C. 812=1933 L. 782. As to value of lathandi papers a secondary evidence of certificate of sale, *see* 21 W.R. 333. A compromise filed in a recent suit may be proved by producing a certified copy as the compromise so filed is a part of public record. L.R. I.A. 132 (Rev.). *See also* U.B.R. (1909) 4th Qr. Evi. 19 (Supplementary survey records); 1 P.B. 1914 (Cr.); 15 Cr.L.J. 344; 5 P.R. 1903 (Cr.). Certified copies of registered deeds. 103 I.C. 752=1927 L. 817. Secondary evidence of a compulsory registrable but unregistered deed is not admissible in evidence. 101 I.C. 839=1927 N. 214. Secondary evidence of returns filed with the Registrar of Joint Stock Companies is admissible as such returns constitute the public records of private documents, within sec. 74 (2). 45 C. 169=21 O.W.N. 1161 (F.B.). The mere fact that a document which is required by law to be attested was admitted in evidence without objection by the defendant, does not absolve the plaintiff from establishing that it had been duly executed and attested. 42 O.W.N. 1500

=1938 O. 702. Secondary evidence of a document should not be rejected on appeal merely on the ground that the loss of the original has not been satisfactorily proved. 15 I.C. 625. Secondary evidence admitted without objection, not to be excluded on appeal. 29 M.L.J. 307=19 O.W.N. 929 (P.C.). *See also* 14 I.C. 539; 32 P.L. R. 696=1931 L. 722; 14 L. 473=1933 L. 601. Where a suit is brought on certified copies of documents and the loss of the document is not proved the suit must be dismissed as no secondary evidence is admissible in the circumstances. 23 I.C. 886. Where the plaintiff has suppressed the documents in his possession, he could not be permitted to establish their contents by secondary evidence. 1933 M. 451=64 M.L.J. 676. *See also* 1937 N. 116=169 I.C. 834. The defendant pleaded that the original was not lost but had been suppressed because it contained an endorsement of payment, *held*, that as the pleading of the defendant amounted to an admission of execution of a document, the plaintiff could maintain the suit on its copy without proving the loss of the original. 11 A.L.J. 734=20 I.C. 955; 11 A.L.J. 731=21 I.C. 81. Where in a suit for redemption, it is proved that in *waftul-ars* predecessors in title of the defendants admitted in writing the existence condition and also the contents of the original sec. 65 (b) applies. 148 I.C. 1172=1934 A. 529. Order granting letters of administration with copy of will annexed, if public document—Certified copy, if admissible. *See* 19 C.W.N. 1068=30 I.C. 690. Certified copy of probate in Australia—Secondary evidence. *See* 11 I.C. 261. Copy of award admissible when original in possession of party not subject to process of Court. 1917 P. 241. A certified copy of a robokari is admissible in evidence. 29 C.W.N. 742=46 I.C. 689. Contents of document called for but not produced—Court bound to receive secondary evidence. *See* 49 I.C. 507; Mortgage deed executed in England comprised properties situate in India—Loss of deed before registration—Secondary evidence may be given. 1928 P. 134=7 P. 99. Document lost—Copy of, bearing endorsement by deceased predecessor of party that it was a copy of original—Admissibility. 56 M.L.J. 730 (P.C.).

The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within sec. 65 (b). It is a statement under sec. 6, Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount; on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay



(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact, to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g) evidence, may be given as to the general result of the document by any person who has examined them, and who is skilled in the examination of such documents.

66. Secondary evidence of the contents of documents referred to in section 65

Rules as to notice to produce. clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is [or to his attorney or pleader], such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

#### LEG. REF.

1 Inserted by the Indian Evidence Amendment Act (XVIII of 1891), S. 4.

anything or any admission of liability for anything. 1941 N. 95=1941 N.L.J. 134.

LOST DOCUMENT, INSUFFICIENTLY STAMPED.—Inadmissible in evidence, as no duty or penalty can be levied on a lost document. But proof of title by independent evidence is not barred. 4 Mys.L.J. 194.

SECS. 65 AND 66.—The only purpose of a notice under secs. 65 and 66 is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of its contents. Secondary evidence is admissible when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce the original document in reasonable time and under sec. 66 the Court has absolute power, when it thinks fit, to dispense with a notice under those sections. 63 I.A. 85=40 C.W. N. 226=70 M.L.J. 206 (P.O.).

SEC. 65 (g).—See 6 M. 8; 5 C. 568.

SEC. 66.—Section is mandatory. 31 C.W. N. 215=1927 C. 102. Secondary evidence of deeds of sale of houses adjacent to the suit house can be given in order to prove title only when the person in possession of those docu-

ments fails to produce them in spite of notice given to him. Where no such notice is given secondary evidence in the form of copies of the original document should not be admitted. 11 L.L.J. 401. See also 123 I.C. 197 (omission to give notice is a fatal objection to the admission of secondary evidence. Where a pardanashin woman is living with her brother, service of summons on him instead of the woman herself would constitute such notice as is required by sec. 66 and if that brother is expressly named in the summons as the person upon whom it might be served it is only a technical irregularity. 27 A.L.J. 1091=1929 A. 680. No doubt notice to produce have been given before giving secondary evidence of its contents, but such notice is not essential to render secondary evidence admissible in certain cases, e.g., where the Court in its discretion thinks it fit to dispense with it; the objection should however be raised at the time of the reception of the evidence and no objection should be allowed to be taken in appellate Court as to the admissibility of secondary evidence which was admitted without objection. 163 I.C. 408 (2)=1936 R. 277.

SEC. 66, PROVISOR.—6 P. 102. It is doubtful in a *pro forma* defendant who is not interested in suit property or in the decision of the case is not an "adverse party" within



Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence :

<sup>1</sup>[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.]

#### LEG. REF.

<sup>1</sup>Proviso added by Act XXXI of 1926.

the meaning of Proviso, cl. (2). 118 I.C. 663=1929 A. 680. Certified copy of mortgage deed may, for proper reasons, be admitted without notice to produce the original. 97 I. C. 348=1926 P. 512. See 9 C. 939; 2 M. 295. Where a party alleges that no facts are adduced by the opposite party nor any facts proved which would justify the Court in admitting as secondary evidence a copy of an original document and it is found that the original document is in possession or control of the party taking the objection and he fails to produce it, proviso, cl. (2), sec. 66 applies and notice to the party to produce the original is not necessary as by the nature of the case the party must be held to be knowing that he would be required to produce it. 161 I.C. 465=1936 P. 129.

SEC. 67.—See 22 W.R. 390; 21 W.R. 429; 11 B. 690; 12 B.L.R. App. 18. The definition of "sign" in the General Clauses Act, sec. 3 (52) has no application to term 'sign' as used in sec. 67, Evidence Act. 1934 A. 390. Thumb marks are not exempt from the provisions of sec. 67. 40 L.W. 277=1934 M. 558. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. 37 C. 467=14 C.W. N. 1114. Proof of document by examination of writer. See 19 C.W.N. 1148=22 I. C. 654. Handwriting may be proved by circumstantial evidence under sec. 67 which prescribes no particular kind of proof. The execution or authorship of a document is a question of fact and may be proved like any other fact. 1933 A.L.J. 799=1933 A. 690. The identity of the machine on which two letters have been type-written would not by itself show that the writer of the two is one and the same person. Such a conclusion may be drawn from additional evidence, e.g., internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee. 1933 A. 690. See also 37 C. 467=14 C.W.N. 1114. The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of "proved". That definition of the word "proved" must be read along with sec. 67. Sec. 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. 1928 A. 303. See also 1941 A.W.R. (Rev.) 461=1941 O.A. (Supp.) 402; 1942 Pesh. 83. Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the handwriting of the attesting witness and of his identity is sufficient proof of execution. So where one attesting witness was dead and the other turned hostile, proof or admission of his handwriting is sufficient. 1930 M. 770=125 I.C. 231. See also 1942 N.L.J. 214. 57 M. 662=1934 M. 365=66 M.L.J. 712.

SECS. 67 AND 68.—In the N.W.F. Province, a conveyance of property does not require to be attested and therefore sec. 68 has no application. Hence admission of the execution of the document by the executant is sufficient to prove execution under sec. 67. 1942 Pesh. 83. See also 1942 N.L.J. 214. It does not necessarily follow that because an attesting witness is unable to point to the signature on a document of the person whose signature he purports to have attested, that he has failed to prove the signature within the meaning of secs. 67 and 68. If he has seen the other person sign or affix his mark in his presence or to have received from the executant a personal acknowledgment of his signature or mark, it would be enough to satisfy the definition of 'attested' under the Transfer of Property Act. Sec. 67 only shows what has to be proved and sec. 68 what kind of evidence is essential for this purpose and when this is forthcoming there is no reason why the word 'proved' in sec. 3 should not be constituted according to the definition. 1943 O.W.N. 425.

Sec. 68.—*See* 104 I.C. 622; 45 C.L.J. 577. If sec. 68 was intended to express that a document required by law to be attested should not be used as evidence for any purpose until one attesting witness at least had been called, then the words "for any purpose" would have found a place in the section. Those words are not in the section and therefore it has to be concluded that this was not the intention of the framers of the Act. There is no reason why an admission in one document should require a different kind of proof from an admission in another document. The mere fact that one of the documents requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. Sec. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. 1939 A.L.J. 142=I.L.R. (1939) A. 366=(1939) A. 269. Sec. 68, only applies when execution of a document has got to be proved. Where execution has not got to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document in question. 48 Bom.L.R. 83. The word "execution" in sec. 68 includes attestation as required by law. Where the document is registered and its attestation not denied, it is not necessary to call an attesting witness. 1945 A.L.J. 537. The fact that one of the attesting witnesses has turned hostile is no sufficient ground to excuse the party producing the document from his duty of calling the said witness. It is always open to him to cross-examine that witness with the permission of the Court. 1941 O. 89=1940 O.W.N. 1077. A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution is an attesting witness. 193 I.C. 41=1940 N.L.J. 437=(1940) N. 382. Under sec. 68 what is necessary is that an attesting witness, if available, should be called in evidence. It is wrong to think that a mortgage deed can be proved only by an attesting witness. If the latter is unable to prove it, there is no bar to its being proved by other evidence. 193 I.C. 161=1941 O.W.N. 249=(1941) O. 284; 1941 O.W.N. 1298=1941 O.A. 983; 1942 Oudh 201=1941 R. 122.

**PROOF OF WILL.**—Reading sec. 63 of the Succession Act with sec. 68 of the Evidence Act, it is clear that what a person propounding a will have to prove is that the will was duly and validly executed, and that has to be done by not simply proving that the signature on the will was that of the testator but that the attestations were also made properly

as required by cl. (a) of sec. 62 of the Succession Act. Under sec. 63 (c) of the Succession Act it is necessary to prove by one or more witnesses that both the witnesses had properly attested the will. The Evidence Act only lays down the mode of proving; it does not define what is required to be proved under sec. 63 (c) of the Succession Act. When a person comes to Court to establish the authenticity and the valid execution of a will, the mere formal execution and its valid execution cannot be separated. To prove the valid execution of a will there must be proof of both the attestations. There cannot be a valid execution without proper attestation under sec. 68, Succession Act, and if such proper attestation is not proved, there is no proof of execution under sec. 68, Evidence Act. Sec. 68, Evidence Act, does not say that a document required to be attested by two witnesses shall be proved by the evidence of one of them. All that the section provides is that such a document shall not be accepted in evidence unless the evidence of "at least" one of the attesting witness is called. The words "at least" are of the utmost importance and presuppose that more evidence may be required; it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. If one attesting witness only proves that the testator had acknowledged his signature to him, that does not dispense with proof of acknowledgment by the testator before the other attesting witness. All that sec. 68, Evidence Act, means is that if two attesting witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they have received the acknowledgment from the testator. 47 Bom. L.R. 709=A.I.R. 1946 Bom. 12.

**SCOPE OF PROVISOR.**—*See* 149 I.C. 1109 (1)=1934 L. 282. Sec. 68 has no application to the Punjab and there is no law which requires sale-deed in the province to be attested. 10 L. 447=114 I.C. 62; 1928 L. 148. The change in the meaning of the word "attested" effected by sec. 2 of Act XXVII of 1926 as amended by Act X of 1927 is retrospective in operation and the person who identifies the executant of a document before Sub-Registrar can be an attesting witness. 30 N.L.R. 62=152 I.C. 1007=1934 N. 1. The amendment of sec. 68 by Act XXXI of 1926 is a provision relating to processual law and not be substantive law and therefore must be taken to be retrospective in its operation. 1929 M.881=57 M.L.J. 588; 1933 M.W.N. 141=37 L.W. 677=1933 M. 432; 144 I.C. 49=1933 M. 612. The words "Indian Registration Act, 1908" occurring in proviso to sec. 68 could not be interpreted so as to com-

fine the application of the proviso, only to documents registered according to the provisions of that particular Registration Act and not of any previous Registration Act. 178 I.C. 198=1939 P. 47. Where a defendant in a suit on a mortgage does not admit the execution and completion of the document, and receipt of consideration, and his pleader contended that the execution and due attestation of the mortgage bond was not proved against his client, it must be held that the execution has been specifically denied. 43 O.W.N. 669=181 I.C. 216=1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.). The admission of execution contemplated by sec. 70, and the failure to make a specific denial of execution contemplated by the proviso to sec. 68 of the Evidence Act, relate only to the person who has actually executed or purported to have executed the document; that is to say, the person who is in a position to admit or deny execution, and it manifestly implicit that such person must be a party to the suit. I.L.B. (1943) Kar. 420. The words 'specifically denied' used in the proviso to sec. 68, do not mean more than this that the denial in question should relate to the specific document which is sought to be denied and that the denial should leave no room for doubt that the particular document is denied by the person against whom it is sought to be used. The proviso does not lay down that the denial should be contained in the written or oral pleadings. 1943 O.W.N. 105. The 'specific denial' referred to in the last sentence of the proviso to sec. 68 is not confined only to a denial by the executant but contemplates a specific denial by the party against whom the document is sought to be used. Hence an attesting witness has to be called even if execution is denied by one against whom the document is sought to be used. 1943 O.W.N. 382. It cannot be said that a denial to be a specific denial for purposes of sec. 68 must be a denial as regards the proper attestation of the document in question, that is a denial of the validity thereof on the ground that it was not properly attested. The words 'specifically denied' used in the proviso to sec. 68, only mean that the denial in question should relate to the specific document which is sought to be denied and that the denial should be unqualified so as to leave no doubt that the execution of the particular document is denied by the person against whom it is sought to be used. 1943 O.W.N. 136. Where a registered deed of mortgage is attacked on the ground that it represents a sham and nominal transaction entered into to defeat a creditor, there is no specific denial of execution so as to make it incumbent on the plaintiff to call the attesting witnesses to prove the execution of the document. A document may represent a sham transaction notwithstanding that it has been executed by the

person who is mentioned in the document as the executant. 57 L.W. 7=(1944) 1 M.L.J. 28 (F.B.). The section does not apply to account books which do not require attestation. 1930 A. 37. A document which is not a mortgage owing to non-compliance with sec. 59 of the Transfer of Property Act regarding attestation is not a document which is required by law to be attested within the meaning of sec. 68 of the Evidence Act and is admissible to prove the personal covenant to pay therein which is not required by law to be attested. [32 M. 410=19 M.L.J. 584 (F.B.), Foll.] 54 M. 163=60 M.L.J. 56; 146 I.C. 694=1933 S. 257. Where the execution of a registered mortgage deed is not denied by the mortgagor, it is not necessary to call the attesting witnesses of the deed to prove it. 165 I.C. 404=1936 O.W.N. 1113=1937 O. 149. To prove a deed of gift, the production of a witness, who identified the donor and attesting witnesses and who was personally known to the Sub-Registrar, and an entry in favour of the donee in the village records are sufficient. 60 I.C. 234. The proper way of proving an entry in the Register of Motor Vehicles would be either that the Register itself should be produced by a proper official or a duly authenticated copy of the material part of the register placed before the Court. A mere statement by the Commissioner of Police made in answer to a letter written by the Corporation, without his being called or the register produced, cannot be accepted in proof of the ownership of a car. 36 O.W.N. 1147. A writer who signs his name in token of being the scribe of a mortgage deed does not attest the deed merely by subsequently seeing the mortgagor affix his signature. 6 N.L.R. 152=8 I.C. 1119. "Execution" of mortgage deed—Meaning of. See 69 C.L.J. 454. Attestation by mark—Illiterate witness—Effect of. See 12 A.L.J. 1114=26 I.C. 84. Executant of document or party to transaction not an "attesting" witness. 14 C.W.N. 1046=7 I.C. 735. A writer of a deed who has not signed it as witness but has as a matter of fact been a witness of execution is a competent attesting witness. 146 I.C. 694=1933 S. 257. The certificate of admission of executive endorsed by the registering officer upon a document registered by him could not be used as an admission of execution within the meaning of sec. 70. 13 N.L.R. 197; 18 S.L.R. 282=93 I.C. 660=1926 S. 88. See also 38 I.C. 605=1936 A. 712=1936 A.L.J. 1262. Where the execution of a document is admitted or not denied it is not necessary to prove the attestation. 42 I.C. 91 (Under the present amendment want of specific denial dispenses with proof by attester). 14 R.D. 404; 1936 O.W.N. 1113=1937 O. 149; 1936 O. 270=161 I.C. 605=17 R.D. 70; 1934 A.L.J. 817=1934 A. 507. See also 1933 L. 378. If any of the defendants to a suit denies that

any of the alleged executants executed the deed the plaintiff must produce one of the marginal witnesses to prove the document. 140 I.C. 115=1932 A.L.J. 207=1932 A. 320. *See also* 1936 A.M.L.J. 54. Executant of a mortgage deed, admission by, whether binds others not admitting. 44 C. 345=20 Q.W.N. 1044. Mortgage, proof of—Only one attesting witness called, sufficient proof. 39 A. 24=15 A.L.J. 164. Where an attesting witness is called but his evidence has not been accepted, the contention that the provisions of sec. 68 had been complied with and that no further evidence of due execution and attestation of the mortgage was necessary cannot be accepted. 43 O.W.N. 669=1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.).

**PRACTICE.**—Attestation being a mixed question of law and fact point cannot be raised for the first time in second appeal. 97 I.C. 611=1926 M.W.N. 559. Where in spite of the best efforts of the plaintiff, the attesting witness could not be served with summons and by the time of the appeals the witness was dead. *Held*, that, whether under the amendment to sec. 68 or sec. 69, it was open to the plaintiff to prove the document by other means. His own evidence held in the circumstances sufficient. 144 I.C. 89=1933 M. 612. No doubt only one attesting witness need be called, if that attesting witness speaks to attestation by the attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting it will be presumed, until the contrary is shown, that the persons who purported to have signed were in fact attesting witnesses. 1941 R. 122. Where the executant of a mortgage deed, the writer of a deed and the attesting witnesses have all died, having regard to the new definition of attestation in sec. 3, Transfer of Property Act, and to the varied mode of proving a registered document as amended by sec. 68, Evidence Act, it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed. 1929 S. 235. No attempt to prove attestation of mortgagee deed—Document cannot be used as evidence. 1929 A. 389. Execution of mortgage deed not specifically denied—Need not be proved. 30 Bom.L.R. 565; and examination of attesting witness is not necessary. 1927 P. 403. *See also* I.L.R. (1937) A. 723. It is not the law that a plaintiff in a suit on a mortgage bond should call all the attesting witnesses to the bond who are alive before he can take advantage of sec. 71. It is incumbent on the plaintiff to call at least one witness, and if that witness denies

or does not recollect the execution of the document then the execution may be proved *aliunde*. Whatever the English law may be sees. 68 to 71 do not necessarily state it. 173 I.C. 983=19 P.L.T. 234=1938 P. 301. *See also* 1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.); 181 I.C. 572. Defendant admitting execution of mortgage deed but denying attestation—Duty of plaintiff to prove due attestation. 1936 A.L.J. 297=1936 A. 169. Where the party challenging certified copy of a registered deed of gift, does not specifically deny that it is the copy of the deed, according to the proviso to sec. 68 the production of attesting witnesses to prove execution and attestation of the deed is not essential. 1939 L. 414. Where execution of a document is not denied, the execution and attestation of the document can be proved by other evidence, and it is unnecessary to call any of the attesting witnesses. 190 I.C. 413=1940 R. 184. *See also* 1941 R. 122. Where the defendant not only denies the execution of the suit mortgage deed but also its genuineness, the execution of the mortgage is “specifically denied” and the proviso to sec. 68 becomes applicable and it is incumbent upon the plaintiff to produce at least one of the attesting witnesses. 1941 O. 89=1940 O.W.N. 1077. A deed of relinquishment is not a document required by law to be attested; so it can be proved by the unchallenged evidence of the alleged writer thereof. 14 L.R. 466 (Rev.)=17 R.D. 637. A document executed in England and requiring to be attested under the English law but not requiring to be attested under the Indian law, relating to property in India may be proved only by proving the signature of the executant. 7 P. 520=111 I.C. 57=1928 P. 304. The proviso to sec. 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not relieve the party of the necessity of proving a mortgage as prescribed under sec. 59, Transfer of Property Act. 11 R. 26=1933 R. 6 (1929 P. 422, Diss.). The word “execution” as used in the proviso to sec. 68 in the case of mortgage bonds includes all the series of acts which would give validity to the instrument *qua* mortgage, i.e., the word “execution” not only means signing by the borrower but the attestation of the signature by the witnesses as required by sec. 59 of the Transfer of Property Act. If, therefore, in a suit on a mortgage bond the defendant admits the signature but denies the attestation, it must be taken that he denies the execution of the mortgage bond and his denial requires the plaintiff to prove the mortgage bond by examining one of the attesting witnesses, if available. I.L.R. (1937) 1 C. 507=41 C.W.N. 306; 1940 O.W.N. 1077=1941 O. 89; 1942 O.W.N. (B.R.) 255; 43 C.W.N. 1025=1939 C. 688.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must

Proof where no attesting witness found.

be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

70. The admission of a party to an attested document of its execution by

Admission of execution by party to attested document.

himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

SECS. 68 AND 70.—The execution contemplated in sec. 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. In the case of document required to be attested, there can be no execution unless there has been a signing by the executant in the presence of the attesting witnesses, and execution is not complete unless the deed is attested by two witnesses. If a question of attestation is put in issue, the plaintiff must prove that the document has been duly attested, and the plaintiff is not relieved of the obligation of calling an attesting witness under sec. 68. A statement by the executant that when he signed the deed there were no alterations or erasures and there were no attesting witnesses to the document, etc., is not an admission of execution at all, but a denial of execution. 46 L. W. 610=1938 M. 43=I.L.R. 1938 M. 523.

SECS. 68 AND 72.—The definition of bond in sec. 2 (5) of the Stamp Act is not exhaustive, nor is it proper to infer from the definition in an Act which deals with stamp matters only that it means that such a document is required by law to be attested. Therefore it is sec. 72 which applies to the case of a bond and not sec. 68, and examination of the attesting witnesses to prove execution is not necessary. 188 I.C. 638=1940 N.L.J. 70=1940 N. 240.

SEC. 69: MORTGAGE—PROOF OF IN CASE OF—DEATH OF ATTESTING WITNESS.—See 24 A. 615=10 A.L.J. 217; 11 N.L.R. 9=27 I. C. 866; 35 A. 364=11 A.L.J. 379. Where regarding a mortgage deed regularly signed and attested the signatures of all attesting witnesses who were dead were proved, as also of the mortgagor, held, that there was a presumption of its due execution and it lay upon the other side to rebut it. 39 A. 112=15 A. L.J. 167; 41 I.C. 171. Admission of execution recorded in registration endorsement is not admissible to prove execution. 20 O.C. 18=38 I.C. 605. See also 13 N.L.R. 197; 1928 N. 244. It must be proved that "no attesting witness can be found". The party must ask the Court to exhaust all processes of the Court as by adopting the procedure in O. 16, r. 10, C.P. Code, for the arrest of the witness and for the attachment of his property. 7 P. 312=1928 P. 356 (Ruling before the amending Act XXXI of 1926). In order that sec. 69 may be applied, mere taking out of the summons or the service of summons

upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the processes under O. 16, r. 10, C.P. Code, which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the application of the section. But if a party moves the Court for processes under O. 16, r. 10 when a witness summoned by him has failed to obey the summons but the Court refuses the process asked for, there is no reason why the section cannot be invoked. 49 C. W.N. 377=A.T.R. 1945 Cal. 350.

SEC. 70.—See I.L.R. (1938) M. 523=1938 M. 43. The admission here spoken of does not include admissions made before the suit and sought to be proved by witnesses in the suit. 27 C. 190. There is no reason to restrict the application of sec. 70 to admissions made by a party during the course of the trial of the suit. 1943 O.W.N. 105=1943 O. A. (C.C.) 55; I.L.R. (1943) Kar. 420 (Admission by person not party to document). As to admission of execution before Sub-Registrar, see 18 S.L.R. 282=93 I.C. 660=1926 S. 88. See also 38 A. 1=13 A.L.J. 881=30 I.C. 376; 7 N.L.R. 85=11 I.C. 689; 47 I. C. 9; 48 L.W. 610. The "admission" contemplated under sec. 70 is an admission made for the purpose of or having reference to the suit, made either in the pleadings or during the course of the trial. 1928 N. 244 (Admission of execution at the registration is not sufficient for the section). The admission of execution contained in some other document such as a power-of-attorney cannot be availed of for the purpose of dispensing with the citation of the attesting witness. 46 L.W. 610. Where a mortgagor merely says he does not admit the execution or attestation of the mortgage and puts the mortgagee to proof, the plea is not one of specific denial of the execution or attestation of the document, and proof of one attestation is quite sufficient. It is only in a case where there is not only absence of an admission but a specific denial of the validity of the mortgage that the mortgagee is called upon to prove attestation of two witnesses. I.L.R. (1937) A. 723=1937 A.L.J. 710=1937 A. 646. Section applies only to document which is duly attested. 5 R. 461=1927 R. 233. Where in a deed of further charge the executant admits the execution

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

of an earlier mortgage deed, the admission is a sufficient proof of execution of the mortgage deed as against the executant and no formal proof of proper attestation is necessary. 1943 O.W.N. 105—1943 O. 218. A successor in interest is bound by his predecessor's admission of execution where it is contained in a document on which the successor founds his title. He must be taken to have accepted it as correct when he acquired rights under that document. 1943 O.W.N. 382. Where there is admission of execution in the written statement, but the attesting witness called stated the mortgagor did not sign the deed in his presence, *held*, that the document must be taken to have been proved. *See* 84 I.C. 558—1926 P. 295. As to effect of admission of execution by pardanashin lady, *see* 30 C.W.N. 364—5 P. 58—1925 P.C. 203 (P.C.). Where in a mortgage suit the defendant pleaded that she executed the bond under a misrepresentation as to its contents, *held*, that under these circumstances, sec. 70 applied and that the admission was sufficient proof of the execution of the mortgage deed. 1929 C. 441.

SEC. 71.—Sec. 71 is applicable only where the attesting witness 'denies or does not recollect the execution of the document.' Their Lordships were doubtful whether the description would be applicable to the case of a witness whose evidence was considered unreliable but were willing to assume that the discrepancies were due to deficient recollection. It was held on the fact that even assuming that it would be legitimate in the above circumstances to look at the proceedings relating to the registration of the mortgage deed for the purpose of proving its due execution and attestation, the plaintiffs had failed to prove the material facts necessary to comply with the provisions of the T.P. Act. 43 C.W.N. 669—1939 P.C. 117—(1939) 2 M.L.J. 762 (P.C.). Sec. 71 cannot be construed as meaning that the evidence of the executant of a deed required by law to be attested is not admissible unless the attesting witnesses denied or did not recollect the execution of the document. There is nothing in the Evidence Act which precludes a party from adducing as a witness to the execution of the deed any person who happened to be present when the deed was executed and actually saw it signed by the executant and by the attesting witnesses. The section, while permitting the evidence of the executant of the deed in certain circumstances does not

have the effect of rendering his evidence or that of other witnesses inadmissible. 1937 A.L.J. 161—1937 A. 273. Sec. 71 has no application to a case where the attesting witnesses are not before the Court. If, therefore, the plaintiff takes out summons on one of the attesting witnesses and the witness does not appear in Court, that is not enough to let in further evidence under that section. The plaintiff must exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible the plaintiff can avail himself of the provisions of sec. 69. 69 C.L.J. 454—43 C. W.N. 1025—1939 C. 688. The 'other evidence' referred to in sec. 71 cannot refer to the statement of witnesses who had seen the attesting witnesses sign in the presence of the executant. It only means any evidence that may be considered satisfactory by the Court seized of the matter. 1941 A.M.L.J. 75. The word 'execution' in sec. 71 not only means signing by the executant but it means and includes attestation as well. If, therefore, an attesting witness called by the plaintiff turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence as laid down in the section. This other evidence includes his own evidence as well, although he is the grantee under the instrument. 43 C.W.N. 1084. Under sec. 50 of the Indian Succession Act (X of 1865) witnesses must sign their names and not merely set their marks. *See* 3 B. 382; 11 C. 429; 5 C. 738. But initials will be sufficient. 15 M. 261. A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. 48 I.C. 724; 5 O.L.J. 667—48 I.C. 538. Where in a mortgage suit the plaintiff called one of the attesting witnesses then alive and when that witness recalled he proceeded to prove the document by other evidence, *held*, that there was compliance with secs. 68 and 71. 69 C.L.J. 454; 33 C.W.N. 248—1929 C. 188. *Mortgage suit—Two out of four witnesses dead—Third turning hostile—Fourth witness summoned but refusing to depose—Admissibility of other evidence to prove attestation.* 1929 C. 441.

SEC. 72.—*See* 1940 N.L.J. 70—1940 N. 240.



73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written

Comparison of signature, writing or seal with others admitted or proved.

or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[This section applies also, with any necessary modifications, to finger-impressions.]

#### PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents :—

- (i) documents forming the acts or records of the acts—
  - (i) of the sovereign authority,
  - (ii) of official bodies and tribunals, and
  - (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country ;
- (2) public records kept in British India of private documents.

#### LEG. REF.

Words in brackets were added by Act V of 1899, sec. 3 (2).

SEC. 73: MEANING OF TERMS.—“Purports” means “alleged”. 14 Bom.L.R. 310=15 I.C. 549. See also 35 M.L.J. 698=48 I.C. 68. History of the section. See 1 M.H.C.R. 160 at 166, 167. Section based on and follows English Law. See 1914 M.W.N. 240. Procedure under the section. Rat. 452. Value of evidence afforded by comparison of handwriting, see 14 I.C. 741; 10 C. 1047; 37 C. 467. Question of comparison is different from question of admissibility. 53 C. 372=92 I.C. 442=1926 C. 139. The Court has power to compare the alleged genuine signature with admittedly genuine signature to come to a conclusion from it. 120 I.C. 335=1930 N. 27. But see 152 I.C. 1042. In a case where there is no conflict of evidence, the Court is entitled to form its own opinion after comparing the signatures on the documents produced in Court and the admitted signatures. Such procedure is expressly contemplated by sec. 73. 17 P. 15=19 P.L.T. 432. But he ought not to attach much weight to such comparison. 1939 A.M.L.J. 34. Danger of resting decision solely on comparison of handwriting. See 16 A. 157 (P.C.). See also 56 B. 304=1932 B. 406=34 Bom.L.R. 598. Where a signature is denied, the only safe way to prove that the alleged signature is really the signature of the person who denies it, is to produce some signature admittedly made by the same person at about the same time as the disputed signature was allegedly signed. 1940 A.M.L.J. 2. Data for arriving at a conclusion. 62 I.C. 882. As to thumb-impression, see 17 Cr.L.J. 316=35

I.C. 492; 1 R. 759 (F.B.); 1924 B. 115. Modes in which handwriting can be proved. 37 C. 467=14 C.W.N. 114. An anonymous writing ascribed to a particular person may be compared with a genuine signature. 14 Bom.L.R. 310=15 I.C. 649 (37 C. 467, Dist.) Court ordering accused to make thumb-impression for purpose of comparison—Accused refusing to do—Adverse inference against accused, validity of. See 6 P. 623.

SEC. 74: CONSTRUCTION OF SECTION.—See 20 M. 189. Schoolmaster is an Executive Officer of Government under sec. 74 (1) (iii). 28 Bom.L.R. 1225=50 B. 716=1927 B. 11; 12 Mys.L.J. 133=39 Mys.H.C.R. 406. A public document is one prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document. 1928 L. 640. A survey and settlement report prepared by an Assistant Superintendent of Survey being a public document is admissible in evidence. 1941 P. 260.

THE FOLLOWING ARE PUBLIC DOCUMENTS. —Municipal proceedings. 19 A. 293. But see also 30 I.C. 643=16 Cr.L.J. 659 (C.). Settlement record, with history of district attached to it. 1924 L. 639. See also 1941 P. 260. Canal jamabandi papers. L.R. 3 A. 386 (Rev.) Printed copy of Index Register of lands granted on lease in city. 44 Bom.L.R. 295=1942 Bom. 161. Loan register in public debt office in Bank of Bengal. 31 C. 284. Orders of Inam Committee. 39 Bom.L.R. 288. Parchas distributed to cultivators. 19 Cr.L.J. 886=47 I.C. 82 (P.). Items of entry in Register of inventions. 4 A.L.J. 11. District Gazette. 3 U.P.L.R. (B.R.) 30. Dakhnamah is public document. 1927 A. 52. Dakhaldihant (docu-



ment purporting to transfer possession under orders of Court). 1941 R.D. 867=1941 A.W.R. (Rev.) 907. Crop cutting report of Revenue Officer under Bengal Tenancy Act. 8 P.L.T. 74=1927 P. 167. *See also* 7 P.L.T. 761=1926 P. 436. As to Government Survey plan, *see* 10 I.C. 653; 22 P.L.T. 699=1941 P. 260 (survey and settlement report). Records of acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. 105 I.C. 353. *See also* I.L.R. (1937) B. 464=1937 B. 307; 1941 O.A. (Supp.) 807=1941 A.W.R. (Rev.) 933 (Certified copies of extracts from patwari's records). Certified copies of confessions by accused would be admissible under sec. 74 to prove the act of the Magistrate recording the confession. Where there are no irregularities and the statement was taken in accordance with law, then, under sec. 80 there would be a further presumption that the circumstances under which it was stated to have been taken were true. The copies would not be sufficient to prove the identity of the accused. 1933 A.L.J. 1551 (F.B.). Preliminary order under sec. 144, Cr.P.C.—Police report and reference from Health Officer referred to therein—Copies of—Right of accused to. 12 Mys.L.J. 197=39 Mys.H.C.B. 172. Report in form B under sec. 173, Cr.P. Code. is public document. 7 Mys.L.J. 231. Also deposition of witnesses. 5 P. 777=8 P.L.T. 510; 14 C.L.J. 578. *See also* 19 C.W.N. 1068 (Letters of Administration); 18 C.W.N. 644=23 I.C. 529 (notice issued under sec. 117, Cr.P. Code); 18 I.C. 250 (pedigree filed before Settlement Court); 35 A. 165 return of village officer on reference by Political Agent). As to deposition of witnesses taken in Court, *see* 5 P. 777=101 I.C. 289=1927 P. 61; 1933 R. 212. An order sheet in a case is a public document being the record of an act of a public judicial officer and the presumption is that it is genuine. It would require evidence and not mere suggestion that it has been fabricated to justify its rejection. 1937 P.W.N. 119=1937 P. 534. *See also* 46 C.W.N. 967. As to income-tax returns, *see* 52 L.W. 159=1940 M. 768=(1940) 2 M.L.J. 257 (B.); I.L.R. (1939) 2 C. 394=43 C.W.N. 1169=1940 C. 187; 50 L.W. 815=1939 M. 546=(1939) 1 M.L.J. 791.

THE FOLLOWING ARE NOT PUBLIC DOCUMENTS.—A plaint or written statement is not an act or the record of an act of the Court and cannot therefore be treated as a public document merely because of the court's endorsement thereon. 1945 A.W.R. (Rev.) 13=1945 R.D. 40. Plaint is not a public document. 7 P.L.T. 267=1926 P. 180; 93 I.C. 650=1926 N. 339. Order of assessment is not a public document in view of sec. 54 of the Income-tax Act. 84 Bom. L.R. 236. An income-tax assessment order

is a public document under sec. 74 and a certified copy of it would be admissible under sec. 65. 1944 O.A. (H.C.) 91=1944 A.W.R. (H.C.) 91=1944 A.L.W. 197=1944 A.L.J. 118. Although an income-tax assessment order is a public document within the meaning of sec. 74, the assessee has no right to inspect it, and has, therefore, no right to demand a certified copy of it under sec. 76. Accordingly a copy of that order obtained from the Income-tax Department is not under sec. 77 a certified copy which may be produced in proof of the contents of the original order of assessment. 1940 C. 187=I.L.R. (1939) 2 C. 394=43 C.W.N. 1169. But *see also* 52 L.W. 159=1940 M. 768=(1940) 2 M.L.J. 257; 50 L.W. 815=(1939) 1 M.L.J. 791. Returns filed with Registrar of Joint Stock Companies. 21 C.W.N. 1161. Printed proceedings of Municipality (by themselves). 30 I.C. 643=16 Cr.L.J. 659. Letter of an Executive Officer. 1 P.B. 1914. *See also* 1939 M.W.N. 841. Notice under sec. 107, Cr.P. Code. 18 C.W.N. 644. *Dehalmamah*. 25 I.C. 529. *Teishkhana* register 23 C. 366. Document merely with rubber stamp initials of public officer but not signed by him. 3 U.P.L.R. (B.R.) 53. *See also* 50 C. 135=26 C.W.N. 878; 71 I.C. 239; 1922 C. 298. A report by a village Nikha Khawan to the Mohavir in a central office informing him of the objection to an entry of marriage in the village register by the former husband of the woman is not a public document within sec. 74. 1 P.R. (Cr.) 1914=23 I.C. 696. So also a statement prepared by patwari. 1930 A. 712. Also purchase slip granted in the course of survey proceedings. 19 Cr.L.J. 886=47 I.C. 82 (P.). So also a letter to the Collector by the president of a public meeting forwarding the proceedings of that meeting. 55 C.L.J. 558. *See also* 1933 C. 312=143 I.C. 367. As to proof of public documents, *see* 56 P.L.R. 1903=5 P.R. 1903 (Cr.). Private documents (as) Kobalas, conveyance leases, etc., filed in Courts or public offices how proved. 22 W. R. 355; 14 I.A. 71=14 C. 486. A disputed document cannot be used for the purposes of comparison of signatures in another disputed document. 1942 O.W.N. (B.R.) 229=1942 A.L.J. (Supp.) 28. A mere record copy of a lease prepared for the private use of Government Officers cannot be admitted as a public document unless it is shown that it was the duty of the Government to maintain such a copy. I.L.R. (1942) Bom. 357=44 Bom.L.R. 295=A.L.R. 1942 Bom. 161. As to proof by copy of compromise petition, *see* 25 W.B. 68. As to proof of judgment, plaint and written statement, *see* 10 B.L.R. App. 31. As to proof of Municipal proceedings, *see* 30 I.C. 643=16 Cr..J. 659. Civil Surgeon's report to a Magistrate as to the age of a person is not expert opinion and not a record of his "act." 1 Luck. 733=1928 O. 155. So also a circular issued by Director-General of

Private documents.

75. All other documents are private.

76. <sup>1</sup>Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

*Explanation.*—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Proof of documents by production of certified copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

#### LEG. REF.

1 A village officer in the Punjab has been declared for the purposes of this Act to be a public officer having the custody of a public document. *See* Pun. Land Rev. Act XVII of 1887, Sec. 151 (2) (P. & N.W.F. Code).

Posts and Telegraphs as to future issue of certain kind of stamps is neither "a record of an act" nor "an act." 115 I.C. 509 (1) = 1929 M.W.N. 193. Letters received from the Controllor of Military Accounts in reply to warrant of attachment is a public document. 1928 O. 438. Departmental enquiry by Magistrate in his executive capacity is not judicial inquiry and statements recorded therein are not evidence taken on oath. Such statements, therefore, are not public documents and sec. 163 can be applied to such statements. 1930 O. 370 = 58 C. 96. As to report by Magistrate called for by High Court on an application for transfer *see* 46 Mys. H.O. Rep. 402.

SECS. 74 AND 65.—A receipt granted by one private person to another and registered is not a "public document". Consequently a certified copy of such a receipt is not admissible in evidence under sec. 65 (e) without any foundation being laid for the admission of secondary evidence. 47 C.W.N. 607 (P.C.).

SECS. 74 AND 76.—Entry in register of powers-of-attorney—Maintained by Registering Officer—Admissibility. *See* 43 C.W. N. 907 = 70 O.L.J. 5 = 1939 O. 569.

SECS. 74 AND 77.—A certified copy of the entry of registration of a deed is admissible in evidence under secs. 74 and 77 as proof of the entry but not of the contents of the deed. 177 I.C. 517 = 1938 C. 120.

SECS. 74 AND 78.—A certified copy of a written statement could only be admitted as a public document under sec. 78. To become a public document it must under sec. 74 be held to be a public record of a private document. A written statement is not a public document and hence must be proved by direct evidence. A presumption of genuineness cannot be asked to be raised in the

case of certified copies of pleadings, where they are not incorporated in any way in the decree of the Court. 1942 O.W.N. 191 = A.I.R. 1942 Oudh 303. *See also* 1943 Oudh 54.

SECS. 75 AND 67.—It is not permissible to raise any presumption of genuineness in respect of a plaint which is only a private document and which has to be proved by direct evidence. 1942 O.W.N. 522 = 1943 Oudh 54.

SEC. 76.—The contents of a document can be satisfactorily established by producing a certified copy. I.L.R. (1938) N. 333 = 176 I.C. 315 = 1938 N. 152. Undoubtedly under sec. 76 a copy of a talukdari sanad to be certified should be sealed whenever the keeper of the records of the Government of India is authorised by law to make use of a seal. But if there is no evidence to the effect that he is so authorised, the Court cannot make such a presumption when other necessary formalities have been duly carried out. Accordingly a copy of a sanad which complies with other formalities but is not sealed cannot be treated as uncertified and is admissible in evidence. 172 I.C. 882 = 1938 O.W.N. 67 = 1938 O. 69.

SECS. 76 AND 77: CONSTRACTION.—*See* 30 M. 466 = 17 M.L.J. 471. In order to be admissible copies must be duly certified. *See* 4 I.C. 929 = 87 P.L.R. 1909. Plaint is not a public document. 7 P.L.T. 267 = 1926 P. 180. The Khasra Girdawaris are public documents. 151 I.C. 786 (1) = 35 P.L.R. 405 = 1934 L. 698. Where a document purports to be a copy given by a public officer having the custody of a public document, but does not bear a certificate as required by sec. 76 and is not supported by the evidence of the person who prepared it, it is inadmissible in evidence. 1941 O. 77 = 1940 O.W.N. 999.

SEC. 77.—In proof of the fact of a statement made in a correction of papers case and an application made in execution no better evidence could be produced than the production of certified copies taken from the judicial files. Formal proof of signa-

Proof of other official documents.

78. The following public documents may be proved as follows:—

(1) Acts, orders or notifications of the <sup>1</sup>[Central Government] in any of its departments <sup>2</sup>[or of the Crown Representative] or of any [Provincial] Government or any department of any Provincial Government,—

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government <sup>2</sup>[or as the case may be, of the Crown Representative] :

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or Abstracts, or by copies purporting to be printed <sup>1</sup>[by order of the Government concerned] ;

(3) proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's printer ;

(4) The acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals, published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country, or sovereign, or by a recognition thereof in some <sup>3</sup>[Central Act] :

(5) The proceedings of a municipal body in British India,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

#### LEG. FEF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> Inserted by A.O., 1937.

<sup>3</sup> The words "Central Act" were substituted for the words "public Act of the Governor-General of India in Council" by A.O., 1937.

tures on the application is not necessary; still less is any further proof necessary in case of the statements. 1941 R.D. 793.

Sec. 78.—Section not exhaustive. See 1936 C. 316. Presumption as to authorised text of Indian Acts, see 1927 P. 142; 97 I.C. 316; as to Government order and notification in Official Gazette, see 53 M.L.J. 603. Proof of Acts of the Indian Legislature.. 93 I.C. 566=1926 M. 65. Reference to the District Gazetteer, in order to elucidate the history of a family, is admissible under sec. 78. 3 U.P.L.R. (B.R.) 30. See also 170 I.C. 392=39 P.L.R. 491 (Wajib-ul-arz). An extract from a newspaper about a Government notification is inadmissible. A copy of the Government Gazette should be produced. 1930 A.L.J. 1535=1931 A. 12. With respect to the existence of certain tanzim numbers reliance was placed on a report published by Government and this report was filed by the party relying on it but was returned by the Court thinking that it was a matter of which it was entitled to take judicial notice under secs. 56 and 57. There was a reference to this report in the judg-

ment of the Court, *held*, that the Court should have regarded the report as a public document under and admitted it formally in evidence and marked it as an exhibit. 1937 P. 334=170 I.C. 61. Order of Government affixed with Government seal, see 1936 C. 316. Notification not published in Government Gazette as required by law cannot be proved under this section. 1937 Pesh. 52=170 I.C. 772.

RESOLUTIONS OF PARLIAMENT—MODE OF PROOF.—The Volumes of the Official "Parliamentary Debates" which show that certain resolutions were passed by the Parliament are adequate legal proof of the passing of the resolutions by the Parliament. The proceedings of Parliament fall under either the second or the fourth of the categories of public documents mentioned in sec. 78. The expression "Journals" in sec. 78 is to be given a broad and general meaning and in its application to Parliament it should not necessarily be confined to the Journals published by the two Houses which contain a formal record of the business. The official Parliamentary Debates are also "Journals" within sec. 78. I.L.R. (1942) Kar. (F.C.) 56=46 C.W.N. (F.R.) 9=14 R.F.C. 22=A.I.R. 1942 F.C. 22.

Sec. 78 (6).—Printed proceedings of Municipality themselves would not be sufficient legal proof unless they answer the description of a printed book purporting to be published under the authority of the com-

## PRESUMPTIONS AS TO DOCUMENTS.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in British India, or by any other officer in any <sup>1</sup>[Indian State] who is duly authorized thereto by the <sup>1</sup>[Central Government or the Crown Representative] to be genuine :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed, or certified, held, when he signed it, the official character which he claims in such paper.

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine ; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

## LEG. FEF.

<sup>1</sup> Substituted by A.O., 1937.

mittee as required by sec. 78. 30 I.C. 643 =16 Cr.L.J. 659 (C.). See also 17 C.W.N. 531=18 I.C. 651.

SEC. 78 (6).—As to records of a German Court, see 14 C.L.J. 375=15 C.W.N. 1053. "DIPLOMATIC AGENT" includes Resident of Hyderabad. 1927 B. 11=50 B. 716. Admissibility of attendance and leave register kept at Native State. See 1926 O. 29.

SEC. 79.—A copy of a letter of sanction, headed from the Chief Secretary to the Government of Bengal and signed by an officer for the Chief Secretary, cannot be regarded as a certified copy under sec. 76. 50 C. 135=26 C.W.N. 878=1922 C. 298. As to proof of certificate of visitors of lunatic asylum, see 63 C. 425.

SEC. 80: PRESUMPTION OF GENUINENESS when raised, see 10 A. 174; 15 M. 63; 3 Weir 794; 12 C.W.N. 845; 13 C. 129. As to the nature and extent of presumption under the section see 93 I.C. 978=1925 L. 605; 94 I.C. 985=1926 O. 489. Presumption of genuineness of a document does not include the presumption that the document was printed or published by the particular person by whom it purports to have been published. 36 M. 457=22 M.L.J. 73.

SCORE.—Sec. 80 does not deal with the question of the admissibility of documents referred to therein but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done. 50 C.L.J. 106=1929 O. 617 (F.F.). The evidentiary value of the statement of a witness in another judicial proceeding as to the age of a person is very

little. (*Ibid.*) Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain if it is capable of explanation. 12 L.L.J. 161. Sec. 80 merely says that the Court will presume that the confession was duly recorded and that the circumstances under which the confession was recorded are such as have been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession. The fact that the accused pleads not guilty and retracts his confession is a circumstance to indicate that the case of the accused was that his confession was not a voluntary one. 1 L.L.R. (1943) 1 Cal. 487 =A.I.R. 1943 Cal. 625. The presumption mentioned in sec. 80 could not arise in a case where the statement of a person as to the cause of his death is recorded by a magistrate not authorised by law to record it, and it has to be proved. But where it is recorded as authorised by law, it is not necessary that it should be proved by the magistrate who recorded it, when the statement is not made in the presence of the accused. All that is required is that there must be proof of the identity of the person who made the statement. 1941 Rang.L.R. 258=1941 R. 30. If a person whose dying declaration is recorded by a Magistrate in hospital dies subsequently, the statement made by him in hospital can only be proved by the Magistrate who has recorded it or some one else who heard that statement. But when that person survives and gives evidence at the trial his statement is admissible in evidence for the purpose of corroborating or contradicting him. It is not necessary that the recording Magistrate

pre- 81. The Court shall presume the genuineness of every document purport-  
 cer Presumption as to gaz- ing to be the London Gazette, or <sup>1</sup>[any Official Gaz-  
 of ettes, newspapers, private ette or the Government Gazette] of any colony, de-  
 f. Acts, of Parliament and other pendency or possession of the British Crown, or to be a  
 documents. newspaper or journal, or to be a copy of a private Act  
 of Parliament printed by the Queen's Printer and of  
 every document purporting to be a document directed by any law to be kept  
 by any person, if such document is kept substantially in the form required by law  
 and is produced from proper custody.

82. When any document is produced before any Court, purporting to be  
 a document which, by the law in force for the time  
 being in England and Ireland, would be admissible in  
 proof of any particular in any Court of justice in Eng-  
 land or Ireland, without proof of the seal or stamp  
 or signature authenticating it, or of the judicial or  
 official character, claimed by the person by whom it purports to be signed, the  
 Court shall presume that such seal, stamp or signature is genuine, and that the  
 person signing it held, at the time when he signed it, the judicial or official character  
 which he claims,

## LEG. FEET.

<sup>1</sup> Substituted by A.O., 1937.

should be called as witness to prove the statement. A statement recorded by a Magistrate under sec. 164, Cr.P. Code, in the course of an investigation is evidence in a judicial proceeding, which under sec. 80 of the Evidence Act can be proved without calling the person recording the same. 1941 P.W.N. 622. Deposition of witness taken by special judge appointed under ordinance which is *ultra vires*—If one taken in judicial proceeding. See A.I.R. 1945 Cal. 159.

ILLUSTRATIVE CASES.—A statement not read over to or corrected by the witness in accordance with law is not admissible against the person making the same. 13 Cr. L.J. 569=15 I.C. 985. See also 21 Cr.L.J. 500=56 I.C. 160; 142 I.C. 653=1933 O. 190=18 N.L.R. 192=68 I.C. 36=1923 N. 39. As to depositions before Commissioners, see 63 P.L.R. 1900. Presumption under sec. 80 can be raised if the deposition is read over by the witness himself in Court. 46 C. 895=50 I.C. 660=23 C.W.N. 661; 93 I.C. 978=1925 L. 605. (See also C.P. Code, O. XVIII, r. 5). The absence of a certificate by the Judge at the foot of the deposition of its having been read over, etc., does not deprive it of the presumption under sec. 80. 46 C. 895=50 I.C. 660. The presumption under sec. 80 that the circumstances under which a document appears to be taken are true applies to a dying declaration to which a certificate is appended by the Magistrate who recorded it, that it was read over to him and declared to be correct. 40 B. 97=31 I.C. 361=17 Bom.L.R. 881. See also 17 Cr.L.J. 23; 9 P.R. 1900 (Cr.); 11 Bom.H.C.B. 247; 152 I.C. 248=1934 A. 340. Under sec. 80 confession by any prisoner or by any accused taken in accordance

with law and purporting to be signed by the examining Magistrate shall be presumed to be so made. The officer who recorded the confession may be examined as a witness. 38 I.C. 1005=2 P.L.J. 80. Though a confession duly recorded by a Magistrate, may be presumed to be voluntary and as such admissible, such admissibility is subject to the restrictions imposed by sec. 24. 61 C. 399=38 C.W.N. 659=1934 C. 636. The statement of an accused person recorded by a Magistrate in a Native State is inadmissible unless the Magistrate himself deposes to it in person. 24 I.C. 169=16 Bom.L.R. 261. Confessions recorded in Indian Native States can be used in British India under the provisions of sec. 80, and they may be accepted as admissible for prosecution in British India. I.L.R. (1938) A. 875=1938 A. 625. The recital in a judgment of a statement made by the witness is not the same thing as a record of the deposition of the witness. Nor can such recital be accepted as evidence under sec. 80. 2 Cr.L.J. 500=56 I.C. 660 (P.).

SEC. 81: LEGISLATIVE ASSEMBLY.—REPORTS OF DEBATES.—The reports of debates in the Legislative Assembly can only be evidence of what was stated by the speakers in that Assembly, and are not evidence of any facts contained in the speeches. 153 I.C. 1=41 L.W. 665=1935 P.O. 34 (P.C.). Reports and Gazetteers are not strictly evidence of the truth of all the statements contained in them although they may be read for what they are worth. 44 C.W.N. 873. Presumption as to genuineness does not include presumption that it was printed and published by the person mentioned in it. 36 M. 457=12 I.C. 961. Presumption as to genuineness of the specimen, see 120 I.C. 798=1930 L. 371.

SEC. 82.—As to presumption in case of printing and publishing a newspaper, see 36

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. The Court shall presume that maps or plans purporting to be made by the authority of <sup>1</sup>[any Government in British India] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the <sup>2</sup>[Central Government] was so executed and authenticated.

#### LEG. REF.

<sup>1</sup> The words within brackets were substituted for the word "Government" by A.O., 1937.

<sup>2</sup> Substituted by A.O., 1937.

M. 457=12 I.C. 961. Documents admissible under English Law in English Court are relevant. See 22 C. 491. Chittas. See 2 I.C. 513; 19 C.W.N. 1068.

SEC. 83.—See 22 W.R. 519; 5 C. 287; 5 C. 822=6 C.L.R. 519; 19 C. 741; 23 C. 335; 18 C. 224; 25 W.R. 179. Chittas made by Government for private use in connection with presumption proceedings are not—Maps and plan prepared by patwari is not in discharge of their official duty—Accuracy—Presumption—Statements contained in—Relevancy. 16 P.R. 1913=18 I.C. 799. A plan the accuracy of which has not been established by evidence in accordance with sec. 83 can be admitted in evidence when both parties had relied on it before the local Commissioner and no objection was taken that it had not been proved to be accurate. 190 I.C. 689=1940 L. 308. A map prepared by private arrangement by a District Collector for the settlement of the silted bed of river does not fall within purview of this section. 19 I.C. 572; 17 C.L.J. 642=16 I.C. 747. Maps and survey plans prepared by Government—Admissibility of in evidence. 10 I.C. 653; 18 P.L.T. 464. (Municipal Survey Map). See also 44 Bom. L.R. 295=1942 Bom. 161. Thak maps—Evidentiary value of maps more than 30 years old—Presumption—Map prepared by Collector in private capacity. See 16 C.W.N. 317=14 C.L.J. 578. The Thakbust map which preceded the revenue survey was intended to guide the revenue surveyor who was supposed to put in the estate boundaries to be bound in the Thakbust maps. The

value of the records of the Thak survey and of the revenue survey and also of the collectorate papers is not uniform. 67 C.L.J. 495. See also 21 P.L.T. 873=1941 P. 118. Value of survey may as evidence pointed out. Boundaries in cadastral survey taken into account in determining a question of title. 1933 P. 671. Great weight should always be given to the accuracy of survey maps. They are not conclusive but in the absence of evidence to the contrary, they will be presumed to be accurate. 44 C. 328=38 I.C. 379=43 I.A. 303 (P.O.). See also 1933 P. 555. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible, and would be valuable evidence as to the state of things at the time they were prepared. 44 I.O. 247.

SEC. 84.—Cf. Act XVIII of 1875 (Law Reports).

SEC. 85: SECTION IS MANDATORY.—See 33 C. 625=9 C.W.N. 986; 16 C. 776. The provisions of sec. 85 are mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power of attorney have been duly fulfilled. But sec. 85 is not exhaustive, for there are different legal modes of executing a power of attorney. Under sec. 57 (6) the Court shall take judicial notice of *inter alia*, all seals of notaries public. Where a power of attorney is given under the seal of a notary public, the Court must presume its proper execution before and authentication by the notary public I.L.R. (1939) Bom. 295=41 Bom. L.R. 530=1939 B. 347. Mere registration is not in itself evidence of execution. 17 C. 908. But see 14 C. 176. As to what is sufficient proof of power of attorney, see 21 M. 492; 1936 A.L.J. 684=1936 A. 475.



86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming

Presumption as to certified copies of foreign judicial records.

part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the <sup>1</sup>[Central Government] <sup>2</sup>[in or for] such country to be the manner commonly in use in that country for the certification of copies of judicial records.

<sup>3</sup>[An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, Cl. (40) of the General Clauses Act 1897, shall, for the purposes of this section, be deemed to be a representative of the <sup>1</sup>[Central Government] in and for the country comprising that territory or place.]

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and

Presumption as to books, maps and charts.

that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

88. The Court may presume that a message, forwarded from a telegraph

Presumption as to telegraphic messages.

office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

89. The Court shall presume that every document, called for and not produced after notice to

Presumption as to due execution, etc., of documents not produced.

produce, was attested, stamped and executed in the manner required by law.

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937 for "Government of India."

<sup>2</sup> Substituted by Act III of 1891, sec. 8 for 'resident in'.

<sup>3</sup> Substituted by Act V of 1899, sec. 4.

SEC. 86.—Sec. 86 does not exclude other proof. So, a document purporting to be a copy of a deposition in a Court in Cutch was admissible in evidence though not certified by the Political Agent of Cutch in a manner which fully satisfied the requirement of secs. 76 (a) and 86. *Held*, that the fact that the certificate as to the document being a "true copy" was given by a higher officer than the trial Judge was really an additional reason for accepting its authenticity. 30 Bom.L.R. 1519=1929 B. 24.

SCOPE OF SECTION.—See 27 O. 639. Section mandatory. See 5 L. 105=1924 L. 493. Presumption of certified copies of German Court. 15 C.W.N. 1053=14 C.L.J. 375. Presumption of certified copies of other foreign States. See 14 O. 546; 27 O. 639.

SEC. 87.—See 21 C.L.J. 637. A history of a particular sect prepared by an Extra Assistant Settlement Officer during the second settlement, does not form part of the settlement record and has no presumption of truth attached to it, but may be of some value if it was prepared when there

was no dispute. 1934 L. 1=154 I.O. 375.

SEC. 88: TELEGRAM—PROOF THAT IT EMANATED FROM GOVERNMENT.—The sanction of Local Government to prosecute a person for an offence under sec. 134-A, Penal Code, communicated by telegram, must be proved to have emanated from the Government. The Court is forbidden by the express provisions of sec. 88 to make any presumption as to the person by whom the telegram was sent. 42 M. 885=37 M.L.J. 81. See also 4 I.O. 240=10 Cr.L.J. 520; 21 I.O. 274; 91 I.O. 690=1926 B. 71; 13 P.L.T. 802=1933 P. 96. The contents of telegrams are not evidence of the facts stated in them. 1945 O. W.N. 287=1945 M.W.N. 634=A.I.R. 1945 P.C. 174 (P.C.).

SEC. 89.—Where a party produces an unstamped copy of an instrument by way of secondary evidence the Court may, in the absence of contrary evidence, presume that the original was stamped. 1932 M.W.N. 432. In a suit for redemption, the question was whether the plaintiff was the mortgagor and the defendant the mortgagee. The plaintiff alleged that the mortgage was executed 50 years ago and that the entry as regards mortgage was made in the mortgagee's *bahi* and called upon the defendant to produce it. The defendant denied that he possessed any such *bahi*. The plaintiff's evidence showed that the entry was made



90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the

Presumption as to documents thirty years old.

particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

*Explanation.*—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

in ordinary bahi and not on stamped paper though required by law as such. Moreover there was no evidence by plaintiff to show that the defendant was in possession of the bahi and was withholding it though called upon to produce it. *Held*, that no presumption under sec. 89 could be drawn under the circumstances and as the entry was made in the ordinary bahi and not on stamped paper no question of presumption arose in such case. 1938 L. 90.

#### Sec. 90: PRESUMPTION—WHEN ARISES.—

Under sec. 90 documents more than thirty years old coming from proper custody prove themselves, but there is no presumption that the contents of the documents are true. 40 Bom.L.R. 1262—I.L.R. (1939) Bom. 97=1939 B. 59. The presumption under sec. 90 with regard to documents 30 years old arises in the case of copies as well as originals. *If the copy is proved to be a true copy, a presumption may be made in favour of the genuineness of the original.* 46 M. 92; 6 O.W.N. 880=1929 O. 483 (2); 152 I.C. 861=11 O.W.N. 1435; 30 N.L.R. 155=1934 N. 67. But *see also* 162 I.C. 527=1936 O.W. N. 619=1936 O. 298; 1937 R.D. 133; 41 P.L.R. 376=1939 L. 458; 20 N.L.J. 209. *See also* 17 Mys.L.J. 510; 50 Mys.H.C. Rep. 48; 1939 L. 458; 1940 M. 273; 1940 A. 74; 16 Luck. 778. The statutory presumption under sec. 90 can be raised only with regard to the actual document produced in Court; it cannot be raised with regard to the original document when that is not produced and when what is produced is only a certified copy. 47 Bom.L.R. 116=1945 Bom. 319. The statutory presumption under sec. 90 cannot be made in respect of a document merely on production of its copy under S. 65 of the Act. Where the original is a registered document, and the copy produced is a certified copy, bearing the necessary endorsements of the Registering Officer before whom the executant acknowledged the execution and was duly identified, the facts mentioned in the endorsement may be proved by the endorsement, the copy can be admitted in evidence as proof of the execution of the original. 47 Bom.L.R. 962. Sec. 90 according to its plain terms applies to wills

as to other documents. If therefore, a will made more than 30 years ago is produced from the proper custody, the Court may presume that it was duly executed and attested. Where the Court chooses to make the presumption authorised by sec. 90, no further proof of the facts is necessary under sec. 69. 47 O.W.N. 359. The presumption contained in sec. 90 cannot apply to a copy that is not itself 30 years old. 1940 N.L.J. 437=1940 N. 382. *See also* 1939 L. 458; 1939 L. 273. The presumption under sec. 90 is a rebuttable one to be made at the discretion of the Court. It is based on the rule of expediency, and unless the surrounding circumstances satisfy the Court that the document tendered has been produced from proper custody it would be unsound to admit the document. The Court must insist on a satisfactory account of the origin of the possession being given by the party relying upon the document. The custody may not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The soundest policy even upon the rule of expediency necessitates circumspection and scrutiny in the examination of the surrounding circumstances before raising the presumption. The Court must therefore examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the document should naturally have been. 40 Bom. L.R. 202. When a document is suspicious on the face of it when an important word is erased and re-written, presumption under sec. 90 does not arise. 95 I.C. 261=1926 A. 537. Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute *prima facie* title. 56 C.L.J. 369. The Court is not bound to make the presumption merely because of the alleged age of the document. 31 Bom.L.R. 1279; 110 I.C. 415. The Court "may presume". The section does not say that the Court *must* presume the document to be genuine. 7 Mys. L.J. 57; *See also* 175 I.C. 594=1938 A. 345; 40 P.L.R. (J. & K.) 51=175 I.C. 861

=40 Bom.L.R. 202=1938 B. 257. The Court can presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is lost. 1929 A. 561. As to presumption of genuineness of pedigree tables, *see* 105 I.C. 81. Where a person executes a will and deposits it with the Registrar and the endorsement by the Registrar shows that the will was so deposited by the executant on being identified by two persons, a presumption under sec. 90 as to execution arises. The presumption however does not cover the question of disposing mind. 1933 L. 53; 145 I.C. 241. The raising of presumption under sec. 90 as to the genuineness of a document is a matter which is eminently within the discretion of the trial Court and where a document bore only the seal and there was no signature and where there were strong reasons to doubt its genuineness, the appellate Court *held* that it was not prepared to draw a presumption about its genuineness which the Lower Court had refused to do. 1942 O.W.N. 225=A.I.R. 1942 Oudh 374; 104 I.C. 219=1927 C. 870; 51 C. 135=81 I.C. 493; 31 Bom.L.R. 1279. Presumption not drawn by trial Court—Appellate Court refusing to draw inference—Genuineness of documents decided on evidence—Proper. 108 I.C. 412. Court may presume genuineness of signature authenticating a copy. 56 I.A. 146=1929 P.C. 115=56 M.L.J. 730 (P.C.). As to the extent of presumption regarding old documents, *see* 6 L.L.J. 97=75 I.C. 57; 82 I.C. 487; 77 I.C. 478; 1924 A. 869=22 A.L.J. 857; 41 P.L.R. 108. Sec. 90 does not involve any presumption that the contents of a document more than 30 years old coming from proper custody are true. The presumption is only as regards due execution. 17 Mys.L.J. 510=45 Mys.H.C.R. 57. The Court should be very careful about raising any presumption under sec. 90 in favour of old deeds of shankalap which never saw the light of day until they were produced during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. (9 O.W.N. 379, relied on.) 37 C.W.N. 215=1927 C. 102; 164 I.C. 494=1936 O.W.N. 768; *see also* 166 I.C. 930=1938 O.W.N. 179; 11 C. 539; 39 P.L.R. 370; 27 C. 740; 93 I.C. 1021=1927 C. 229; 1929 A. 561; 138 I.C. 513=1932 O. 227. *See also* 1940 L. 245 (*Pondah's bahis*). Sec. 90 does not provide for any presumption regarding anonymous documents the writer of whom is not known. But an objection that the document should not be admitted without proof as to the writer of the document must be raised at the earliest stage and cannot be permitted to be raised for the first time in second appeal. 50 L.W. 527=1939 M.W.N. 946=1939 M. 926= (1939) 2 M.L.J. 593. Sec. 90 cannot be

relied upon for the proof of a document which does not purport to be in any person's handwriting or to be signed by any known person. 53 L.W. 634=(1941) 1 M.L.J. 759=1941 M. 602. If a copy more than 30 years old is produced from proper custody the signatures authenticating the copy may be presumed to be genuine; but the production of a copy is not in itself sufficient to justify any presumption of due execution of the original. 1941 L. 400. No presumption of genuineness in case if document bearing no signature. 164 I.C. 494=1937 O. 448; 166 I.C. 930=1937 O. 353; 41 P.L.R. 108=1939 L. 285; (1941) 1 M.L.J. 759; or in the case of a copy of a lost document. 162 I.C. 56=1936 A.L.J. 161=1936 A. 298, especially when such copy is not in itself 30 years old. 1936 L. 788; *see also* 1937 L. 920=20 N.L.J. 209. No presumption under sec. 90 can be raised on the basis of the certified copies when the originals are not forthcoming. 41 P.L.R. 377 (2)=1939 L. 273. *See also* 1941 O.W.N. 669=1941 O. 433; 1941 Pesh. 89; 1941 L. 400. A copy purporting to be more than 30 years old and produced from proper custody may be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, when that copy contains a statement that it is a true copy and contains the signature of the author of the original. In such a case the Court is entitled to presume the genuineness of the signature on the copy under sec. 90. 1930 M.W.N. 841. If a plaintiff in a suit for possession does nothing more than produce a certified copy of the original sale deed in his favour which was more than 30 years old, he would not succeed in establishing his title to the property. But if he produces evidence of identifying witnesses of the executants it can be held that the evidence is sufficient to prove the due execution of the sale deed in question. 1939 A.L.J. 1023=1940 A. 74. As to presumption of genuineness of seal affixed to old document, *see* 164 I.C. 494=1936 O.W.N. 768. *Jama Wasil Baki* papers seventy years old—Presumptions as to. *See* 45 C.L.J. 129. The presumption of execution of a document extends also to the mark put on the document in dictating that the document was signed by the executant by a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary. 58 C. 686=1931 C. 596; 143 I.C. 1172=1934 A. 529. Presumption of genuineness includes presumption of executant's authority. 58 C. 686. But *see also* 162 I.C. 56=1936 A.L.J. 161=1936 A. 298; 97 I.C. 292=24 A.L.J. 920; 1927 A. 765; 1925 A. 1. Presumption of genuineness only dispenses with proof, but the question of evidence is not affected thereby. 95 I.C. 261=1926 A. 537. Where the deed did not even purport to be signed by the executant and his mark was not proved by the person attesting the same, *held*, that the Court

*Illustrations.*

(a), *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(b) *A* produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is improper.

(c) *A*, a connection of *B*, produces deeds relating to lands in *B*'s possession which were deposited with him by *B* for safe custody. The custody is proper.

could refuse to presume that the document was genuine. 110 I.C. 415=5 O.W.N. 424. In order to attract the provisions of sec. 90 the document must have been signed which most of the entries in the account books are not. They could not therefore be brought within the purview of this section. 45 P.L.R. 441. Sec. 90 only gives the discretion to Courts to dispense with proof as to the execution of a document. It raises no presumption whatever as regards the accuracy of the plan and cannot be used as to dispense with formal proof of the contents of the documents as required by law. 111 I.C. 361. See also 1937 N. 43.

"DULY EXECUTED AND ATTESTED."—The words "duly executed and attested" merely mean execution and attestation according to law. The question whether the document has been explained to the executant and whether she has fully understood the import and effect of it is hardly a question of execution. 5 Luck. 526=1931 O. 103. Where a deed is executed by a *pardanashin* lady, the onus of proving the validity of the transaction is on the transferee. 5 Luck. 525. See also 10 O.W.N. 147=1933 O. 170. Where a party tendering a document is unable to say who prepared or signed it, or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible without proof. (3 P.L.J. 306. Rel. on.) 1937 R.D. 88. Presumption can be raised in the case of school register. 30 years old. 163 I.C. 87=1936 L. 104. When a Registrar makes his endorsement on the back of a document, he is simply carrying out his statutory duties under the Registration Act and makes the signature *alia intutio* and is not purporting to attest the document. And though the endorsement shows that the Registrar received from the executant a personal acknowledgment of his signature, in the absence of evidence that the Registrar signed in the presence of the executant, no presumption can possibly be made under sec. 90, that the signature of the Registrar was affixed in the presence of the executant or that the document was duly attested, even if the document is over 30 years old. 61 C. 525=38 C.W.N. 753=1934 C. 722. Apart from sec. 90 the Court can make a presumption of fact about the valid execution of a will from a certified copy of the will obtained from the Registration Office, if such presumption is justified by the proved facts and circumstances of the case. 172 I.C. 882=1938 O.W.N. 67=1938 O. 69. The period of 30 years, under sec.

90, is to be reckoned not from the date upon which the deed is filed in the Courts but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes subject of proof. (5 C.L.R. 135, Foll.) 63 I.A. 85=40 C.W.N. 226=1936 P.C. 15=70 M.L.J. 206 (P.C.); 169 I.C. 402=39 P.L.R. 340.

PROPER CUSTODY.—Whether "custody" is proper is a question of fact. 126 I.C. 19. As to proper custody, see 94 I.C. 814; 1926 C. 370; 164 I.C. 494=1936 O.W.N. 768. Where a document is written 55 years ago by a licensed stamp-vendor and comes out from proper custody it can claim the benefit of sec. 90. 1934 L. 885. It is for the Court to decide in each case whether the custody from which the document is produced is or is not proper and if it considers the custody to be proper it can raise the presumption. Where the lower Court draws the presumption after considering the circumstances of the case the High Court will not interfere in second appeal. 32 P.L.R. 626=134 I.C. 296. See also 38 P.L.R. 322; 152 I.C. 861=11 O.W.N. 1435; 1933 L. 347=142 I.C. 13=34 P.L.R. 356; 1938 A. M.L.J. 63; 1939 O.W.N. 1=1939 A. 96. And where the appellate Court is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption. 145 I.C. 147=1933 A.L.J. 907=1933 A. 443. Where a sale has been made nearly 30 years before the suit is brought and all the parties to the transaction have died, it is impossible to expect full and detailed evidence of all the circumstances that gave rise to the transaction and presumptions are permissible to fill in the details which have been obliterated by time. 30 N.L.R. 192=148 I.C. 1033=1934 N. 106. In cases where documents more than 30 years old are being produced only as instances of a particular custom and not as foundation of title, such documents may be admitted in evidence irrespective of the fact whether they come from proper custody or not. 1939 L. 152. The mere proof of the map is more than 30 years old, by itself is only proof of the fact that the map was prepared by the maker thereof. The fact that a particular person prepared a map, or in other words made certain statements by lines, cannot, without or apart from and independent of the proof of the correctness of its contents have any bearing on the matters in issue in this suit. The fact that the map is a part of the decree does not make any difference, when the decree does not fall within any of the secs. 40, 41 or 42 of the Act. 49 O.W.N. 791=A.I.B. 1945 Cal. 492.

## CHAPTER VI.

## OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

*Exceptions.*—(1) When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer the writing by which he is appointed need not be proved.

(2) Wills <sup>1</sup>[admitted to probate in British India] may be proved by the probate.

*Explanations.*—(1) This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases, in which they are contained in more documents than one.

(2) Where there are more originals than one, one original only need be proved.

(3) The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

*Illustrations.*

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) *A* contracts, in writing, with *B*, for the delivery of indigo upon certain terms.

The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

## LEG. FEE.

<sup>1</sup> Substituted by Act XVIII of 1872, sec. 7.

SEC. 91: SCOPE AND APPLICABILITY.—Where the terms of a contract have been reduced to writing at the same time as it is made, the document only, or if permissible, a secondary evidence of its contents can be the only evidence available to prove the document under sec. 91 the parties are debarred from adducing oral evidence to prove such contract. 22 Pat.L.T. 666; 33 M. 413 =11 Cr.L.J. 716; 13 R.D. 685; 5 P.L.T. 45=1940 P. 245. Sec. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. So also sec. 91 only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence

about some other matter. Even if there were no provisos to secs. 91 and 92, there is nothing in either section to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore no contract. 63 I.A. 126=59 M. 446=1936 P.C. 70=70 M.L.J. 232 (P.C.). Secs. 91 and 92 do not apply to a will as it is neither a contract, nor a grant nor a disposition of property until the death of the testator makes it operative. Sec. 92 (4) does not prevent the revocation of a registered will by an unregistered document. 1938 M.W.N. 699=1938 M. 616=(1938) 1 M.L.J. 444. The provisions of sec. 91 are not applicable to a permission granted by a Municipal Committee. 120 I.C. 221=1930 N. 130. Having regard to the terms of sec. 91, what the Court has got to do is to find out the real contract between the parties. 1928 M. 459. The term "in proof of such matter" must carry with it the term "in disproof of it," because if evidence were to be admitted on one side, it would have to be admitted on the other. Therefore, a Court which allows evidence to prove that a

payment endorsed on a promissory note had not been made, violates the provisions of sec. 91. 1935 A.L.J. 304=1935 A. 58.

**ILLUSTRATIVE CASES.**—Admissibility (i) of oral evidence to prove deposition of witnesses. *Bat.* 334; (ii) deposition not read over to witness. 13 Cr.L.J. 569; (iii) deposition of accused. 6 C. 762=8 C.L.R. 292; 54 P.R. 1887 (Cr.); 21 M.L.J. 411=9 I.C. 262; (iv) admission of guilt in departmental enquiry. 36 A. 222; (v) Confession to Magistrate—Proof by oral evidence. 9 M. 224=2 Weir 125; 35 A. 260; 14 Cr.L.J. 211; 11 A.L.J. 286; 35 B.H.C.R. 166; (vi) Search list—Proof of. 3 Weir 766. *See also* 21 M.L.J. 281; (vii) Previous convictions—Proof of. 28 C. 689; (viii) Warrant; it should be produced in a case of assault of process-server. L.B.R. (1872-1892) 572. A statement made by an accused at a departmental enquiry is not within sec. 91, as it is not required by law to be reduced to the form of a document. Such confession can be proved at the time of the prosecution. 35 A. 222=25 I.C. 321. The confession of an accused made to a Magistrate holding an enquiry is a matter which must be reduced to the form of a document within the meaning of sec. 91. 35 A. 260=19 I.C. 307. Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. 67 I.C. 577=1924 L. 12. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. 1924 L. 12. The record by Court of deposition is the only evidence admissible of the statement alleged to have been made by the witness and if it is not shown to have been read out to the witness he can't be convicted of perjury. 42 M. 561=36 M.L.J. 296. Sec. 91 even if it covers a deposition merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. 74 I.C. 445=1923 O. 119. Where a deposition is not taken in accordance with sec. 369, Cr.P. Code, it is inadmissible in evidence and other evidence is shut out by sec. 91. 18 Cr.L.J. 966=42 I.C. 326. Sec. 91 has no application to matters entered in a special diary under sec. 172 of the Cr.P. Code. Oral evidence is admissible to prove statements made to the police by the witnesses who heard them made. 18 Cr.L.J. 1022=42 I.C. 766. Unregistered sale-deed and partition deed can be used as evidence to establish the nature of the possession of the person who claims under the deeds. The fact of possession and partition of property can also be proved by oral evidence. 98 I.C. 940=28 Punj.L.R. 88. *See also* 100 I.C. 153; 98 I.C. 448; 92 I.C. 1028=1926 M. 402 (partition deed); 95 I.C. 584

=1926 M. 872 (sale deed); 103 I.C. 281=1927 M. 830; 30 C.W.N. 254=1926 C. 705. Where the rent note is one that requires registration and has not been registered, it is inadmissible not only to prove the terms of the contract but also to prove the fact that it contained all the terms of the contract. There is no bar, therefore, under sec. 91 to the reception of other evidence consisting of an entry in the record-of-rights to prove the nature of the tenancy. 58 B. 419=150 I.C. 555=36 Bom.L.R. 359=1934 B. 194. *See also* 1938 O.A. 785=1938 O.W.N. 1080; 1939 A.M.L.J. 148. An unregistered patta cannot be admitted in evidence in a suit for possession of land for the purpose of proving the plaintiff's title. Nor can the plaintiff be allowed to prove his title by the production of rent receipts or by the general circumstances of the case. Sec. 49 of the Registration Act and sec. 91, Evidence Act are a bar to such proof. 18 P.L.T. 1012. There is no provision of law which requires the production of the original lease in order to prove merely the factum of the lease. Under sec. 91, the original lease would have to be produced only for the proof of any of its terms. 1944 A.W.R. (Rev.) 76=1944 B.D. 132. Ejectment suit—Permanent occupancy claimed in defence—Compromise not stamped or registered—Decree merely dismissing suit—*Held*, that the compromise was not admissible to prove the recognition of occupancy rights. 14 L.R. 513 (Rev.)=17 B.D. 660. *See also* 1940 N. L.J. 85=1940 N. 116. Lease by public auction of agricultural land for 7 years—Defendant's bid accepted possession for 4 years—Plaintiff's suit in ejectment alleging subsequent agreement of lease for one year in writing. *Held*, that as it was an agricultural lease, it could be made orally, and that the document which came into existence subsequently did not supersede the oral lease. 1933 M. 451=64 M. L. J. 676. Unregistered lease—Oral evidence to prove relationship of parties, not admissible. 148 I. C. 558=1934 L. 743. Where lease-deed is inadmissible in evidence being unregistered, the tenancy can be proved by other evidence as by the doctrine of part-performance. 105 I.C. 172; 111 I.C. 358. But *see* 1930 L. 675. Where a party sues upon a promissory note, he must produce that note or give a satisfactory explanation as to why he is unable to produce it; else, he is not entitled to rely upon a relative and ancillary document such as a receipt which formed part of the same document upon which both the promissory note and the receipt were inscribed. Courts should refuse to exercise their powers in favour of a litigant who is deliberately concealing important material and relevant information. 151 I.C. 123=1934 A. 837. When a contract is wholly contained in a Promissory note, *i.e.*, where it forms the substance of the contract with all its terms, sec. 91

would preclude proof of the contract otherwise than by the document itself. 1936 N. 225; 1936 Pesh. 146; 1937 A. 439=1937 A. L.J. 235. If such promissory note is inadmissible for any reason, the contract cannot be proved by any extraneous oral evidence, nor can money be recovered as money had and received, *i.e.*, as a debt independently of the promissory note. 1936 N. 225. But where the note is executed in satisfaction of a *pre-existing* liability the inadmissibility of the P. Note by reason of its being insufficiently stamped does not preclude proof of the pre-existing liability by oral evidence. 1936 N. 225. Where in a suit to recover a sum of money advanced to the predecessor in interest of the defendant, a promissory note and a contemporaneous receipt are produced and the promissory note is found inadmissible in evidence for want of proper stamp, on a question whether other evidence was admissible, it was *held*, that the loan could be proved by other evidence including the receipt. 1943 A.L.J. 189=A.I.R. 1943 A. 220 (F.B.). When the loan is contemporaneous with the execution of an inadmissible P. Note, the debt can be proved by oral evidence independently of the P. Note *only* if the parties intended at the time of the execution of the P. Note that it was collateral to an oral contract by way of giving security for the loan or making conditional payment of the debt, antecedent or contemporaneous. 1936 N. 225. *See also* 1936 A.M.L.J. 37. If in such a case the defendant repudiates the P. Note as being merely a colourable document and neither party relies on the document, as embodying the substance of the contract, sec. 91 does not apply, and the P. Note can be used as corroborative evidence on the point of the actual payment of the money. 1936 N. 225. In any event, the plaintiff would be prevented from claiming interest as per terms of the P. Note and interest at best can be allowed only under sec. 73, Contract Act, by way of damages. 1936 N. 225. *See also* 1936 A.M.L.J. 37. Where a promote is inadmissible for want of proper stamp duty the plaintiff, may recover his money by proving orally the advance of the loan. 1933 N. 57 (2)=144 I.C. 175=29 N.L.R. 131; 139 I.C. 298=1932 O. 235 (F.B.). *See also* 25 A.L.J. 102; 103 I.C. 634=1927 A. 503; 1937 A.L.J. 360=1937 A.W.R. 323. *Held by the Full Bench (Stodart, J. dissenting)*, that the answer to the question whether a person who has lent money on a P. Note, which is inadmissible in evidence owing to defect in the stamping can sue to recover the debt apart from the note, depends on the circumstances under which the instrument was executed. If the note was given in respect of an antecedent debt, or as collateral security or by way of conditional payment or if the note does not embody all the terms of the contract the true nature of the transaction can be proved. But if the promissory note embodies all the terms of

the contract, no suit on the debt will lie as sec. 91 of the Evidence Act and sec. 35 of the Stamp Act bar the way. The fact that the execution of the P. Note is contemporaneous with the borrowing cannot, however, exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. I.L.R. (1938) 2 M. 933=1938 M. 785=(1938) 2 M.L.J. 189 (F.B.). Although a loan and a promissory note for the loan form part of the same transaction a suit will lie on the original consideration. If there is a loan, that itself gives a cause of action, and the fact that there is a loan can never be a term of the contract contained in the promissory note, it is therefore open to the creditor to prove that there was a loan independently of sec. 91. It does not matter whether the loan was made at the same time as the promissory note which is the evidence of it or whether it is not properly stamped and therefore inadmissible in evidence. 40 Bom.L.R. 174=175 I.O. 540=1938 B. 286. But *see* 53 A. 114=1931 A. 183 (F.B.); 144 I.C. 130=1933 A. 280; 152 I. C. 370=1934 A. L. J. 1185; 147 I.C. 445=1934 A. 271; 146 I.C. 751. *Also* 140 I.C. 117; 95 I.C. 704; 1922 L. 307. Where the debt and execution of the promote are contemporaneous the debt can be proved only by the note and where it is insufficiently stamped the plaintiff cannot apply by amendment to convert his suit into one on the original consideration. 139 I.C. 361=1932 M. 687; 140 I.C. 193=1932 M.W.N. 1260=67 M.L.J. 595; 1934 L. 606. But *see* 9 P.L.T. 471; 134 I.C. 254=1931 A. 560; 95 I.C. 847=1926 B. 357; 67 M.L.J. 912; 12 B. 500=1934 B. 389 (F.B.); 1933 P. 584; 141 I.C. 767=1933 Pat. 159; 12 Pat. 862=14 P.L.T. 651=1933 P. 575 (F.B.). In cases where a P. Note is given in payment for goods sold and delivered, the presumption would be that the note is given as conditional payment for the goods sold and delivered. In such cases, when the note is inadmissible as being unstamped, the original debt can be availed of by the seller for the purpose of recovering the amount due to him, irrespective of it. *Per Chief Justice and Pandrang Row, JJ.* (Cornish, J., contra).—Where the P. Note is part and parcel of the transaction of loan, and itself contains all the terms, it must, in the absence of evidence to the contrary, be taken to be the contract, and no contract *alundi* can be proved. 59 M. 268=1936 M. 179=70 M.L.J. 267 (F.B.). *See also* 1937 A.L.J. 360; 169 I.C. 780=1937 A. 439. P. Note for debt—Debt barred by limitation on date of note—Absence of specific recital that the promise is to pay such barred debt—Oral evidence to connect promise to pay with prior loan, if admissible. 63 C. 759. P. Note by co-sharer for owelty—Suit on—Oral evidence of terms of partition—Un registered partition lists—Admissibility. (1937) 1 M. L.J. 676. The mortgagor of occupancy hold-



ing is not debarred from proving his title to the holding although the mortgage deed, being not registered, was not receivable in evidence and other evidence to prove the nature of the transaction was no admissible. 1932 A.L.J. 101=140 I.C. 42=1932 A. 259. But see 137 I.C. 31=1932 L. 276. Where prior oral agreement was held inadmissible—Written statement regarding indent transactions—Proof of usage at variance with the terms of contract—Admissibility. 54 C. 549. Lease silent as to place of payment of rent—Evidence is admissible to prove subsequent agreement as to the place. 23 N.L.R. 26. Document embodying only some terms of contract, oral evidence of other terms are not inconsistent with written terms is admissible. 1930 A. 615. Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not admissible in evidence. 53 A. 114=1931 A. 183 (F.B.). Where a mortgage deed is alleged to have been executed and registered oral evidence to prove the transaction is inadmissible. 14 L.R. 148 (Rev.)=17 R.D. 241. Where the mortgage deed is clear and unambiguous and actually applies to existing facts, parol evidence is admissible. 147 I.C. 633=1934 A. 100 (2). Endorsement of payment of mortgage bond not registered—Admissibility of oral evidence to prove payment. 100 I.C. 129. Mortgages executed in favour of creditor—Debtor if can subsequently ask for taking of accounts regarding amounts covered by mortgage. 31 C.W.N. 179=1926 P.C. 129 (P.C.). As to secondary evidence of contents of mortgage document, see 5 R. 650. Where a gift has been effected by an instrument, only the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be. 104 I.C. 229=1927 O. 278. Bond silent as to interest—Oral evidence to prove agreement to pay interest is admissible. 100 I.C. 794=1927 N. 195. Where a mortgage was alleged to be in writing but the same was proved by circumstantial evidence, such as recitals in deeds deferring to the mortgage extracts from account books and by a transfer of a share of the mortgage, held, that the written mortgage not having been proved, the circumstantial evidence was not rendered inadmissible by sec. 91 of this Act, or sec. 49 of the Registration Act. *Held also* that there being no prejudice, the plaintiff could abandon the written mortgage and contend that it was unwritten. 30 Bom.L. R. 1277=1928 B. 484. In order to explain a decree one can look at the judgment and at the pleadings; where however the point of doubt is not determinable from them the Court may permit oral evidence to be adduced in order to correct the misleading descriptions in the decree. 147 I.C. 23=35 P.L.R. 20=1934 L. 181. Award effecting out-and-out partition—Extrinsic evidence to show that some members remained undivided—Admissibility of. 55 M.L.J. 132. As a

private unregistered award dealing with immovable property of over 100 Rs. is inadmissible in evidence no secondary evidence of its contents can be given. Though it cannot be said to be a contract or a grant, it would fall within the category of 'any other disposition of property' and hence under sec. 91, no oral evidence can be given in proof of its terms. 1942 A.W.R. (Rev.) 502=1942 O.A. (Supp.) 528=1942 O.W. N. (B.R.) 758. Where an unregistered partition deed is relied upon by the defence in a partition action, though the deed may be inadmissible in evidence, being unregistered that does not prevent any other evidence being admissible to prove merely the factum of separation in order to defeat the plaintiff's claim. 177 I.C. 682=1938 P.W.N. 799=1938 P. 603; 34 P.L.R. 1033=1933 L. 194; 144 I.C. 312=1933 N. 270; 145 I.C. 833=1933 R. 249; 12 Mys.L.J. 236; 6 R. 337=1928 R. 196. Family arrangement reduced to form of document inadmissible for want of registration. Evidence relating to contents of document is admissible. 26 A.L.J. 952 (F.B.). Joint and several liability of executors under a P. Note—Oral agreement splitting up the liability into several and divisible liability of each can be proved. 27 L.W. 820=1928 M. 173. P. Note—Suit on original consideration permissible when debt is provable apart from P. Note. 26 A.L.J. 415. When there has been an oral sale of property worth less than one hundred rupees by payment of the price and delivery of possession, the fact that some time later an unregistered sale deed is passed on to the vendee does not prevent evidence of the oral sale being adduced. 44 L.W. 949=1937 M. 265. See also 19 Pat.L.T. 489. A letter which merely states that a certain sale is a fictitious transaction, does not purport or operate to extinguish any right, and is admissible in evidence. I.L.R. (1945) Nag. 510=1945 N. 103; 1945 N.L.J. 89. Where the terms of a contract originally made by parol are reduced to writing, sec. 91 applies and oral evidence is not admissible. 28 L.W. 234=1938 M. 546. But where a contract of marriage is not signed by either of the contracting parties but is in the nature of a memorandum prepared by a nikah-khwan belonging to the Sharia Department of Musal it is open to one of the parties to prove by other oral or documentary evidence that he or she had been married and also the terms. 1934 L. 705. Although a wakf may be created by word of mouth once the terms of the dedications have been put in writing, the document itself or secondary evidence of the same should be tendered. 8 P. 484=1929 P. 410. An agreement to refer to arbitration is not a contract, grant or other disposition of property and so sec. 91 does not apply to it. 116 I.C. 853=1929 A. 415. Bill of exchange or hundi does not necessarily embody whole contract between parties. If it embodies the whole contract, other evidence



92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced

Exclusion of evidence of oral agreement.

to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms :

to prove the terms cannot be allowed. 51 A. 530=1929 A. 254. Since the act of depositing is a physical act which can always be proved by any one who has heard the statement being made, the fact of depositing might be proved by any one who has seen and heard the witness. 115 I.C. 147=1929 M. 187. Where the mortgage deed provided compound interest, oral agreement to pay simple interest cannot be proved under secs. 91 and 92. 27 A.L.J. 866=119 I.C. 92. Where property is conveyed by an unregistered sale deed, though the document cannot be relied upon for the purpose of establishing title, it may be referred to for the purpose of understanding the nature of the contract between the parties and to prove delivery of possession. To such a case sec. 91 does not apply. 10 P.L.T. 449=1929 P. 620. See also 1937 N. 116. Even though a contract in writing was signed only by a certain party, oral evidence could be added to show that another person was also a party to the arrangement or was bound by it. 159 I.C. 1005=43 L.W. 218=1936 M. 5.

SECS. 91 AND 92.—Sec. 91 only excludes oral evidence as to the terms of a written contract. Sec. 92 only excludes oral evidence to vary the terms of the written contract. There is nothing in either section to exclude oral evidence to show that there was no agreement between the parties and therefore no contract and that a document executed by a party was never intended to operate as an agreement, but was a sham or fictitious document brought into existence solely for the purpose of creating evidence about some other matter. 1938 A. 132=1937 A.L.J. 1352. See also 174 I.C. 309=1938 M. 320=(1938) 1 M.L.J. 236; 177 I.C. 6=1938 N. 335 (F.B.). Where an endorsement of payment has been made on the back of a bond and it does not specify whether it was towards principal or interest. Secs. 91 and 92 would stand in the way of the admission of any oral evidence to show that the payment was in fact made towards interest. 1939 O.W.N. 201=14 Luck. 456=1939 O. 142.

Sec. 92.—The Evidence Act is not altered by the Negotiable Instruments Act, sec. 46 of the Negotiable Instruments Act does not exclude the application of sec. 92 of the Evidence Act in suits on negotiable instruments; sec. 46 of the Negotiable Instruments Act and sec. 92 of the Evidence Act must be read together. I.L.R. (1942) Kar. 516. The Court in considering whether oral evidence can be given or not has to look to

the Evidence Act and the equitable considerations which have influenced the English Courts in like cases have no application in this country. 35 Bom.L.R. 1197=1934 B. 39. Sec. 92 clearly refers to a contract, grant or other disposition of property entered into by agreement between the parties to the document. It cannot refer to a decree which is imposed upon one of the parties by *force majeure*. The section cannot, therefore, bar the setting up of an oral contract to operate as an adjustment of a decree. 1941 L. 149=43 P.L.R. 192=I.L.R. (1941) L. 383 (F.B.). See also 1943 Pesh. 29. Evidence to prove an oral adjustment of a decree is not inadmissible under the section. I.L.R. (1943) 1 Cal. 195. Prior correspondence to vary terms of mortgage deed inadmissible. 1933 L. 1094. See also 12 Mys.L.J. 11. But where a letter was sent by mortgagee, acting as agent of mortgagor, and containing the scope of the security and the terms, held it was admissible. 148 I.C. 721=1934 R. 61. Where most of the *sansads* are in a stereotyped form, in any particular case, the intention of the parties could be ascertained by reference to the terms of the settlement embodied in the correspondence. 150 I.C. 635=36 Bom.L.R. 158=1934 B. 145. Where a usufructuary mortgage is reduced to writing but is unregistered no other evidence of its terms could be given because of sec. 92. 1938 N. L.J. 123. Where the mortgagee under a simple mortgage happens also to be a tenant of the mortgagor and the former sets up an oral agreement between him and his mortgagor that the rent due by him for the land is to be set-off against the interest due to him from the mortgagor, there is no bar to the proof of such an agreement. 1946 A.L.W. 5=1946 O.W.N. (H.C.) 5. It is, open to prove that an agreement purporting to provide for maintenance was never intended to be given effect to or acted upon but was in fact brought about with the sole object of securing an acknowledgment of the undivided status of the person by the insertion of a recital to that effect as a preamble to the deed of maintenance. 30 L.W. 817=63 M.L.J. 707. Secs. 91 and 92 only apply when the document on the face of it contains or appears to contain all the terms of the contract. 56 B. 180=34 Bom.L.R. 26=1932 B. 151. See 92 is applicable only to parties to instrument and their representatives. See 10 A. 421; 25 A. 337; 2 C.L.J. 338; 42 B. 512; 1930 A.L.J. 724; 1928 O. 472; 6 B. 376; 1930 A.L.J. 926; 1932 O. 168; 36 Bom.L.R. 158=1934 B. 145; 38 C.W.N. 1004=1934

C. 821; 1939 R. 139=1939 Rang.L.R. 622. See also (1937) Rang.L.R. 13; 1940 M.W.N. 19; 1941 Mad. 345. Statement of fact in a written instrument, if open to contradiction. See 1 Luck. 160=3 O.W.N. 248=1926 O. 273. Section is not applicable to strangers, i.e., persons not parties to the contract. 104 I.C. 786; 1937 Rang.L.R. 13=1937 R. 220. The words "between the parties to any such instrument" in sec. 92 refer to the parties who on the one side and the other came together to make the contract or disposition of property, and do not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. 1941 P. 211=1941 O. 739. It does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. 6 R. 741=1929 R. 86. Where in a mortgage with possession provides that redemption would be effected on payment of the "entire mortgage money" by the mortgagor, evidence of a subsequent oral agreement for delivery of possession on payment of a portion of the mortgage money is inadmissible. But this does not preclude the Courts from coming to a finding on the question of fact whether the mortgagor's possession of the property was unlawful or by consent of parties. 1936 O.W.N. 1086=1937 O. 7. See also 15 Mys.L.J. 237. It merely prescribes a rule of evidence. It does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. 107 I.C. 658=1929 N. 91. Where the wording of the contract is capable of different interpretations, the Court is justified in finding with what intention a particular expression was used as a matter of pure construction. Sec. 92 has no reference to the interpretations of the terms of a contract. 55 C. 808. Oral evidence of intention is not admissible for the purpose of construing a deed or ascertaining the intention of the parties. The case has to be decided on a consideration of the contents of the document with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document was related to the existing facts. 46 P.L.R. 101. It is perhaps a moot point whether oral evidence is admissible to determine the intention of the parties. It is certainly not admissible if the document is unambiguous but if there is doubt then it is permissible. I.L.R. (1933) N. 604=178 I.C. 293=1938 N. 434. The rule that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted. [(1842) 1 Dr. & War. 353,

Foll.] 108 I.C. 418=1928 P. 225. Oral evidence of intention of parties is inadmissible. But evidence under sec. 92 (b) regarding the attendant circumstances is admissible. 1929 M. 807. See also 171 I.C. 702=1937 R. 142. Evidence to prove that some executants of the P. Note signed in the capacity of surety only is inadmissible under sec. 92. Even where the contention is that one of the debtors signed as surety to the knowledge of the promisee, evidence to prove it is not admissible and it cannot affect the right of the promisee. (1927 R. 199, Rel. on.) 1937 R. 82. See also 1942 O. W.N. 63=1942 A.W.R. (C.C.) 58. Where there was an expressly alleged fraud such as that the promise induced the surety to sign as executant or that he promised not to sue him except as such, then proviso (1) to sec. 92 would come into operation. (1924 R. 360, Expl.) 1937 R. 82=168 I.C. 477. It is doubtful whether evidence is admissible in the case of consent decree to explain the ambiguity. (1927 M. 911, Ref.) 144 I.C. 95=1933 M. 516. Section does not apply to decrees. See 91 I.C. 705=1926 C. 643; 53 M.L.J. 533. See also 6 R. 573 (oral agreement varying or effecting settlement is not barred). Where a decree based on an award is ambiguous in its terms, the evidence of the arbitrator is admissible for the purpose of interpreting the decree as sec. 92 does not govern decrees. 165 I.C. 429=1937 L. 168. There is nothing to prevent a person arrayed on the same side to give evidence to vary terms. 54 I.C. 962; 1 Bur.L.J. 160. Section applicable only when the written instrument contains the whole of the terms. 6 C. 328; 76 I.C. 215. But oral evidence may be admitted to prove that there was no agreement at all. 7 M.H.C.R. 189; 1933 L. 222=145 I.C. 689; 171 I.C. 481=1937 O.W.N. 1058. As regards admissibility of oral evidence and to prove acts, conduct and intention of parties varying contract. See 22 A. 149 (P.C.) the leading case. See also 42 Mys.L.J. H.C. 257; 25 M. 7; 8 O.W.N. 101; 34 B. 59; 56 C. 201=1929 C. 437; 1937 R. 142=171 I.C. 702; 22 A. 149. Oral evidence inadmissible to prove that two documents executed and registered on same day are part and parcel of one transaction. 103 I.C. 399=1927 A. 696. Oral evidence may be admitted that consideration did not pass. 45 A. 679; 44 A. 53. See also 94 I.C. 371=1926 S. 202; 92 I.C. 187=1926 O. 301. Sec. 91 or 92 of the Evidence Act does not bar evidence to show that a certain receipt was a fictitious document in the sense that no money was paid. 1934 A. 1068=153 I.C. 611. That a sale deed is only a mortgage. 34 B. 59; 35 B. 231; 17 O.W.N. 1053; 106 I.C. 18=1928 M. 459 (contemporaneous agreement not in writing not admissible). 1928 N. 182. That an apparent mortgage deed was really intended to be different. 7 P.L.T. 293; 1925 B. 501;

5 R. 644. That a mortgage with possession was intended to operate only as a simple mortgage. 165 I.C. 510 (Pesh.). As to scope of section, *see* 38 C. 893 (P.C.). Oral evidence can be given by the petitioner, suing in *forma pauperis*, to prove that he was personally present when the petition was presented by his counsel or that he himself presented the petition, and that a note contrary to that by the Judge is wrong. 36 P.L.R. 100=1934 L. 452 (1). As to application of section to criminal cases, *see* 11 Cr.L.J. 738=8 I.C. 952. Oral evidence as to representation of intention to deliver goods not embodied in pronote. *See* 13 I.C. 386=4 Bur.L.T. 99. Where by mistake of parties the duration of a lease was wrongly entered in the written instrument, evidence can be let in to prove the real intention of the parties. L.R. 4 A. 302 (Rev.). *See also* 1938 N. 259. The making of a pronote by way of security for a sum of money advanced or given to the maker does not shut out oral evidence as to the purpose for which the money is given. 13 Bur.L.T. 239=64 I.C. 33. Oral evidence to prove that a pronote was executed only as security is admissible. 107 I.C. 510. *See also* 49 A. 464=25 A.L.J. 305; 1932 N. 62=28 N.L.R. 325. There is no reason in sec. 92 why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance should not be proved. 44 M.L.J. 53=71 I.C. 61=1923 M. 184. Intention of parties—Fraud—Oral evidence to prove—Representation of intention on which the deed is silent. 13 I.C. 389=13 Cr.L.J. 50. *See also* 1938 N. 604. As to admissibility of oral evidence to prove extension of time in respect of the date of performing contract, *see* 18 S.L.R. 320. *See also* 1934 R. 316. Oral evidence regarding a verbal agreement whereby the time of repayment is extended and the mode of repayment is changed, ought to be excluded. 1930 A. 721 (F.B.) (oral agreement to extend time for mortgage inadmissible); to explain meaning of words used in document. 93 I.C. 193=1926 N. 301; agreement varying terms of sale deed in respect of easement (latrine). 96 I.C. 276; as between lessor and lessee. 24 A.L.J. 548=1926 A. 445. Proof of condition precedent to sale deed taking effect. 5 R. 636. But *see* 1930 A.L.J. 1066. Where oral evidence to show that the document was not to take effect forthwith as mentioned in the document was held inadmissible, oral evidence to prove discharge of debt admissible. 30 C.W.N. 710=1926 C. 906; 42 C.L.J. 582=1926 C. 170; 44 C.L.J. 449=1926 C. 27. But *see* (1938) 2 M.L.J. 469 (P.C.) *contra* (discharge by part-payment and partly by remission). *See also* 6 R. 191; 1930 A. 721 (F.B.), that one of the two co-executants of a P. Note was only a surety. 35 Bom.L.R. 1197=1934 B. 39; 1933 L. 965; 92 I.C. 667

=1926 S. 156; 1939 A.M.L.J. 84, a plea of benami, 1939 R. 139 (Plea of agency). *See* 95 I.C. 512=1927 R. 94. Oral evidence of surrounding circumstances. 104 I.C. 736. Evidence of conduct of parties to prove partition. 93 I.C. 1028=1926 M. 402. *See also* I.L.R. (1938) N. 604=178 I.C. 293=1938 N. 434. Relinquishment of interest by mortgagee. 48 A. 705. Oral evidence to prove that mortgagee agreed to charge lower rate of interest or receive less than that entered in the deed is inadmissible. 95 I.C. 1019=1926 O. 273. *See also* 53 M.L.J. 863; 1942 A.M.L.J. 22; 62 M.L.J. 224=100 I.C. 54. An oral agreement to take less than what is due under a registered mortgage bond would be inadmissible. But a discharge by paying less is admissible. 136 I.C. 317=1932 M. 141; 30 L.W. 293=1929 M. 794; 30 Bom.L.R. 1455=1928 B. 522; 1930 A. 721; 6 R. 91 (F.B.); 9 L. 597. *See also* 1930 N. 235 (calculation of reduced rate of interest immaterial) *See on this point* 54 M. 889=61 M.L.J. 556. Sale deed—Whether oral agreement to resell can be proved. *See* 105 I.C. 482=1927 R. 314. Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment-debtors is not inadmissible by reason of sec. 92. *See also* 1929 C. 437=56 C. 201; 1929 A. 79. Mortgagor and mortgagee—Intended sale of mortgaged property to mortgagee—Settlement as to money due under mortgage—Proof of. 11 O.W.N. 254=1934 O. 115. *See also* 1937 R. 142. In a case of joint purchase in the name of several persons, parol evidence is admissible to prove tenancy in common. 1929 P.O. 72=56 M.L.J. 643 (P.C.). So also to prove that a lease in the name of one member was in fact on behalf of the entire joint family. 133 I.C. 897. The section does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. What is not allowed by the section is to contradict the terms of the document. 7 R. 292=1929 R. 240; 28 S.L.R. 266; 1933 A.L.J. 1364=1933 A. 576. *See also* 1929 M.L.R. 12 (O.); 169 I.C. 1002=41 C.W.N. 734=65 C.L.J. 225. In a suit on a P. Note executed in respect of the amount due under a prior P. Note plus the amount of costs incurred in a suit on the prior P. Note, the defendant is entitled to adduce evidence to prove that he had paid some amount towards the prior note and that to that extent his liability under the renewed note should be proportionately reduced. Sec. 92 is not a bar to the consideration of this question. 40 L.W. 706=67 M.L.J. 650. Cash loan can be proved to be rent due. 5 R. 822. Document in favour of two persons—Oral evidence to prove one of them alone is entitled to the amount is admissible. 1929 N.

91. When a loan is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was and especially when the document is silent on the point. By such oral evidence the terms of the document are not varied. 70 C.L.J. 201. Oral evidence is admissible to prove that a debtor under a Hundi, upon which the suit is based, compounded with his creditors including the payee under the hundi by agreeing to pay them 12 annas in the rupee in full and final settlement of their claims. 1929 S. 153. P. Note can be proved to be conditional. 50 A. 754=1928 A. 289. A pre-emptor who was not a party to the sale deed could adduce oral evidence to show the intention of parties. 1928 O. 472=4 Luck. 68. See also 1938 A.L.J. 668; 1938 N. 604. It is not open to a party to a registered sale-deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed that in spite of a certain property, belonging to the vendor, being entered in the sale-deed, title to it would not pass to the vendee. 118 I.C. 589=1929 A. 578 (2). Where a document is on the face of it a registered mortgage deed is not open to any of the parties to plead or to lead oral or circumstantial evidence to show that the transaction was other than what it appears to be. 1933 L. 104. Where there is nothing showing that there had been an inadvertent misdescription of property in a mortgage deed and that the property which was intended to be mortgaged was something over and above what was actually described and specified in the document the mortgagees are barred by the provisions of secs. 92 and 94 from showing that the intention of the parties was different from what appears from the terms of the mortgage deed itself. I.L.R. (1938) A. 494=1938 A.L.J. 477=1938 A. 364. Evidence to prove that a surety bond was executed under a mistake is admissible. 1929 R. 262. Oral evidence to prove a subsequent agreement relinquishing portion of rent reserved under a kabuliya is inadmissible. 56 C. 201=1929 C. 437. Where a gift of the remainder which was invalid under the Mahomedan Law was sought to be validated by evidence as to the consent of the donee of the life estate to such an arrangement such oral evidence is clearly inadmissible. 108 I.C. 637=1928 M. 613. Maintenance grant by Hindu husband in favour of wife—Condition as to chastity imposed by Hindu Law—Same not mentioned in deed—Enforcing condition as to chastity whether amounts to violation of the provisions of sec. 92. 9 P. L.T. 397. Registered mortgage deed—Contemporaneous written varthamanam providing for payments towards mortgage deed is admissible. The varthamanam is not compulsorily registrable under sec. 17 (b) of Registration Act. 27 L.W. 47=1928 M. 362. Where a lease from month to month

is registered, a subsequent oral agreement which modifies the contract of the lease is not admissible in evidence. 1939 P. 428. No oral agreement is admissible to prove variation of the terms of a registered lease including a term as to the payment of rent, notwithstanding the fact that the lessee has paid and the lessor has accepted, rent at a reduced rate for many years. 206 I.C. 401=A.I.R. 1943 Pat. 152. Though a contemporaneous oral agreement, for re-purchase between the parties to a conveyance, cannot be proved as between the parties, it can be proved if one of the parties is not actually a party to the conveyance. 6 R. 376=11 I. C. 832=1928 R. 244. See also 5 R. 836. Sale deed registered—Recital that vendee should as part-consideration for the sale, discharge mortgage debts of the vendor—Oral evidence to show that the recital was false and the liability intended to remain with vendor is inadmissible. 1928 O. 148; 1939 P. 142. An express covenant for title or for freedom from incumbrances cannot be regarded as a mere recital which can be contradicted by oral evidence. Such a covenant is a term of the contract of sale itself and any oral evidence to contradict the same falls within the mischief of sec. 92, Evidence Act. Even the statutory covenant for title must be deemed to be embodied in every sale deed in the absence of a contract to the contrary. When therefore the sale deed expressly recites that the seller has not created any incumbrance on the property, oral evidence cannot be admitted to show that the sale was in fact subject to an incumbrance. 1945 M. 205=58 L. W. 121=(1945) 1 M.L.J. 323. Ordinarily the title to immovable property transferred by sale passes on the registration of the sale deed. But the parties may agree that title shall not pass until the consideration is completely paid. In contracts of sale there are recitals of the receipt of the purchase money as well as terms providing for the passing of the property. The strictly contractual part, that is to say, the arrangement as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose of contradicting, varying, adding to, or subtracting from its terms as mentioned in sec. 92. The question when the property is to pass is a matter of contract. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence to determine what the intention of the parties was, but if the intention of the parties has been stated in unambiguous terms then the terms must remain the sole criterion of the intention of the parties, and evidence cannot be introduced for the purpose of showing that the

*Provisos.*—(1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ;

contract means something other than what it expresses in unambiguous terms. 17 P. 318=1938 P. 505. An oral agreement between the endorser and the endorsee of a negotiable instrument that the endorsee will recover the amount of the instrument from the drawer only is admissible under proviso 2. 105 I.C. 747=1928 S. 50. In a suit on promissory oral evidence to prove that money had been borrowed by both the defendants and that defendant having "witness" before his signature, was one of the executors and not a witness, is admissible. 1930 A. 709. In a suit for recovery of rent, held that oral evidence to prove the rescission of the registered lease was inadmissible. 1933 L. 278=145 I.C. 176. Wrong description of name in deed is a latent ambiguity and parol evidence is admissible. 1931 O. 54. Mistake—Palpable error—Equity, if sanctions admission of evidence to expose error. See 1938 N. 259. The word "fraud" used in the proviso is wide enough to include a fraud on the registration law. Thus a party can show that an item was fictitiously put in. Scope of proviso discussed. 1933 A.L.J. 926. Document silent as to interest two joint transferees—Evidence of subsequent conduct is admissible. 1930 M. 690. In case of a clerical mistake, it can be proved by parol evidence under sec. 92. 1930 A. 337 (1). Mortgage deed—Interest agreed to be paid at one per cent. per month—Words "per cent" omitted inadvertently—Admissibility or oral evidence—Evidence Act, sec. 93, is not applicable as there is no patent ambiguity. 7 O.W.N. 14=1930 O. 95. Where a bond declares that money is to be repaid with interest at a certain rate, an oral contract to the effect that no interest is to be paid but the person is to be in possession of a certain piece of land and to pay himself the interest out of the usufruct cannot be proved. 122 I.C. 894 (2)=1930 A. 440. See also 1936 A.M.L.J. 107. Where there is a registered *kabuliyat* providing for the payment of rent any oral agreement between the parties as to the retention of such rent for interest due on loan cannot be allowed in evidence as it varies definite terms of the registered instrument. 1942 O.W.N. (B.R.) 420=1942 O.A. (Supp.) 317. Oral evidence may be let in prove an agreement to pay interest though there is no mention of such an agreement in a balance struck in the creditor's book. 1932 L. 652. It is not open to a party to a document to prove by oral evidence, a variation in the amount of consideration of the document though it is open to him to prove want of consideration or failure of consideration or a difference in kind of consideration. A vendor cannot adduce oral evidence to prove

that the consideration for the sale was that stated in the sale deed plus an undertaking by the vendee to discharge an existing mortgage on the property. 1930 M. 659=58 M.L.J. 240. See also 189 I.C. 423=1940 C. 379; 174 I.C. 309=1938 M. 320=(1938) 1 M.L.J. 236. Suit on money bond—Provision for repayment in cash—Plea that payment should be made by medical services to be rendered—Not open—Evidence to prove plea not admissible. 1936 A.M.L.J. 107. Extraneous oral evidence is inadmissible especially when the terms of the bond are clear. The parties must be presumed to know the difference between interest on interest and compound interest and if they deliberately choose to use one expression they cannot be permitted to prove that they meant the other. 1931 N. 25. Acknowledgment is not a document contemplated in sec. 92. It is neither contract, grant nor disposition of property nor analogous to any of them. 26 N.L.R. 320. Oral promise made at the time of acknowledgment of a contract of loan is admissible. 26 N.L.R. 320. The law is well settled that to prove an acknowledgment of liability oral evidence of the intention of the party said to have made the acknowledgment is not admissible for construing the writing given. It is equally settled that in construing such a writing it is legitimate to look to the surrounding circumstances. 45 C.W.N. 208. A contract of simple money debt is not one required by law to be reduced to the form of a document. 26 N.L.R. 320. The prohibition in sec. 92 is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract. So long as the passing of consideration is not a term of the contract, evidence adduced to show that it did pass, even though the contract does not recite it, is not within the scope of the prohibition in sec. 92. Where a letter evidences the terms of a contract under which possession of land is supported on the basis of part performance, if the contract does not recite the consideration for the transfer there is no prohibition to proof *alunde* of consideration. (1945) 1 M.L.J. 346.

SECS. 91 AND 92.—Income-tax assessment proceedings—Income-tax Officer—Right to go behind recitals in registered document as to consideration. 1944 I.T.R. 458.

SEC. 92, Prov. (1).—The statement of law in *Amir Ali's Evidence* that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible, is too wide and must be qualified by the express proviso. 1 to 3 to sec. 92. 49 A. 680=1927 A. 422. Proviso (1) has no application in a case where the instrument repre-

such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want of failure]<sup>1</sup> or consideration, or mistake in fact or law.

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

#### LEG. REF.

<sup>1</sup> These words in brackets in proviso 1 were substituted by Act XVIII of 1872, S. 8.

sents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about, but which, for some reason, they did not want to put in writing. Where a person transfers certain property by a deed of gift, it is not open to him to say that when he gave the property he did not do it. The donor is not himself entitled to have the deed set aside on the ground that his intention was that it should operate on his death, especially so when there is no evidence that the donor, giving away practically the whole of his property wanted to retain any sort of control after the date of gift. 171 I.C. 702=1937 R. 142. See also 1945 Pat. 311. Where in a printed form of a P. Note after mentioning, the interest payable, there is an omission to state that it is—per cent. oral evidence can be let in to show what was the agreement between the parties and it is a case to which proviso (1) applies. 1939 A. W.R. (H.C.) 171=1939 A.L.J. 196; 1939 A. 308. The wording of the proviso (1) and especially the use of the words 'such as' clearly show that the illustrations are not meant to be exhaustive. 1939 N.L.J. 33=1939 N. 20. The mistakes contemplated by proviso (1) to sec. 92 are genuine and accidental mistakes, just as a misdescription of the property. 184 I.C. 585=1939 Pesh. 41. There is nothing in proviso (1) to suggest that the facts which may be proved under that proviso can only be proved in support of a claim to which those facts give rise, and such facts may be pleaded by way of defence only. The validity of every contract depends on the presence of *animus contrahendi* the intention to contract. When a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification on the ground that the written instrument does not give effect to the agreement which the parties actually entered into. All that the Court has to do in such case is to rectify, not the contract, but the document embodying it. and put that document into such a form as to carry out the contract which the parties really entered into. When there is unilateral mistake the position is different because in that case there is, in

fact, no contract. The minds of the parties were not at one; one intended one thing, and the other intended something else, and if any relief can be granted, it must be rescission. 41 Bom.L.R. 191=I.L.R. (1939) B. 149=1939 B. 151. Under Proviso 1, oral evidence is admissible to prove that the khasa numbers of the land sold were wrongly entered in the sale-deed particularly when both the vendor and the vendee admit that a mutual mistake of fact had crept into the sale-deed. 188 I.C. 813=42 P.L.R. 222=1940 L. 236. Where in a suit on mortgage bonds which stipulated for payment of compound interest, the defendant alleged that at the time of the execution of the bonds, he was persuaded to sign them only on the plaintiff's promising not to enforce that stipulation. *Held*, that such evidence would be admissible under the first proviso to show that the signature to the document was obtained by fraud at the inception. 61 C. 344=1934 C. 564. Though a document says there was a consideration and states exactly what it was a party may show that there was none or that it has failed. In the same way there is no reason why the other party should not be allowed to show that the consideration was paid in full, not in cash but in kind. 1939 N.L.J. 33=1939 N. 20; (1938) 1 M.L.J. 236. Where under a kabuliyaat two *hals* of land were settled with a tenant, at a certain rate, a separate oral agreement that one of the *hals* would be given rent free is not admissible in evidence although evidence that the kabuliyaat was not intended to be acted upon at all would be admissible under proviso (1) I.L.R. (1938) 1 C. 48=176 I.C. 972=1938 C. 356. Plea of want of consideration may be proved in a suit on P. Note. 108 I.C. 158; 1934 A. 496=148 I.C. 1124. Where a plaintiff makes no claim for rectification regarding the rate of interest contained in the mortgage instrument, the proviso 1 does not empower a plaintiff suing on an unambiguous unreformed and registered deed to lead evidence to show that by a mistake a term has been omitted from the deed. 54 M. 978=61 M.L.J. 437. See on this proviso 59 C. 1111=1932 C. 708; 189 I.C. 221=34 Bom. L.R. 971; 140 I.C. 104=1932 P. 332; 56 B. 180=137 I.C. 478; 35 C.W.N. 279. An obligor is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether con-



(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

sistent or not with the condition of the bond. The validity of a document may be challenged on the ground of the illegality of the transaction. 19 P. 424=188 I.O. 859=1940 P.W.N. 878=1940 P. 578. Under proviso (1), it is open to a Life Insurance Company to prove facts which show that the contract of insurance was illegal. The company is, therefore, entitled to prove facts showing that the insurance was really effected by the assignee of the policy for his own use and benefit and not for the use and benefit of the assured. 42 P.L.R. 801=1941 L. 33.

Sec. 92, Prov. 2.—A separate oral agreement on a distinct and collateral matter, although a part of the same transaction would come within proviso (2), if the original instrument is silent on the point which is the subject-matter of the agreement. 41 C.W. N. 1053=1937 O. 619. The parties to a conveyance are not in view of the second proviso, prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed of conveyance and the vendor cannot be prevented from attempting to prove that there was such an agreement. 18 Pat. 318=181 I.C. 184=1939 P. 411. Where a *sir* land had been mortgaged by the proprietor who afterwards sold the equity of redemption, he cannot be allowed to give oral evidence of a separate agreement to give up proprietary rights. 14 L.R. 425 (Rev.)=17 R. D. 500. Oral evidence is admissible to prove a collateral agreement regarding lessee's right of pre-emption. 138 I.O. 774=1934 P.C. 231=63 M.L.J. 408 (P.C.). See also 1935 A. 322 (agreement for interest); 1939 A. 248=1939 A.L.J. 46.

Sec. 92, Prov. 3.—It was not intended by proviso 3 to permit the terms of a written contract to be varied by a contemporaneous oral agreement; the proper meaning of proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force at all until the happening of a certain event may be proved. I.L.R. (1942) Kar. 516. It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract. Where a P. Note is, by its express terms, payable on demand that is at once the obligation under the note at-

taches immediately. A collateral oral agreement not to make demand until certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the P. Note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3. 40 Bom.L.R. 1075=1938 P.C. 198=(1938) 2 M.L.J. 469 (P.C.). See also 1939 P.W.N. 200=20 P.L.J. 514=1939 P. 495. Proviso

(3) presupposes that in a case to which it could be applied the contract, grant or other disposition of property itself remains intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder. 41 Bom. L.R. 1263. The words "any obligation" mean any obligation whatever under the contract, and not some particular obligation which the contract may contain. 1932 C. 328=59 O. 106. As to scope of the proviso, see *ibid.* See also 1932 L. 549=33 P.L.R. 712. As regards scope and applicability as to the meaning of the term 'condition precedent,' see 33 Bom.L.R. 490; I.L.R. (1939) Kar. 523=1939 S. 299; 41 Bom.L.R. 1263. Pronote pleads absence of consideration and asserts that the note was executed as between such third person and himself it is security for money which might be found between such third person and himself, it is a plea that the proof of the existence of amount due to the third person is a condition precedent to the enforcement of the liability under the note and where the plaintiff admits the existence of such a condition precedent, the burden at once falls upon him to satisfy the Court that the condition precedent has already been satisfied. 1943 A.L.W. 82. In a suit on a promissory note payable on demand, it is not open to the defendant to plead or prove any contemporaneous oral agreement that no sum is

payable until accounts have been taken in a certain partnership and then only so much as is shown to be due to the plaintiff's firm because such an agreement is clearly an attempt to alter the express terms of the written contract embodied in the pronote is not admissible under sec. 92. I.L.R. (1942) Kar. 516. In a suit on a promissory note the defendant admitted the execution but pleaded that the consideration merely represented a part of the consideration for a usufructuary mortgage to be executed later in favour of the plaintiff and that the note was not enforceable under



(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

any circumstances. *Held*, that the plea could not be allowed to be proved by oral evidence the effect of the plea being to nullify the promissory note itself. 21 Mys.L.J. 385. Where money is not advanced unconditionally upon the P. Note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability. 34 P.L.R. 470=1933 L. 456. Where the defendant pleads that the note sued on was only a receipt for the earnest-money for a contract of purchase by the plaintiff, that the purpose of the receipt of money has been wrongly stated in the P. Note, and that it was not intended to attach any obligation to the instrument as such, he is entitled to adduce oral evidence in support of such plea. Sec. 92 does not bar oral evidence to prove the same. 1939 P.W.N. 200=20 P.L.T. 514=1939 P. 495. Plaintiff who purchased certain properties in Court auction subject to a mortgage in the defendant's favour agreed with third parties to sell some of them with the knowledge and consent of the defendant who agreed in writing to accept piecemeal payments from the plaintiff and to release the lands which plaintiff agreed to sell to the third parties. Plaintiff having sued for specific performance of the agreement the defendant pleaded an oral agreement that the release deed was only to be given when the entire mortgage debt had been discharged, and that he was bound to give it if called upon by the plaintiffs after such discharge and not before. *Held*, that the arrangement set up by the defendant was not a "condition precedent to the attaching of any obligation" within the meaning of proviso (3) and hence the oral arrangement could not be admitted in evidence. 44 L.W. 749=71 M.L.J. 599. *See also* 44 L.W. 629=1936 M. 841=71 M.L.J. 522. Where a party to a document admits execution of the deed but pleads that the deed was never acted upon because of the non-performance of an agreement by the other party and that the deed was vitiated by fraud, it is open to him to offer evidence of fraud; and oral evidence to prove fraud or the existence of any oral agreement invalidating the deed is admissible under provisos 1 and 3 to S. 92. 24 Pat. 230=1945 P.W.N. 246=A.I.R. 1945 Pat. 311.

SEC. 92, PROV. 4.—Proviso (4) to sec. 92 only permits proof of the existence of any subsequent oral agreement to modify a contract. Hence, if such an agreement is come

to contemporaneously with the contract, it cannot be proved. 1943 O.W.N. (H.C.) 267 (2)=1943 A.L.J. 411=A.I.R. 1943 All. 370. There is no law in India whereby a release of mortgage should be in writing and registered. A contract of release between the mortgagor and the mortgagee may require writing under Proviso 4 and may require registration under the Registration Act. But the case is different when the contract to release is between the mortgagee on the one hand and a stranger who purchases the property released after the contract. Such an oral release is valid. 40 L.W. 942=68 M.L.J. 91. *See also* (1937) Rang.L.R. 13 (where a second mortgagee was held not entitled to plead the bar under this section of proof of oral agreement between mortgagor and first mortgagee to release some items of his mortgage from the mortgagee). An oral statement of a promisee that he remits the interest payable under a promissory note is not an agreement within the meaning of sec. 2 (e) of the Contract Act, but is an one-sided act on the part of the promisee, and it is, therefore, not excluded by sec. 92 (4). 47 O.W.N. 213. If a creditor waives his right under a contract or relinquishes his claim, such an act of grace does not amount to an agreement falling within the exception in proviso 4. A remission or relinquishment or discharge does not come within the mischief of proviso 4. An endorsement of payment on an agreement which, though not registrable, is registered, evidencing the receipt by the creditor of a smaller amount than is due and discharging the debtor, does not fall within the proviso and therefore parol or oral evidence to prove the creditor's waiver is admissible in evidence, although the endorsement is not itself registered. 20 Mys. L.J. 160=46 Mys.H.C.R. 516. This proviso bars proof of oral agreement by lessor to release lessee from his liabilities under the personal covenants contained in a registered lease. 60 B. 394=38 Bom.L.R. 34=161 I.C. 57=1936 B. 88. *See also* 1937 O. W.N. 477=1937 O. 341. Where a mortgage deed contains a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt should be payments endorsed on the mortgage deed itself, it does not preclude the parties from adducing other evidence to prove discharge. Sec. 92 does not bar such evidence. 192 I.C. 861=1941 P. 248. *See also* 196 I.C. 645. *See also* 23 P.L.T. 379=1942 Pat. 105. But

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

(6) Any fact may be proved which shows in what manner the language of a document is related to existing facts.

*Illustrations.*

(a) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

see 1940 P. 49. Though it is always open to a mortgagor to prove that on a certain day he paid the sum due under the mortgage, still when in the registered mortgage deed there is an express term that payment should be made in a certain way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage. 187 I.C. 63=21 P.L.T. 437=1940 P. 49. Oral agreement between one of several mortgagors and mortgagee for redemption of his share thereunder. Payment can be proved. 112 I.C. 559=1928 M. 1050. Mortgage suit for sale—Defendant pleading subsequent oral agreement to accept properties in satisfaction of mortgage—Agreement not admissible. 1929 A. 615. But see contra. 44 L.W. 944=71 M.L.J. 850. A distinct oral agreement between co-mortgagors subsequent to the deed should, in order to be admissible under this proviso, be in writing. 137 I.C. 285=1932 M. 218. An oral agreement that a registered deed of sale should be null and of no effect until the agreement of re-purchase has been executed by the vendor cannot be proved under the provisions of prov. (4). 1933 R. 310. The expression "oral agreement" as used in proviso 4 is wide enough to include all unwritten agreements whether they are oral or they are implied from acts and conduct of the parties. But evidence of conduct is admissible to show that as between the parties the particular term was never intended to be acted upon or enforced, or to prove an estoppel or waiver. 1929 P. 717. A document purporting to be a sale deed was presented for registration. The executant denied that he had executed a sale deed and stated that he had merely agreed to execute a mortgage deed. After some dispute the parties agreed that the transaction should be treated as a mortgage and made statements to the Sub-Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage deed. *Held*, that proviso 4 did not prevent the successor-in-interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a sale. 145 I.C. 697 (1)=1933 L. 318. When the document is in terms a possessory mortgage, evidence to show that the mort-

gage was in reality a simple mortgage according to the intention of the parties is inadmissible under sec. 92. 60 I.A. 273=14 L. 466=65 M.L.J. 150 (P.C.). Where the subsequent oral agreement relates merely to the mode of payment of mortgage-money, evidence with respect to it is admissible. But if it is not merely an agreement as regards the mode of payment but an alteration of the mortgage itself, such as changing the original mortgage which was without possession into a usufructuary mortgage, it is not admissible. 110 I.C. 261. Subsequent to a registered mortgage parties entered into a contract by which the property was to be put in possession of the mortgagee for 5 years and the mortgage debt was to be deemed discharged. *Held*, that the contract to let and the letting into possession for 5 years operated as a discharge of the obligation and in no way offended the provisions of sec. 92. 162 I.C. 53 (2)=1936 M. 380. An oral agreement by the executant of a P. Note, that, instead of money being paid, payment shall be made in the form of a transfer of land cannot be proved under sec. 92 (4). 151 I.C. 398=1934 R. 228. See also 1937 R. 521. Oral evidence to prove satisfaction of a claim is admissible. 6 R. 191=1928 R. 144; but not to prove an oral agreement modifying terms of reference of a registered agreement referring matter to arbitration. 135 I.C. 230=1932 A. 154. A C.I.F. contract is not required by law to be in writing; if it is not registered, it can be legally varied by an oral agreement modifying its terms. 34 P.L.R. 266=1933 L. 453. No oral agreement is admissible to prove variation of the terms of a registered lease including a term as to the payment of rent, although rent at a reduced rate has been paid and accepted for many years. 22 Pat. 5=206 I.C. 401=A.I.R. 1943 Pat. 152. Where an oral agreement is made by two partners to dissolve the partnership earlier than originally agreed to in their registered agreement, the oral agreement and any payment made in accordance therewith is admissible in evidence. 136 I.C. 874=1932 N. 42. Plaintiff executed a sale deed to the defendant which was registered. On the same date to the defendant executed an agreement to re-convey the properties to the plaintiff which was not registered. The sale deed itself did

(b) *A* agrees absolutely in writing to pay *B* Rs. 1,000 on the 1st March, 1873 only. The fact that at the same time an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved.

(c) An estate called "The Rampore Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) *A* enters into a written contract with *B* to work certain mines, the property of *B* upon certain terms. *A* was induced to do so by a misrepresentation of *B*'s as to their value. This fact may be proved.

(e) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(g) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words "Bought of *A* horse for Rs. 500." *B* may prove the verbal warranty.

(h) *A* hires lodgings of *B*, and gives a card on which is written—"Rooms, Rs. 200 a month." *A* may prove a verbal agreement that these terms were to include partial board.

*A* hires lodgings of *B* for a year, and a regularly stamped agreement, drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the term verbally.

(i) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this.

(j), *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

#### Illustrations.

(a) *A* agrees, in writing, to sell a horse to *B* for Rs. 1,000 or Rs. 1,500. Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

not contain any reference to the agreement. Plaintiff having sued for specific performance of the agreement objection was raised to the use of the unregistered agreement under sec. 92 (4). *Held*, that no objection under sec. 92 (4) could arise. 1934 M. 703=67 M.J. 635. See also 179 I.C. 172=1939 P. 142.

Sec. 92, Prov. 6.—This proviso does not apply where the document is clear and unambiguous in its terms. 1939 Sind 200=I. L.R. (1939) Kar. 530. Oral evidence is admissible to show the real nature of the transaction evidenced by the document as, for instance, that a document though styled a gift is really a will. 117 I.C. 907 (2)=1929 L. 875 (2); but not a sale into mortgage. 1928 M. 459; 1928 N. 182; 1925 B. 501=49 Bom. 662; see also 1939 S. 200=I.L.R. (1939) Kar. 530. Where there is no ambiguity which needs explanation and terms of document are quite clear evidence to explain, the terms of the deed should not be allowed. 164 I.C. 463=1936 L. 508. See also 18 Mys.L.J. 196=45 Mys.H.C.R. Rep. 109; I.L.R. (1939) Kar. 530=1939 S. 200; 1943 O.W.N. 325=1943 A.W.R. (C.C.) 75=1943 O.A. (C.C.) 179. Where the terms of a written contract are perfectly clear the necessity of a deducing the real terms from the conduct of the parties and the reconsti-

tuting of the contract in accordance therewith does not arise. 184 I.O. 585 (2)=1939 Pesh. 41. Sale-deed to a dancing-girl—Contemporaneous oral agreement that it was to take effect as maintenance arrangement is not admissible. 31 L.W. 516=1930 M. 547.

Sec. 93: GRANT.—Opinions and intention of Government officers not legitimate materials for construing a grant. See 29 M. L.J. 289. Kabuliyat—Oral evidence to explain—Interest—Rate of prior transactions—Custom. See 41 C. 349=18 C.W.N. 582. See also 22 I.O. 844. Patent ambiguity—Hand note—"Interest at 2-1/2 per cent."—Evidence admissible to show what the rate of interest was per mensem. 14 C.W.N. 1100=14 C.L.J. 97; 62 I.O. 702. But see also 19 C.L.J. 66=41 C. 342. Ambiguity—Oral evidence as to contents of documents—Specific Relief Act, sec. 31. See 130 P.L.R. 1910=8 I.C. 554. Evidence as regards identity of property leased admissible. 20 A.L.J. 377. Where language is defective, oral evidence inadmissible. 1921 M.W.N., 519. See also 80 I.O. 944; 162 I.O. 797=1936 P. 275. Where two deeds on their face appear to be separate transactions, another agreement which was not evidenced by any writing cannot be proved to show

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

*Illustration.*

A sells to B, by deed, "my estate at Rampur containing 100 bighas." A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

95. When language used in document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

*Illustration.*

A sells to B, by deed, "my house in Calcutta." A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

that the deeds though apparently two separate transactions, were agreed to be treated as one. 175 I.C. 831=1938 P. 242.

SECS. 93 AND 95.—Where the language used in an instrument in describing the property which is the subject-matter, is not on its face ambiguous or defective and is plain in itself but is somewhat unmeaning in reference to existing facts, evidence is admissible to show to which property it was meant to apply. 76 C.L.J. 183.

SEC. 94: DOCUMENT CLEAR AND UNAMBIGUOUS.—Section does not apply in case of misdescription. 194 I.C. 736. As to oral evidence of one not a party to document, see 57 P.L.R. 1915; 16 O.C. 213=21 I.C. 429. Where the language of a document like a deed of compromise is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation. 40 I.C. 491. Contemporaneous circumstances and subsequent conduct of the parties are not admissible when there is no ambiguity in the deed and legal construction can be put on it. 195 I.C. 242=1941 O. 507. Sale deed—Language plain—Mistake in boundaries—Area described correctly—Extrinsic evidence—Admissibility. 150 I.C. 363=36 P.L.R. 61. On this section, see 3 Bom.L.R. 768; 1925 M.W.N. 325; 38 A. 103; 41 M.L.J. 475; 1939 A.W.R. (H.C.) 173. Oral evidence to show that one of the executants of a bond signed it only as a surety is not admissible. 5 R. 168=1927 R. 199. Sec. 94 does not prevent a party to a document from proving that both the parties to the document were under a mistake of fact as to the contents of the document when they signed it. 122 I.C. 493=1930 L. 446. Where in the case of a sale-deed it is not the seller alone who is trying to get out of the bargain but the seller and the purchaser both agree that the intention was

to enter into the deed land bearing different khasra numbers, and that the mistake was mutual, it is open to the parties to produce evidence to show what was intended to be sold and purchased. Sec. 94 is not applicable in such circumstances. 188 I.C. 813=42 P.L.R. 222=1940 L. 236.

SEC. 95.—Though the sale-deeds containing recitals that the property belong to the vendors is not admissible under sec. 13, they are admissible under secs. 95 and 96 to explain the expression used in the documents that property is the vendor's family property. 1914 M.W.N. 779=26 I.C. 747. Release deed conditional—Extrinsic evidence of claim released admissible. See 20 M.L.J. 383=6 I.C. 758; 21 I.C. 69. Original documents in possession of defendant—Document referred to in plaint but not produced—Secondary evidence admissible. See 37 I.C. 794. Contract—Construction—Offer kept open 'until' and 'up to' a certain date—Oral evidence inadmissible to explain. 22 C.W.N. 416=44 I.C. 305. Where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing the security to be given. 61 O. 890=1934 O. 569. Transfer by mortgagee of mortgaged property—No mention in deed that only mortgage rights were intended to be sold—Latent ambiguity to remove which evidence can be given. 118 I.C. 682=1927 N. 267. Under secs. 95 and 98 evidence can be allowed show interest is payable monthly when document is silent. 1933 L. 144. Where just prior to the expiration of three years from the date of the previous promissory note, the defendant executed another receipt, for the amount already received, evidence is admissible to show that the receipt referred to the original consideration. 9 O. W.N. 1024.

Evidence as to application of language which can apply to one only of several persons.

was intended to apply to.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it

#### Illustrations.

(a) *A* agrees to sell to *B* for Rs. 1,000 "my white horse." *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(b) *A* agrees to accompany *B* to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekhan or Haidarabad in Sindh was meant.

Evidence as to application of language to one of two sets of acts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

#### Illustration.

*A* agrees to sell to *B* "my land at *X* in the occupation of *Y*." *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible character, etc.

#### Illustrations.

*A*, a sculptor, agrees to sell to *B*, "all my models." *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

#### Illustration.

*A* and *B* make a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

Saving of provisions of Indian Succession Act relating to wills.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865)<sup>1</sup> as to the construction of wills.

### PART III.

#### PRODUCTION AND EFFECT OF EVIDENCE.

#### CHAPTER VII.

##### OF THE BURDEN OF PROOF.

101. Whoever desires any Courts to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Burden of proof.

#### LEG. REF.

<sup>1</sup> See now the Indian Succession Act (XXXIX of 1925).

Sec. 96.—If the language of a document directly describes two sets of circumstances but cannot have been intended to apply to both, evidence may be given to show to which it is intended to apply. 10 Bur.L.T. 245. P. Note hearing both English and Malayalam dates—Inconsistency—Evidence as to date of note—Admissible. See (1941) 1 M.L.J. 502=53 L.W. 449=1941 Mnd. 587.

Sec. 97.—Latent ambiguity—Mortgage deed—Ambiguity in the description of land—Evidence *abundant* to clear up ambiguity is admissible. 43 I.C. 731. See also 57 I.C. 2; 58 I.C. 67; 18 B. 288; 30 M. 207.

Sec. 99.—This section is merely an enabling provision. 27 M. 329. Evidence by strangers to show real nature of transaction is admissible. 8 I.C. 501; 28 A. 473; 23 L.W. 664=1926 M. 744; 1928 O. 253 (persons not claiming through settlor can show that wakf was illusory).

Sec. 101.—As to meaning of "burden of proof" and the rules governing it, see 145

I.C. 413=1933 B. 211; 1939 A.W.R. (B.R.) 71=1939 R.D. 216. When all evidence is in question, burden of proof has little or no importance in appeal. 103 I.C. 166; 1929 R. 183. See also 162 I.C. 247=1937 R.D. 170; 1936 L. 1016; 52 L.W. 57=1940 P.O. 93 (P.C.); 1940 L. 336; 1939 M.L.R. 244 (Civ.); I.L.R. (1940) Kar. 235 (P.C.); 63 M.L.J. 694=37 C.W.N. 71=1932 P.C. 228 (P.O.); 60 C. 1158=37 C.W.N. 1001=1933 Cal. 900; 29 N.L.R. 298=1933 N. 379. The burden of establishing case rests on the party who asserts the affirmative. 35 C. 1051; 9 W.R. 192; 41 P.L.R. (J. & K.) 21; 1939 M.L.R. 86. Where a will is propounded, the *onus probandi* is on the party who propounds the will. He must prove that the will was duly executed and that it was in existence at the date of the death of the testator. 57 C.L.J. 8=1933 C. 449. Applies to probate cases. 39 C. 245.

**MARRIAGE.**—In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed. 1939 M.L.R. 244 (Civ.). See also I.L.R. (1940) Kar. 235; 1945 N.L.J. 489. Where a person accepts the burden of proof and undertakes to discharge it, he cannot be allowed to turn round and say that he has been wrongly treated in the matter of burden of proof. 1939 M.L.J. 244 (Civ.). The burden would in any party who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed, the marriage itself was void. 56 A. 428=1934 A.L.J. 1129=1934 A. 273. **Benami**—Onus of proof. 1933 B. 393. Appeal—Error of lower Court—Onus on appellant. 10 O.W.N. 201=1933 O. 142. **Fraud**—Burden of proof. 12 P. 359=1933 P. 306. As to burden of proving knowledge of party defrauded, see 143 I.C. 84=1933 C. 339. Party alleging that a contract is conditional must prove the condition. Debtor paying debt to a person other than creditor—Onus is on debtor to prove that the person was authorised by creditor to receive payment. 49 M. 436=53 I.A. 84=51 M.L.J. 570 (P.C.). The onus lies on the creditor to prove that the acknowledgment to pay a money debt was made within time; and it would be contrary to the provisions of ss. 101 to 104 to require that the burden lies on the defendant who acknowledged the liability. 1932 A. 199=53 A. 963. Defendant thinking that suit is barred by limitation—It is for defendant to establish facts that support his plea. 1934 P.

44. When a tenant of lands in India in a suit by his landlord to eject him from them sets up a defence that he has right of permanent tenancy is the lands, the onus of proving that he has such a right is upon the tenant, and proof of long occupation at a fixed rent does not satisfy that onus. 46 M.L.J. 546=51 I.A. 83=47 M. 337 (P.C.). [16 C. 224 (P.C.): 43 M. 567 (P.C.), Ref. [See also 1930 M.W.N. 874; 146 I.C. 1002=1933 A. 825. Where an alleged adoption was questioned after an interval of more than fifty-five years the onus lies on the plaintiff to disprove adoption and although the defendant was bound to prove his title as adopted son, every allowance for an absence of evidence to prove such fact must be favourably entertained. 55 M. 40=1932 M. 198=62 M.L.J. 116. Where the right of sisters is challenged on the ground that they are excluded in the presence of collaterals, the onus of proving the existence of collaterals is on those who challenge the sister's right. 10 O.W.N. 424=1933 O. 231. Where a recorded tenant files a suit to eject a recorded sub-tenant the onus of proof lies on the latter to prove that the relationship of land-holder and tenant did not exist between the parties. L.R. 2 A. 39 (Rev.). Agreement for sale with one but sale to another. Burden of proving *bona fides* is on vendee. 1926 J. 580=96 I.C. 175. As to evidence of conduct and probabilities, see 75 I.C. 733=1923 L. 436. Suit on lost mortgage bond—Denial of execution by defendant—Alternative plea of payment does not relieve plaintiff from proving loss. 49 A. 78. **Easement**—Ejectment suit—Onus. See 105 I. C. 560. Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them. 56 I.A. 248=52 M. 549=57 M.L.J. 1 (P.C.). The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative the party who avers a title cannot be absolved from proving it. [9 W.R. 190 (F.B.). Foll. 114 I.C. 113=13 R.D. 480=1929 O. 204; 60 C. 1253=37 C.W.N. 1174. In a suit for possession of land the plaintiff has to prove that the land lay within his holding and it is not for the defendants to prove that it lay outside. 56 C. 805=33 C.W.N. 227=1929 C. 325. See also 42 P.L.R. 294=1940 L. 311. Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him on his representatives when they set up the defence of minority. 1928 P.C. 152=55 M.L.J. 88 (P.C.). Where a mortgage deed contains an admission of receipt of consideration before the Sub-Registrar, the onus is upon the mortgagor to disprove this admission. 109 I.C. 149. See also 1939 M.L.R. 118; 1939 M.L.R. 86. When there is an affidavit of the peon serving the notice, of proper service



When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

*Illustrations.*

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts.

102. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

thereof, the party who impugns the fact ought to prove that there was no service. 1928 C. 722. In a suit against a Railway Company for non-delivery of goods the Railway must first prove lost of goods and on such proof the onus will shift to the plaintiff to prove wilful neglect on the part of the Railway or its servants, etc., according to the terms of the risk-note. 1928 L. 774. Where the parties have produced all their available evidence, the dispute on the point of onus is mainly of an academic nature. 9 L. 224=1938 L. 432. *See also* 1929 R. 183; 56 C. 805=1929 C. 425; L.L.R. 1940 Kar. (P.C.) 235; 1934 L. 936; 1934 Pesh. 134; 1934 L. 542=45 P.L.R. 462. Where the evidence is conflicting, the party on whom the onus lies does not necessarily fail as in the case where no evidence is led on either side. 123 I.C. 612=1930 P. 134. Plaintiff sued on basis of lease in his favour for plot in dispute—Land recorded as defendant's ancestral holding—Onus lies on defendants to prove that it was part of their ancestral holding. 1930 P. 149 (1). Party accepting burden of proof in trial Court—If can complain in appeal. 1934 L. 1019. *See also* 1939 M.L.R. 244 (Civ.). Wrong view as to burden of proof—Interference in second appeal. 132 I.C. 441=1934 N. 253.

SECS. 101 AND 102.—It is on the person who asserts that a transfer is in contravention of sec. 12 of the C. P. Tenancy Act, that the burden of proving it lies, for it is his application that would fail, if no evidence at all were given. 1938 N.L.J. 474. *See also* 1930 M.L.R. 149. Where in a suit for money lent, the plaintiff admitted that he kept a day book but the same was not produced. *Held*, that the plaintiff on whom lay the onus of proof should produce the best evidence available and in case such evidence was not produced he must suffer the consequences. 41 P.L.R. J. & K. 21.

SECS. 101, 105-106.—Per Dunkley, J.—The phrase "burden of proof" is used in two distinct meanings in the Indian Evidence Act, viz., the burden of establishing a case and the burden of introducing evidence. In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. This principle is enacted in sec.

101, and in this section the term "burden of proof", is used in the first of its meanings, namely, the burden of establishing a case. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task the prosecution is relieved by provisions of sec. 105 and its closely allied section, sec. 106. In sec. 105 the phrase "burden of proof" is clearly used in its second sense, namely, the duty of introducing evidence. The way of the accused under sec. 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception in the Penal Code, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt. The conclusion, therefore, is that if the Court either is satisfied from the examination of the accused and the evidence adduced by him or from circumstances appearing from the prosecution evidence that the existence of circumstances bringing the case within the exception or exceptions placed by the accused has been proved, or upon a review of all the evidence is left in reasonable doubt whether such circumstances do exist or not the accused, in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of the minor offence. 14 R. 666=1937 R. 83 (F.B.). *See also* 1941 A.L.J. 619=1941 A. 402 (F.B.) The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code but whether in setting up his defence he has established a reasonable doubt in the case of the prosecution and has thereby earned his right to an acquittal. 14 R. 666=1937 R. 83 (F.B.).

Sec. 102.—The section embodies a test as to which party would be successful if no evidence at all were given. 3 A. 85; 162 I.C. 21=1936 P. 243; 38 P.L.R. 427. In criminal cases the onus of proving be-



*Illustrations.*

(a) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts was left, to *A* by the will of *C*, *B*'s father.

If no evidence were given on either side, *B* would be entitled to retain his possession.

Therefore the burden of proof is on *A*.

(b) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies.

If no evidence were given on either side, *A* would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on *B*.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it

Burden of proof as to particular fact. is provided by any law that the proof of that fact shall lie on any particular person.

*Illustrations.*

(a) *A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

*B* wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

## LEG. REF.

<sup>1</sup>Sic in the Act as published in the Gazette of India, 1872, Pt. IV, p. 1, there is no illustration (b).

yond reasonable doubt the guilt of the accused is on the prosecution. 56 I.C. 849=24 C.W.N. 619. Execution of document admitted—Onus on executant to prove that he did not understand its terms even if he is illiterate. 1926 L. 692. See also 147 I.C. 591=1934 A. 226. The burden of of proving that a suit is barred under O. 2, r. 2, C.P.Code, is upon the defendant. 102 I.C. 31 (20 C. 716, Foll.). In a suit for ejectment, even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title deed on which he relies as having given him a title superior to that of the defendant is a valid one. 28 L.W. 82=1928 M. 840. When once the execution of a document is proved, if a party alleges circumstances that would make the document not binding on him, it is for him to prove such circumstances. 116 I.C. 143; 39 P.L.R. 42. Onus is on him to prove want of consideration. 1930 L. 65. Though as between parties to a document the admission of proof of execution would shift the onus on to the party denying consideration yet a person who is not a party to the document in question cannot be held liable on alleged receipts of payments unless there is evidence to prove that the money was actually paid. 1935 L. 14. It is for the person claiming the benefit from the disposition of property by a pardanashin to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. 1931 P.C. 100=61 M.L.J. 94 (P.C.).

Secs. 102 and 105.—The burden of proving the existence of circumstances bringing the case within the 'exception' or 'proviso' is no doubt cast on the accused by sec. 105, but this does not in any way absolve the prosecution of the burden laid

on it by sec. 102. The burden of proof so far as the entire 'proceeding' is concerned, remains on the prosecution even though the burden of the 'fact in issue' pleaded by the accused is cast upon him. Hence it is manifest that even in cases to which sec. 105 applies the prosecution has to prove the guilt of the accused. 1941 O.A. (Supp.) 885 (1)=1941 A.L.J. 619=1941 A. 402 (F.B.). See also 1937 R. 83.

Sec. 103.—Where a party claims an exception to the general provision of the law, the onus lies on him to prove that the exception applies. 12 R. 55=1934 R. 90. Where it has been admitted or proved that an admission of passing of consideration has been made in the document, the burden of proving want of consideration rests on the person asserting the same. 104 I. C. 173 [1935 L. 471 (F.B.)]; 1927 L. 272, Foll. 1926 L. 682]. See also 12 L. 540=1931 L. 419; (1941) 1 M.L.J. 257 (Burden of proof under sec. 14, Limitation Act—Good faith—Proof of). Where it is established that the consideration for the bond is different from that recited in the bond, the onus shifts on the plaintiff to prove affirmatively that the bond was executed by the defendant for the full consideration. 1939 M.L.R. 12 (C.). Agreement to sell immovable property—Subsequent registered sale—Right of first vendee to specific performance—Onus. 61 I.A. 115=13 P. 242=66 M.L.J. 255 (P.C.). Partition list proved—Onus to prove jointness is heavy on party alleging it. 1928 M. 865. Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm the onus lies on persons claiming through the deceased persons to prove that those properties belonged to him at the time of his death. 1929 S. 182. Where a suit by a purchaser is contested by the person in possession on the ground that plaintiff's vendor had no title to the property, the onus is on plaintiff to prove that his vendor owned the suit property.

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

*Illustrations.*

- (a) A wishes to prove a dying declaration by B. A must prove B's death.  
 (b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

105. When a person is accused of any offence, the burden of proving the existence of circumstances of bringing the case within

Burden of proving that case of accused comes within exceptions.

any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any

law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

*Illustrations.*

- (a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

- (b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

- (c) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

146 I. C. 445=1933 R. 174. When a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male holder, but also, *prima facie* that no nearer heirs are alive. 151 I. C. 338=1934 A. 117. Where once a mortgage has been admitted the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale. 57 I. A. 86=11 L. 199=1930 P. C. 91=59 M. L. J. 53 (P. C.).

**Secs. 103 and 106.**—If a Mahomedan wife sues her husband for dower payable on demand within three years from the date of the demand, and the husband pleads divorce and communication of the divorce to the wife at a time more than three years before the suit, the onus is on him to prove what he alleges in order to defeat the claim on the ground of limitation. 45 P. L. R. 231.

**Sec. 104.**—Letter posted is presumed to have reached addressee. 8 P. L. T. 633=1927 P. 305. See 1929 C. 459. On this section see also 1945 N. L. J. 489. In spite of presumption of marriage arising from long co-habitation the burden of proof of marriage actually lies with the person who desires to prove it. 1945 N. L. J. 489.

**Sec. 105: Principles of the Section.**—See 20 A. 459; 11 C. W. N. 1085; 1905 A. W. N. 2; 25 Cr. L. J. 1077; 1925 N. 37; 14 R. 666=1937 R. 83. Even in a case to which sec. 105 applies an accused may rely upon an exception in his defence and fail to prove it, and yet be entitled to a acquittal, for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on

record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal. 1939 S. 209=194 I. C. 474. Burden of proof that case comes within exceptions of the Penal Code. See 6 A. 220; 1898 A. W. N. 209. See also I. L. R. (1940) Kar. 249=1939 S. 209; 1940 P. W. N. 795. Once the prosecution is found to have established that an offence was committed by the accused the burden of proving the existence of circumstances bringing his case within any of the General Exceptions in the Penal Code or within any special exception contained in any other part of that Code must lie on the accused and the Court has to presume the absence of such circumstances. Thus the burden of proving that the accused had acted in exercise of the right of self-defence which is in the nature of an exception is on him. This burden can be discharged otherwise than by producing defence evidence but in those cases the version of the accused must be proved to have been established or in any case *prima facie* made out either by the prosecution evidence or by circumstances proved on behalf of the prosecution or elicited by the accused in his cross-examination of the witnesses for the prosecution. The accused need not be called upon to establish right of self-defence unless the prosecution has succeeded in proving a case. But in a case where it has succeeded in making out the main facts the prosecution cannot be thrown out merely because the prosecution evidence is to be regarded as unreliable on a few points. 45 P. L. R. 393. There is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included. 43 Bom,

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

L.R. 519=1941 Bom. 273. It is for the accused to prove the facts essential for the purpose of bringing his case within any of the exceptions. 144 I.C. 420=1933 R. 142. See also 165 I.C. 458=1936 O.W.N. 1013. Even though the accused denies in toto the facts alleged, if it appear from the evidence for the prosecution that there are reasonable grounds for holding that the case falls within one exception, the presumption enacted in the last line of S. 105 does not arise at all. The burden is on the prosecution to establish guilt of the accused beyond reasonable doubt, and if upon a review of all the materials on the record there appears a reasonable doubt as to whether the case falls within any exception, the prosecution has failed to discharge that burden, and the accused must be acquitted or convicted only of the minor offence, as the case may be. 14 R. 666=1937 R. 83 (F.B.). Exceptions not pleaded in Court below cannot be allowed to be raised in appeal. 21 A. 121; 23 C. 604; 3 A.L.J. 652; 17 B. 573; 8 I.C. 259; 8 C.W.N. 714; 7 A.L.J. 438; 4 P.W.R. 1910 (Cr.). Proof of right of private defence. 1 C.L.R. 60. An accused setting up a plea of self-defence in answer to a charge of murder has the burden on him to prove it. In the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence although the accused is shown to have had severe injuries on his person after the crime. 52 L.W. 884=1941 M. 280=(1940) 2 M.L.J. 1018. There appears in some quarters to be the opinion that where an accused person has admitted participation in a fight, in which one of the other party is killed or injured, but pleads that he acted in the exercise of the right of self-defence, it lies heavily upon him under all circumstances to prove under section 105 the facts necessary to establish his plea. It must be remembered that in the vast majority of such cases in this country the accused persons are usually the only persons who could appear as witness in their own self-defence and they are barred from doing so by the law of procedure. The Courts, therefore, must be prepared to take their statements into consideration. In a case where the prosecution evidence is wholly unreliable and there is no other evidence to suggest that that part of their statements in which they put forward the plea of self-defence is not correct, the Court has no other alternative but to accept their statements and act upon them. 43 P.L.R. 144=1941 L. 333.

**Burden of Proof in Special Cases.**—As to grave and sudden provocation, see L.B.R. (1893-1900) 257; private defence. 11 C.L.R. 234; 1904 A.W.N. 113; 1930 O. 438. Fact of marriage. 1939 A.W.R. (H.C.) 811. That game is a mere game of skill, see 13 Cr.L.J. 270=23 I.C. 484; as to possession of excess

quantity of liquor, see 2 I.C. 543; shifting burden of proof, Rat. 820; 4 C. 124.

**Illustrative Cases.**—Plea of insanity to be proved by the accused. 21 A.L.J. 776=77 I.C. 236=1924 A. 186 (2); 1935 O.W.N. 53. General exceptions under Penal Code—Onus lies on accused. But this does not mean that the accused must lead evidence. 45 A. 329=1923 A. 327 (2). See also 29 Bom.L.R. 713=1927 B. 436; 98 I.C. 707=1927 A. 119; 1939 S. 209; I.L.R. (1940) Kar. 249. The burden of proof in a criminal trial is always on the prosecution, and it is only shifted on to the accused in so far as the latter may set up the existence of circumstances bringing his case within any of the exceptions. The mere fact that the defence theory is rejected will not prove the guilt of the accused. 11 O.W.N. 1224=1934 O. 485. See also 14 R. 666=168 I.C. 193=1937 R. 83 (F.B.); 165 I.C. 458. Per Collister, J.—The onus is certainly on the Crown to prove all the facts which constitute the elements of the offence, and if there is any reasonable doubt left in the mind of the Court as to whether these facts have been established the accused person is entitled to the benefit thereof; but this general onus is subject by statute, to the special onus which S. 105, imposes on the accused person, and when the Legislature has enacted specific provisions in the Evidence Act as to what amounts to proof or disproof, the Court will not be justified in falling back upon the general principle that the Crown must prove the prisoner's guilt. 1941 A.L.J. 619=1941 A. 402 (F.B.)=I.L.R. (1941) All. 843. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. 45 A. 329=1923 A. 327 (2). See also 1941 A.L.J. 619=1941 A. 402 (F.B.); 3 L. 144=68 I.C. 113=1922 L. 1. Where in the case of a general fight it could not be said which party was to blame and which party was blameless it would not be proper consistently with justice to convict the members of either party by relying on S. 105. 1943 O.A. (C.C.) 88=1943 O.W.N. 146. Exemption from criminal liability—Unsoundness of mind. When unsoundness is pleaded as a defence to a criminal charge, the burden of proof rests on the accused. 50 I.C. 991=23 C.W.N. 621; (1940) 2 M.L.J. 1018 (plea of self-defence).

**Sec. 106: Scope.**—It contemplates facts which in their nature are such as to be within the knowledge of the accused and of nobody else, and has no application to cases, where the fact in question, having regard to its nature, is such as to be capable of being

*Illustrations.*

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

known not only by the accused but also by others—if they happened to be present when it took place. It cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. Section obviously refers to cases where the defence of the accused depends on his proving a certain fact, that is, cases where his guilt is established on the evidence produced by the prosecution unless he is able to prove some other facts especially within his knowledge which would render the evidence for the prosecution nugatory. 1936 A. 833=1936 A.L.J. 1124. Section applies only to parties to the suit. 37 C.W.N. 657=1933 P.C. 87=64 M.L.J. 413 (P.C.); 38 P.L.R. 427. See 14 R. 666=1937 R. 83. Sec. 106 was never intended to be sued to place upon the accused the burden of proving their innocence. Sec. 106 is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution but on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. Sec. 106 does not enable the Judge to say to the jury that the accused must explain this and that he must satisfy him on this point or that or be found guilty. 1939 S. 209=I.L.R. (1940) Kar. 249. The burden of proof referred to in sec. 106 is that of introducing evidence merely. This section does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge; nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain he ought therefore to be found guilty. 14 R. 666=168 I.C. 193=1937 R. 83 (F.B.). The burden of proving facts peculiarly within the knowledge of any person is on that person. See 9 W.R. 190; 1 P.L.I. 168; 47 M. 800; 20 I.C. 600=6 Bur.L.T. 129. See also 2 R. 549=1925 R. 143; 1942 N. 39; 1939 M.W.N. 883; 40 C.W.N. 938 (knowledge of plaintiff's right in design and user by defendant in trade-mark suit.) It is the duty of a party who has certain facts relating to his case within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to cross-examination by the other side. 139 I.C. 712=33 P.L.R. 906. Where a party does not go into the witness-box to support his allegations regarding facts which are within its special knowledge there arises a strong presumption against him. 138 I.C. 525=33 P.L.R. 207. A party's failure to go into the witness-box raises a strong presumption against the truth of his or her case. The fact of a party being a pardanashin lady is not a sufficient cause for not

getting into the box in as much as she could get herself examined on commission. 187 I.C. 317=1940 O.W.N. 375=1940 O. 266. Sec. 106 cannot be utilised to help persons who are representatives of other parties and who step into their shoes. 30 L.W. 968. Where the question is whether plaintiff is authorised by the Managing Committee of an institution to institute a suit on its behalf, and the proof of the minutes of the meeting of the Managing Committee constituting such due authority is available it is sufficient to discharge any burden on the plaintiff under sec. 106, 65 I.A. 106=I. L.R. (1938) L. 63=1938 P.C. 73=(1938) 1 M.L.J. 359 (P.C.).

**Illustrative Cases.**—(When the goods are solely under the control of the bailee, the fact as to when loss, destruction or deterioration occurred is a matter specially within his knowledge and therefore the burden of proving that the loss occurred at a particular time and not subsequently must be on him. 1932 A.L.J. 798=1932 A. 584. Where an instrument hired by a person was for all practical purposes in his exclusive possession, it is for him to explain how it came to be damaged. It is for him to establish that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree. 184 I.C. 36=1939 S. 245. Where a person accused of lurking house-trespass by night pleads in defence that he had a specific intention in entering the house, i.e., to carry on a love intrigue in secret and not intimidate, insult or annoy, the onus of proof is on him. 49 I.C. 103=40 A. 221; 37 A. 395=29 I.C. 67. See also 22 C. 164; 22 C. 591; 23 M. 152; 23 A. 124; 14 R. 666=168 I.C. 193=1937 R. 83 (F.B.) Employing girl as prostitute—Onus is on accused to show absence of intention—Penal Code, sec. 373. 71 I.C. 232=1922 C. 539. The presumption under sec. 106 is very weak as compared to the presumption of innocence when the trial is one for murder. If an accused after a case has been proved against him withholds evidence in disproof, inferences unfavourable to him may be drawn. 43 I.C. 241=19 Cr.L.J. 81=21 C.W.N. 1152. An accused person is always entitled to hold his tongue; but when the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain the absence of an explanation must be considered in determining whether the possibility should be disregarded or taken into account. 43 I.C. 605=19 Cr. L.J. 189. See also I.L.R. (1940) Kar. 547=1938 S. 209. The burden of proving

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. <sup>1</sup>[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is <sup>2</sup>[shifted to] the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

#### LEG. REF.

<sup>1</sup>Substituted by sec. 9 of Act XVIII of 1872 for "when".

<sup>2</sup>Substituted by *ibid* for "on".

the exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge does not lie on the mortgagee. 115 I.C. 451=1929 A. 209. In a suit for mesne profits, if the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. (47 M. 800 and 24 M. 475, Ref.) 38 L.W. 714=1933 M. 825. See also 21 Pat. 735. Though in cases alleging negligence against a public body the burden of proving negligence lies on the plaintiff yet the provisions of sec. 106 must be borne in mind. The fact that the burden of proving negligence may be on the plaintiff does not necessarily preclude the burden of proving any particular fact being upon the defendant public body. 1940 S. 254. Bailment—Hire of elephant for term of one year—Death of elephant before expiry of period of hire—Claim to damage—Negligence of bailee—Burden of proof. See 45 L.W. 158. See also 184 I.C. 36=1939 S. 245. Defendant intermixing his articles with those of plaintiff—Proportion of intermixture—Burden of proof. 15 P. L.T. 702=1934 P. 492. Where a person is charged with having been a member of an association declared unlawful by the Government under the Criminal Law Amendment Act, the burden of proof is not on the accused to prove that he discontinued his membership. It is for the prosecution to prove that he continued to be a member even subsequent to the notification by Government. The Act imposes no obligation on the member to do anything specific to terminate the membership and so there is no question of there being anything especially within the knowledge of the accused. 33 Bom. L.R. 90=55 B. 484. As to burden of proof in the case of material alteration of documents, see 25 A. 580 (F.

B.); 7 M. 302; 9 M. 399; 12 M. 239; 7 C. 616; 12 C. 313; 7 B. 418.

Sec. 107.—Sec. 107 does not apply to a petition for a declaration of nullity of marriage under the Indian Divorce Act. The Divorce Act governs such proceedings, and sec. 19 (1) indicates in plain language that a decree for nullity can only be given on proof of the fact that the former husband or wife was living at the time of the second marriage. There is no room left in such cases for the application of sec. 107, Evidence Act and it has therefore to be ignored. 1945 M.W.N. 651=58 L.W. 529=(1945) 2 M.L.J. 389. Presumption of life or death—Minor not heard of for some months—Mother appointed guardian. See 1 I.C. 465. Death—Presumption of—Inheritance depending on proof of person surviving female—Onus—Date of death. See 19 M. L.J. 502=2 I.C. 977. See also 11 I.C. 202. I.L.R. (1939) Kar. 509=1939 S. 234. There is no presumption as to death at any particular time. 4 O.W.N. 1074 (53 I.A. 24). See also 165 I.C. 586. It depends upon the circumstances of each case whether a Court would not make a presumption that a person last heard of within seven years is alive, even assuming that a Court may make such presumption. 37 M. 440=23 M.L.J. 443.

Secs. 107, 108 and 114.—The time or date of death of a person who has not been heard of for seven years and whose death is presumed under sec. 108, is not a matter of presumption, but of evidence. Neither sec. 107 nor sec. 114 of Act justifies such a presumption. The burden of proving that death occurred at a particular point of time is on the party who alleges the same. 21 Mys. L.J. 150 and 186.

Sec. 108.—When a person has not been heard of for seven years, there is a presumption that he is dead. There is no further presumption authorised by the Evidence Act. L.R. 3 A. 393 (Rev.); 1930 A. 427; 1941 O.A. (Supp.) 906=1941 A.W.N. (Rev.) 1125; 14 R.D. 672 (not heard of for 40 years). There is no presumption under sec. 108, that he died at the end of the first seven years, or at any particular date. It is the duty of the person who asserts death to prove the date of death. [5 P. 312 (P.C.), Rel. on.] 165

109. When the question is whether persons are partners, landlord, and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.
- Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

I.C. 586. See also 1943 O.W.N. (H.C.) 124=1943 A.L.W. 219; 21 Mys.L.J. 150 and 186; I.L.R. (1938) B. 155=40 Bom. L.R. 147=1938 B. 228. The only presumption which is enacted by this section is that the party is dead at the time of suit, but there is no presumption as to the precise time of his death. 32 P.L.R. 704=1931 L. 582 (F.B.); 11 C.L.J. 580; 6 I.C. 244; 8 A. 614; 23 B. 296; 35 C. 25; 54 I.C. 186; 1944 Pesh. 29; 100 I.C. 833=1927 L. 284; 22 N.L.R. 175=100 I.C. 446=1927 N. 104; 1928 O. 13; 53 I.A. 24; 1930 A. 427; 1944 O.W.N. 195=1944 O.A. (C.C.) 136; 19 Luck. 581. Sec. 108 is a proviso to sec. 107. The rule in sec. 108 supersedes the rules in Hindu and Mahomedan Law. 43 M.L.J. 725; 2 Beng. L.R. 134; 9 Luck. 401=1934 O. 41. There can be a presumption and inference of death irrespective of sec. 108. 103 I.C. 329=1927 A. 687. The rules as to presumption of death contained in this section would govern the case of a Mahomedan who was missing for more than seven years. (7 A. 297, Foll.) Where in order to succeed in a suit it is necessary for a person to establish that a particular person was dead at a particular time, he has to prove the factum of his death at the same time by affirmative evidence either direct or circumstantial. 1932 A. 365=1932 A.L.J. 175; 11 O.W.N. 793=1934 O. 298 (F.B.). Where a husband and wife perish in a same boat disaster, there is no presumption of law arising from age or sex or state of health as to survivorship among them, nor is there any presumption that both died at the same time. The question is one of fact depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined, the onus of proof being on the person asserting the affirmative. 77 C.L.J. 209. Where two brothers die in the same catastrophe and it is not known as to who died first there is no presumption either of survivorship or of contemporaneous death. In such cases the plaintiff must prove his assertion. Two brothers died in a fire and the widow of one of them sought to succeed to the entire properties on the ground that her husband being the younger of the two must be deemed to have survived the other. Held, there was no such presumption in the absence of direct evidence and that the onus of proving it lay upon her. 9 Luck. 461=1934 O. 101. Death of two persons by earthquake—No presumption of younger person surviving elder—If exists—

Burden of proof. See 71 I.A. 171=1944 A. L.J. 513=47 Bom.L.R. 591=I.L.R. (1945) Kar. (P.C.) 36=(1944) 2 M.L.J. 354 (P.C.). This section raises a presumption of death at the end of a continuous absence of seven years and not at the time when the question is raised or the suit is instituted. The party on whom the burden of proving the life of the absentee lies cannot get rid of that burden by admitting the absence's death at some subsequent time. 8 I.C. 55; 35 C. 25; 37 C. 103; 33 C. 173 (P.C.). (8 Bom.L.R. 226, Ref.). No presumption as to the death of a person at a particular time—Person relying on fact bound to establish it by evidence—No presumption that a person died leaving no heirs. 33 M.L.J. 295=42 I.C. 241; see 38 P.R. 1918=45 I.C. 73; 21 O.C. 143=46 I.C. 80; 1930 A. 427. Where a person is not heard of for seven years, there is no presumption that he died after the expiry of seven years from the time when he was last heard of. The presumption is only that he is dead at the time when the dispute arises. 115 I.C. 626. The entry of *mafrur* does not connote "decease" and because a person has not been heard of for many years it does not mean that the death can be presumed to have occurred at a convenient time for the computation of the twelve years. The Court can however presume that death occurred seven years prior to the date of dispute. 13 R.D. 385. A wife, who left her husband and is in the keeping of another, is not one of the persons who would naturally hear from him if he were alive. 117 I.C. 209=1929 N. 127.

Sec. 109: Construction.—"Have been acting as such"—Single instance—If sufficient, 40 L.W. 810. Continuance—Presumption of. See 18 C.W.N. 33=22 I. C. 383. When it is shown that the person in possession before the defendant was a tenant of the plaintiff at one time, it is for the defendant to show when the tenancy ceased and possession became adverse to the plaintiff. 28 M.L.J. 361=27 I.C. 804; 26 B. 410; 7 C.L.J. 202. Tenant for a year—Holding over—Presumption. See 39 I.C. 125. Where there is an admission that parties stood in the relation of principal and agent, the burden of proving that they have ceased to stand to each other in that relationship is on the party who alleges such cessation of relationship. 1935 L. 49. Where a tenant at will admits the tenancy, sec. 109 comes



110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

111. Where there is a question as to the good

into operation and there is a presumption against him that he continues as a tenant till he proves that the relationship has ceased to exist. 173 I.C. 222=1938 S. 16. On this section, see also 89 I.C. 674=1927 N. 99.

**Sec. 110.**—The presumption under S. 110 would apply only if the possession of the claimant (plaintiff) is *prima facie* not wrongful, and if the title of the defendant is not proved. It is necessary for the plaintiff to prove that his possession was of such a character as to lead to the presumption of title and not such a sort of possession as would be regarded as wrongful in its origin. The presumption under S. 110 will not apply when there is a statutory presumption in favour of the Government. I.L.R. (1942) Bom. 357=44 Bom.L.R. 295=A.I.R. 1942 Bom. 161. Admissibility of oral evidence to prove factum of gift under an unregistered lease. 4 I.C. 314. Inquiry at mutation by Revenue Officer—If relevant. See *ibid.* Where in a suit against the Secretary of State for declaration of the plaintiff's title to a certain vacant site, the plaintiff proved his possession for over 30 years, held, that the burden of proving that the plaintiff was not the owner was upon the defendant and that the mere classification of the land as village site by the Government had no legal effect whatsoever except on assertion of title. 33 M. 173=20 M.L.J. 71. Plaintiff is not bound to prove adverse possession for sixty years to establish his title as against the Secretary of State for India in Council. (*Ibid.*) By virtue of sec. 110 a person in possession is deemed to be owner until the contrary is shown. 41 P.L.R. 123. See also 45 Mys.H.C.R. 57=17 Mys.L.J. 510. Onus on the party out of possession—Shifting of onus see 4 Bur.L.T. 159=111 I.C. 777. Presumption from judicial possession—Suit against Government, see 6 S.L.R. 210=19 I.C. 565. In the case of a boundary dispute between the parties the possession of the disputed land is an important element to be taken into consideration in determining the dispute. 1941 S. 632; 197 I.C. 756. Sec. 110 no doubt enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumption, must yield to proof. Where therefore title is proved or assumed the presumption created by sec. 110 can no longer apply. Madras Land Encroachment Act, sec. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property including the beds of tanks. There is no conflict between sec. 110, and this provision. The title of the Government being statutorily declared, the rule of presump-

tion enacted by sec. 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner. 1938 M.W.N. 244=47 L.W. 438=1938 M. 193. The onus laid on a party by sec. 110 is discharged by his showing that the possession enjoyed by the other party rests on a basis inconsistent with a right of property. 172 I.C. 981=1938 P.C. 87 (P.C.). "Possession"—Meaning of—Suit for possession of house site in village—Plea by Government that it is a passage—Failure to prove—Plaintiff proved to have tethered cattle stored grass and built otli—Effect of—If warrants inference of title—Burden of proof—Not thrown on defendant (Government). 39 Bom.L.R. 216=1937 B. 193. A plaintiff who has omitted to sue under sec. 9 of the Specific Relief Act, when first dispossessed, is not debarred when the summary relief under that section has become barred by limitation, from relying, in a suit for ejectment, on this section. As soon as he has proved that the defendant has dispossessed him, the onus is thrown upon the latter to prove his title. 2 P.L.J. 61; 38 I.C. 797. Where nothing else is known, the person in possession of property is presumed to be owner. 45 I.C. 217. Where plaintiff is in possession alleging ownership onus of proving that he is not owner lies on defendant. 103 I.C. 36. But where defendant is in possession the onus is on plaintiff. 10 L.L.J. 488. The mere fact that defendant claimed rent could not defeat the presumption of title arising in plaintiff's favour from the fact that the plaintiff had possession when the suit was instituted. 36 P.L.R. 64=1934 L. 324. Under this section it is presumed that a woman has power to dispose of all property which was in her possession at the time of her death. 1927 O. 618. Prior peaceful possession is *prima facie* evidence of ownership under sec. 110, and is a good title against all persons except the true owner and can be relied on in successfully maintaining a suit for ejectment against another who has no title to the land in disputes. 118 I.C. 680 (1). Where a person is in possession of property and he uses it for four months of every year for tethering his cattle such possession is *prima facie* evidence of title, but Court should not say that the person's ownership is established. 119 I.C. 701=1929 N. 318. See also 1936 P. 602.

**Sec. 111.**—Sec. 111 relates transactions entered into by persons between whom there is fiduciary relationship. 165 I.C. 597 1936 O.W.N. 1106=1937 O. 56. See 78 I.C. 850=1925 O. 18; 8 N.L.R. 150=17 I.C. 363; 36



Proof of good faith in transactions where one party is in relation of active confidence.

faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

*Illustrations.*

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within

Birth during marriage conclusive proof of legitimacy.

two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage has no access to each other at any time when he could have been begotten.

C. 493=2 I.C. 553; 25 A. 358; 30 M. 169 (F.B.) (Donor and donee); 18 C. 545 (P. C.) (Agent and principal); 11 M.L.A. 551; 20 A. 447 (Husband and wife); 1926 N. 414 (Deed by pardanashin lady.) As to whether the presumption in favour of purda woman should be extended to every illiterate and ignorant woman, see 10 Mys.L.J. 217. Person in position of active confidence—Burden of proving bona fides of transaction is on him. 1933 L. 861. Sec. 111 cannot come into operation unless the good faith of the parties is questioned by any one. In the absence of any allegation as to want of good faith by the plaintiff, no Court can assume this fact suo motu and place the burden of proof of good faith on a defendant. 1943 R. D. 173. Sec. 111 has no application itself, as between parties to the transaction itself. It does not apply where the sole dispute on the pleadings is not one of the bona fides of any particular transaction, but is one as to the real nature of the transaction itself. When a question which is entirely outside one of good faith) and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, it does not mean that the method of impugning it should be different or the things to prove should in any way be varied. 1938 R. 412. Where a pleader who was engaged by a judgment-debtor in an execution proceeding advances money to him to pay off the decretal amount and takes a mortgage on the judgment-debtor's property in favour of his son, thereby securing a long term and profitable investment for his money, in view of the fiduciary relation existing between the pleader and his client it is incumbent on those seeking to enforce the mortgage to prove the utmost good faith on the part of the pleader in persuading his client to execute the mortgage. As the pleader knows that the onus

of supporting his transaction would rest upon him, he must preserve the evidence which would be required to support it, if he desires that it should be upheld. 1936 O.W.N. 1033=164 I.C. 945. See also 1940 O.A. 910 (P.C.). Where the fact of undue influence was not seriously disputed the burden lies on him who desires to show that no undue influence was used and the transaction was made in good faith. 1934 A.L.J. 817=1934 A. 507. To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. It must be further established that a person in a position of domination has used the position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. 10 L. 761=1929 L. 369.

**Sec. 112: Proof of Paternity of Child.**—The effect of sec. 112 is that where a child is born during lawful wedlock, that child will have to be assumed to be the child of the man who was at the time the husband of the mother, unless it is shown that they had no opportunity of sexual intercourse in consequence of which the child could have been begotten. Every assumption is to be made in favour of legitimacy of a child born in lawful wedlock, and the onus of proving non-access or illegitimacy, is on the party alleging the same. The law requires in such cases the positive proof of a negative fact, that is, non-access as between the parties to the marriage and the mere fact that they are living separately in two different houses is insufficient to establish non-access. The fact of non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character, but unless such evidence is forthcoming, it will not be

possible for any Court "to believe it to be probable that there was no access". An entry in the birth register containing the name of the mother only does not warrant the inference that the child born is not illegitimate. An entry in the birth register may be relevant under sec. 35 to show the date of birth, but the question as to how far the fact that the name of the mother and not that of the father was given by the informant would bear on the question of the child's legitimacy, even if it is assumed to be relevant, depends largely on the means the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant is a stranger, who did not know the father, the statement, even if relevant, would be wholly unimportant, and the entry would be of no value when the informant is not examined and no explanation is given for his non-examination by the party relying on the entry in support of his plea of illegitimacy. 54 L.W. 411. See also (1943) 2 M.L.J. 108; I.L.R. (1942) Nag. 383=1942 N.L.J. 254=1942 Nag. 96; 1942 Mad. 129. Sec. 112 can have no application to a case where the maternity of a person is in dispute and not his paternity. 188 I.C. 1=52 L.W. 57=72 C.L.J. 263=1940 P.C. 93 (P.C.). In proceedings under sec. 488, Cr.P. Code, an admission of paternity of an illegitimate child by the alleged putative father is irrelevant in view of the clear wording of sec. 112, if the applicant mother fails to prove that she and her husband had no access at the time when the child could have been begotten. 1941 M.W.N. 1037=(1941) 2 M.L.J. 693=1942 Mad. 251; 56 L.W. 383=(1943) 2 M.L.J. 108. As to presumption of legitimacy from marriage in the case of Mahomedans, see 1936 A. 528. The word "access" means no more than opportunity of intercourse. 12 R. 243=1934 P.C. 49=66 M.L.J. 288 (P.C.) See also 54 L.W. 411; (1941) 2 M.L.J. 693; 1942 N.L.J. 254=1942 Nag. 96; I.L.R. (1945) Mad. 53=1944 1 M.L.J. 285. The burden of showing that parties to marriage had no access to each other at any time when child could have been begotten is on the person challenging legitimacy of the child. 66 M.L.J. 288 (P.C.). The parties to marriage were in touch with each other, residing for a short period in reasonable proximity, the wife being in the house of a relative of the husband. There was nothing to suggest that she was unfaithful or that the parties were on terms of personal hostility. Held, that if the child could have been begotten during this period, his legitimacy was undeniable. 66 M.L.J. 288 (P.C.). Nature of presumption under the section explained. 1934 M. 310=66 M.L.J. 279. See also 1934 M. 318=66 M.L.J. 283. The terms of sec. 112 must be given their due effect and any evidence to the effect that a wife has been leading an improper life, even if the Court should be prepared to accept it as true, will not rebut the presumption en-

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acted in that section. A statement by the husband that a child in the womb of his wife was not his child and must have been procreated by somebody else is not entitled to any weight; nor does it amount to such proof, even assuming it to be true, as will displace the effect of sec. 112. The fact that the parties are governed by the Mahomedan Law makes no difference, so far as the application or effect of the presumption under sec. 112 is concerned. The fact that under that law there may be a divorce of a wife by the husband making oath accompanied by an imprecation as to his wife's fidelity, and that if he denies the parentage of the child with which the wife is then pregnant, it will be bastardised, cannot override the presumption enacted in sec. 112. 1937 M.W.N. 957. See also 1937 L. 266. Competency of husband or wife to give evidence of non-access—See I.L.R. (1945) Mad. 53=(1944) 1 M.L.J. 285. The presumption under sec. 112 applies quite irrespective of the fact whether the mother was married or not at the time of the conception. 1937 L. 784. The case of a married woman stands on a different footing from that of a spinster or a widow who may be living as a mistress with somebody. For a mistress it may be open to prove that the real father of the child born during the period of her concubinage is different from her paramour. In such a case the presumption which would naturally arise in respect of paternity of the child in favour of the paramour is capable of being rebutted. I.L.R. (1942) Nag. 383=1942 N.L.J. 254=1942 Nag. 96. In a divorce case where the paternity of the infant is in question, neither husband nor wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock. 39 P.L.R. 262=1937 L. 176. Sec. 112 merely requires proof to the satisfaction of the Court that the parties had no access to each other, not that there was no possibility of access. A finding that there was no access is a pure finding of fact. 150 I.C. 306=1934 N. 124. As to when the presumption is rebutted, see 1937 R. 67. The presumption regarding legitimacy cannot be rebutted by circumstances which only create doubts and suspicions. 39 P.L.R. J. & K. 51. See also 54 L.W. 411. Where the question of paternity is one of evidence only, the case is governed by sec. 112 and not by the personal law of the parties. 26 I.C. 996=16 Cr.L.J. 84. A legal presumption in favour of legitimacy will arise only if it is proved that there was a valid and lawful marriage between the parents of the person whose legitimacy is in question. But the burden of proving such a lawful marriage is on the person who claims to be legitimate, and if he does not establish that, he cannot rely on the presumption so as to shift the burden of proving the contrary on to those who allege illegitimacy.

113. A notification in the [Official Gazette]<sup>1</sup> that any portion of British Territory has<sup>1</sup>[before the commencement of Part III of the Government of India Act, 1935,] been ceded to any Native State, Prince or Ruler,<sup>2</sup> shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

#### LEG. REF.

<sup>1</sup>Inserted by A.O., 1937.

<sup>2</sup>See for example, Gazette of India, 1873; Pt. I, p. 2.

1935 O.W.N. 25=1935 O. 80. See also 1944 O.W.N. 82=1944 O.A. (C.C.) 27; 20 Luck. 108. The presumption of legitimacy created by sec. 112 can be rebutted only by proof of non-access leaving no room for doubt. If the husband has had access, the wife's adultery will not justify a finding of illegitimacy—Proof of impotence would be equivalent to proof of non-access. 26 I.C. 996=16 C.L.J. 84; (1914) 11 U.B.R. 23; 10 I.C. 389=(1911) 1 M.W.N. 312; 77 P.R. 1911=12 I.C. 946; 22 I.C. 409. See also 1 Luck. 71; 5 Mys. L.J. 249. Where the legitimacy of a person is challenged in a suit, a mere finding to the effect that the husband after the marriage, remained outside for long periods, that on his return from one of these periods of absence he found cause to be dissatisfied with the conduct of his wife and denied his paternity of the child born to her, is not sufficient to meet with the requirements of sec. 112. In order to fulfil the requirements of sec. 112, it is necessary to prove that during the period there was no occasion for the wife to meet her husband. 1937 L. 266. As to burden and nature of proof to prove non-access, see 1932 M. 39=61 M.L.J. 878; 1932 M. 44=61 M.L.J. 874. Where a married woman claimed maintenance from the petitioner on the ground that he was the putative father of her minor children, held, that as the evidence did not establish non-access to the woman of her own husband who live in the vicinity no order for maintenance can be passed. 1932 M.W.N. 1217. See also 1942 Mad. 251=(1941) 1 M.L.J. 693. Where the parents married in 1897 but the wife deserted the husband in three months thereafter and lived with a paramour near her husband's village and the evidence was that all through she had been living with her paramour and there had been no kind of access between the husband and the wife, it was held that the presumption as to the legitimacy of a son born in 1901 was, in the circumstances, rebutted. 1934

M. 318=66 M.L.J. 283. Competency of discharged co-accused to testify in the case. See 9 Cr.L.J. 370; 4 L.B.R. 362. A child born 11 months after marital intercourse between its parents had ceased is illegitimate. 38 M. 466=25 M.L.J. 594 (F.B.). See also 27 M.L.J. 580=26 I.C. 61. Where there is an acknowledgement by parents as son by repute and habit for a long time, the burden is on the other side to disprove the presumption of paternity by other reliable evidence. 102 I.C. 713=1927 M. 733; 34 P.L.R. 914=1933 L. 520. As to applicability of section, see 48 A. 625; 7 L. 368; 49 M. 553; 17 Luck. 416=1942 Oudh 143. Word "valid" in section means flawless, and hence presumption will not apply in case of 'fasid' marriages under Mahomedan Law. 1926 O. 231. Difference between English and Indian Law. 28 Bom.L.R. 607. As to proof needed to establish paternity, see 1926 M. 1130. Child born nine months after death of father presumed to be legitimate. 123 I.C. 550=1930 P.C. 139 (2)=58 M.L.J. 708 (P.C.). In order to disprove legitimacy it must be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Where the evidence showed that the father was living in another place and nothing more was proved, held, that the presumption under sec. 112, applied and that there is no question of divorce under those circumstances. 1929 M.W.N. 696. A son was born to a Mahomedan wife 419 days after her husband's death. Held, that the period of gestation was so extraordinarily unusual as to be suspiciously improbable and rebutted all assertions of mother's chastity. 120 I.C. 495=1930 L. 97.

Sec. 114: Scope of Section.—Section is not exhaustive. 46 P.L.R. 355, Sec. 114 includes, but is not limited to the presumption of 'regularity'. 160 I.C. 332=1936 C. 1. The effect of sec. 114 is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging the effect of particular facts and they are to be subjected to no technical rules whatever on the sub-

*Illustrations.*

The Court may presume—

- (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;
- (b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;
- (c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;
- (d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;
- (e) that judicial and official acts have been regularly performed ;
- (f) that the common course of business has been followed in particular cases ;
- (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ;
- (h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer if given, would be unfavourable to him;
- (i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—

ject. 151 I.C. 473=1934 C. 719 (F.B.). See also 164 I.C. 385=1936 R. 332; I. L.R. (1937) M. 299=(1937) 1 M.L.J. 543=1937 M. 182. The words of sec. 114 are general and there is no reason why a Court should not invoke the aid of that section in proper cases and raise a presumption as to the genuineness of old accounts even when they are unsigned if they come from proper custody and appear to have been kept regularly regard being had to the common course of private business. 45 P.L.R. 441. Presumption and inference, difference between. See 25 A.L.J. 833. Sec. 114 applies not only to civil but also to criminal cases. 187 I. C. 127=41 Cr.L.J. 401 (2)=1940 S. 42. Presumption as to ordinary course of business. Where a Judge signs a decree, the presumption is that he has satisfied himself that it had been prepared in accordance with the judgment. 10 O.W.N. 884=1933 O. 466. If the only evidence available is an order of the Court showing that attachment had been made, it would no doubt be presumed that all the necessary formalities were complied with. But where the execution record is available and the process-server's report regarding the attachment does not show that any copy of the order was posted on a conspicuous part of the Court house, the initial presumption is what is not mentioned therein was not done. 41 P.L.R. 149=1939 L. 284. If an official act has been proved to have been done, it must be presumed to have been regularly done. 182 I.C. 982=20 P.L.T. 677=1939 P. 364. Where sums are paid before the presiding officer of the Court at the time when a receipt was given for them, the presumption under sec. 114, is that the ordinary course of business was followed in the case in question. 1923 L. 566. The mere statement by appellant's counsel that these sums are not always paid at the time when the receipts are given was sufficient to throw the onus on the prosecution of proving that the plea was wrong. 1923 L. 566. Where the appear-

ance of a legal practitioner had been noted by the Judge in his own handwriting but the legal practitioner denied his appearance, such denial being neither supported by the record, nor proved by any independent evidence. Held, that both on principle and authority it is the record made by the presiding Judge that is conclusive on the point and not what the practitioner chooses to state after four years. 12 Mys.L.J. 311=39 Mys.H.C.R. 461. School-leaving certificate issued by foreign State—Presumption of correctness. 99 I.C. 307=1927 B. 11. Where sons are recorded as jointly owning lands the presumption that their father owned it cannot be raised. 8 L. 30. Adoption ceremonies—Person enjoying status of adopted son for nearly 50 years—Presumption. 1937 L. 626. In a suit for redemption of an old mortgage where the original mortgagor is dead, and there is a lack of evidence owing to lapse of time presumptions are permissible to fill in gaps in the evidence which has been obliterated by the passage of time. 171 I. C. 174=1937 N. 43. The mere fact of marriage raises no presumption with regard to any properly standing in the name of a wife that the beneficial interest, must be in her husband. Before any such presumption can arise there must be some evidence that the property did not really belong to the wife but to the husband though standing in the name of the wife. 140 I. C. 678=1932 C. 829. An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so. When therefore a rice mill is notified under sec. 193 (1), Local Boards Act, it must be taken that the President of the Panchayat Board issued the notification in conformity with the law and cannot be said to be invalid. 138 I.C. 583 (1)=1932 M. 508 (1924 M. 375, Rel. on). When a document is accepted by the Sub-Registrar as duly presented there is an initial presumption that the document was duly presented and that the person presenting it was duly authorised

to do so. 15 L. 694=1934 L. 452. Under sec. 114 there is a presumption not only that official acts are regularly performed but also that ordinary business acts are normally carried out. Therefore, in the absence of any evidence to the contrary the Court can presume that a power-of-attorney which was stamped was in fact stamped by the proper officer in the Financial Commissioner's office. 196 I.C. 619=43 P.L.R. 499=1941 L. 345. As to presumption of regularity of official acts in settlement proceedings, see 1939 P. 364. See also 1941 R.D. 198. Police officer asked to remember certain date refusing to refresh memory—Adverse inference may be drawn. 164 I.C. 373=1936 L. 707. So also in the case of a party ordered to appear for further cross-examination not so appearing. See I.L.R. (1937) C. 203=64 C.L.J. 80=1937 C. 129.

**Value of Presumption.**—Conflicting presumptions neutralise each other and leave the case at large to be determined solely on the evidence given. 38 C.W.N. 861. When an accused was convicted under sec. 412 of the Penal Code, and the Judge holding that under sec. 114, he must be presumed to have known the nature of the dacoity, awarded him the maximum penalty, held, that as the presumption alone would not justify fixing the accused with knowledge, that the goods recovered from him had been obtained by dacoity, the sentence was excessive. 59 I.C. 204=32 C.L.J. 89. Presumption of fact are assumptions resulting from one's experience of the course of natural events of human conduct and human character, assumptions which one is entitled to make use of and has to make use of in the ordinary business of life as well as the business of Courts. A Judge of fact may raise such presumptions to assist him, if he thinks them likely in relation to the facts of the case with which he is dealing. It is always a question for the judge of fact in any particular case whether he will make use of such an assumption, whether he will raise such a presumption of fact. His discretion in the matter is subject to reconsideration by an appellate Court, if there is an appeal on facts. If the burden of proof lies upon one party, it is not reasonable to raise a presumption of fact which begs the question in favour of that party. 14 Mys. L.J. 491=42 Mys.H.C.R. 163.

**Course of Natural Events.**—An inference of approbation of a book of an objectionable character by persons having access to the library of an individual or association possessing it is not necessarily justifiable. 16 I.C. 257=16 C.W.N. 1105. Human conduct—Discovery on information.—When a man points out unknown matters to others, one may presume under sec. 114 that he is connected with the crime unless he can give some satisfactory explanation as to how he

comes by that knowledge. 47 B. 74=24 Bom.L.R. 803=1923 B. 183. Where a lessee of a wakf property prima facie proves a heritable right in the tenure at a fixed rate an assumption that the grant was originally lawful can be made. The presumption of an origin in some lawful title which the Court has so often readily made in order to support possessory rights, long and quietly enjoyed where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law but even considered as an inference from proved facts the grant presumed is the thing which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made nor is it one which a certain class of possessors is entitled to de jure. 34 C.W.N. 462=1930 P.C. 103=58 M. L.J. 641 (P.C.). Presumption of fact—Mortgage deed endorsed by mortgagee as fully satisfied—Presumption of satisfaction. 30 N.L.R. 196=1934 N. 29. A document on plain paper unstamped and unregistered and not produced till it was filed is presumed to be not genuine. 1930 P. 78. Of two conflicting statements of witness, the statement against interest should ordinarily be preferred. 1930 P. 293. The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. 38 C.W.N. 763=1934 C. 707. No presumption can be made that a state of things that once existed continued to exist when that would militate against the fundamental presumption of law in favour of innocence. So merely because a person is shown to have been a member of an assembly before it was declared unlawful, he cannot be presumed to have continued as a member thereof after it was declared unlawful, because the initial presumption of law is in favour of innocence and lawful conduct. 33 Bom.L.R. 90. Common course of conduct can only be that which is most common in the experience of the Judge who has to decide the point. 1928 N. 52. In the case of a young woman giving birth to her first child and entirely unattended during the process no presumption can reasonably be made under sec. 114 that the child was born alive. 1941 Pesh. 22.

**Abandoning Accused—Presumption.**—No presumption as to guilt can be raised from the fact that the accused has absconded. 21 I.C. 473=24 Cr.L.J. 601. See also 49 A. 57. No adverse inference can be drawn against accused for not disclosing his defence in the preliminary enquiry stage. 8 P.L.T. 656=1927 P. 292. It is to be presumed under sec. 114 that every official act is properly performed, but this presumption is hardly sufficient to satisfy a Court that such precautions have been taken as to render an identification truly valuable, e.g., mixing the

accused in a large number of men dressed all alike. 67 I.C. 721=1922 L. 31.

**Other miscellaneous presumptions.**—Things prescribed by statute may be presumed to have been properly done. 48 A. 766. Presumption that a Court is satisfied about service of notice. See 102 I.C. 12=1927 L. 506. The possession of full bottles of wine in a person's house when the number of bottles is less than that allowed by law does not raise the presumption that the bottles were for sale. 14 I.C. 968=13 Cr.L. J. 424. The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge participated in the act of concealment, if the place is not his own. 43 P. L.R. 600=1941 L. 471. It is more than doubtful if any presumption under sec. 114 can arise against any person merely because his finger-prints were found upon a piece of stolen property. 196 I.C. 679=1941 C. 479. Legitimacy—Connection between man and woman permanent—Presumption. 62 I. C. 769=13 L.W. 511. A presumption of marriage may be drawn from long co-habitation, but if it is known that the connection started in mere concubinage, this presumption cannot arise. 98 I.C. 887=1927 L. 48; 1929 R. 64; I.L.R. (1942) 2 Cal. 299=46 C. W.N. 729=76 C.L.J. 301=1943 Cal. 76. In spite of the presumption of marriage arising from long co-habitation, the burden of proof of marriage actually lies with the person who desires to prove it. 1945 N.L.J. 489. Also the relationship of concubinage once found to exist is presumed under the law to continue until the contrary is proved. 98 I.C. 887. When signature on a document has been proved it is for the person signing to prove that it was affixed by him otherwise than voluntarily. 25 A.L.J. 883. The ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary. 48 C.L.J. 502=1929 C. 283. It might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity, was, in fact, done first. 1929 N. 257. The law presumes in favour of marriage and against concubinage when a man and a woman have cohabitated contemporary for a number of years. 56 I.A. 201=10 L. 725 (P.C.). But in case of persons who cannot prima facie contract a valid marriage living together as man and woman there is no presumption of valid marriage. 1929 N. 343. Where the long delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach

great importance to such presumption in testing the credibility of the evidence actually given. (14 M.I.A. 67; 1924 P. C. 137, Foll.) 118 I.C. 154=1929 A. 561. Failure of party coming forward with a case to give evidence on matters within his knowledge, ought to be a weighty factor when the value of the case put forward on his behalf is appraised. 36 P.L. R. 280=1934 L. 398; 148 I.C. 45=1934 L. 63 (2). Suit for breach of contract—Defendants denying any knowledge of contract—Defendants not going into witness-box—Inference need not be adverse to defendant. 149 I.C. 1119=1934 L. 59. It cannot be said that because a party does not examine all the persons named as witnesses, it should be presumed under S. 114 that the party's case must be false or that the allegations of the other side must be true. 1945 A.M.L.J. 77. Best evidence not produced though available raises adverse presumption. Inconsistent pleas and not proving pleas raised indicate falsity of defence. 33 C.W.N. 430=1929 P.C. 99=57 M.L.J. 565 (P.C.). Where there is no evidence that a non-compoundable offence was compounded, it is to be presumed that the Criminal Court acted according to law, and the presumption is that the criminal case was withdrawn and not compounded. 116 I.C. 749=1929 A. 456. Where a wife alleging that her husband is dead, fails to produce such evidence as she ought to know, a presumption arises against her. 117 I.C. 209=1929 N. 127. Where a mother and daughter met their death in the Quetta earthquake and there is no reliable evidence to show which of the two died first, there can be no presumption in law that the elder died before the younger. I.L.R. (1939) Kar. 509=183 I.C. 717=1939 S. 234. If an accused is to be convicted on his confession it must be taken as a whole and it would be unsafe to use the part against him and discredit the part in his favour. 1928 M. 493 (1)=54 M.L.J. 607. The mere signing of an entry does not raise an irrebuttable presumption of law against which no evidence can be let in. 1928 L. 820. Admission of execution of deed before Registrar—Presumption that the deed is valid. 1930 A. 605. Sec. 114 does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. 35 C.W.N. 133=1930 C. 815.

**Illustrations—Scope of.**—The Illustrations appended to sec. 114 are not statements of the law qualified only by particular exceptions. They are merely what they call themselves, illustrations or instances of the application of certain maxims out of many possible instances. 69 I.C. 257=17 N.L.R. 113. The illustrations appended to sec. 114 are not intended to lay down rules of law which are exhaustive of the



resumptions that may be made under the provisions of the section itself or that they be intended to apply without exception. They are merely examples of circumstances in which certain presumptions may be made and other presumptions of a similar kind in similar circumstances may be made under the provisions of the section itself. Hence, it would be a reasonable inference to presume that people had committed theft or burglary if they were seen the next day with the stolen property in circumstances which suggested division of the booty. 944 A.L.J. 411=1944 A.W.R. (H.C.) 49=A.I.R. 1944 All. 281. See also 46 P.L.R. 355. S. 114 is general in its terms. Illustration (a) is only an illustration, and the fact that the section does not provide an illustration with reference to a dacoity does not mean that where the accused is in possession of property stolen at a dacoity, no presumption can be made either that he was one of the dacoits or that he had dishonestly received or retained the property, knowing or having reason to believe that the possession had been transferred by dacoity or knowing or having reason to believe that it was stolen property. 49 C.W.N. 392=A.I.R. 1945 Cal. 421. A Court may, in appropriate circumstances, presume that a man who is in possession of stolen goods soon after a theft, is either the thief or has received the goods knowing them to be stolen unless he can account for his possession, because if he cannot account for his possession he is likely to be the thief or to have received the goods knowing them to have been stolen. This applies to property criminally misappropriated which is also "stolen property". 58 L.W. 209=1945 M.W.N. 107=A.I.R. 1945 Mad. 208=(1945) 1 M.L.J. 202. See also (1943) 2 M.L.J. 334. The illustrations to sec. 114 show the extent to which Court may draw presumptions and clearly sec. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots her husband, an inmate of the house, must have slept on the other cot on a particular night. 1939 S. 30; 1939 S. 234=1939 (Kar.) 509. The question as to what amounts to recent possession sufficient to justify the presumption of guilt in any particular case, varies, according as the stolen article is, or is not, calculated to readily pass from hand to hand. But the strength and nature of such presumption must vary according to the seriousness of the offence and the nature of the property involved. 109 I.C. 801=1928 N. 213. See 111 I.C. 832 for nature of possession necessary. The mere fact that the accused person points out the place in which the stolen property is concealed does not give rise to any presumption under sec. 114 or justify his conviction of the offence of receiving stolen property. But that presumption would arise when the accused is

not able to account for his possession of such stolen article. 32 Bom.L.R. 574=1930 B. 244. Accused proved to have disposed of property stolen—No evidence as to theft—Conviction not sustainable. 54 B. 171=1930 B. 155. When a presumption arises against the accused by reason of the proof of his possession of stolen property, he is no doubt required by law to account for his possession. But it does not necessarily mean that he should prove his plea to the hilt. It is enough if his explanation might reasonably be true and consistent with innocence. 1944 A.L.J. 445=1944 A.W.R. (H.C.) 272. The presumption that a person in possession of goods obtained by theft is aware of that circumstance is not confined to charges of theft but extends to all charges, however penal, not excluding even murder. 9 P. 606. Finger prints of accused found on plea of stolen property—Presumption: See 43 Cr.L.J. 64. The fact that cloths with blood stains are discovered in the house of the accused in a murder trial does not entitle the Court to make any presumption against the accused as to his guilt or as to the stains being of human blood, though the cloths admittedly belonged to the deceased. If the prosecution proves that any stain of human blood is found on the cloths, the accused might be called on to explain the fact, but when the prosecution failed and there was no evidence to prove that the stains were of human blood, the Court is wrong in making a presumption. 11 O.W.N. 969=1934 O. 373. See also 11 O.W.N. 950=1934 O. 388.

Illustration (a).—Ill. (a) to sec. 114 relates only to stolen property obtained by committing theft. In the case of property obtained by criminal misappropriation, although such property would no doubt be stolen property, the inference that a person who subsequently got possession of such property must have known that it was "stolen property," cannot be drawn in the case of such property, 1943 M.W.N. 580=56 L.W. 547=(1943) 2 M.L.J. 334. See also 1945 Mad. 208=(1945) 1 M.L.J. 202. The condition precedent for the application of Ill. (a) to S. 114, is that the accused must be in possession of stolen goods. But the production of property by itself would not necessarily prove his possession. It would at the most show that the accused had knowledge where the property was kept or concealed. Where the accused without stating that he had concealed stolen property, merely produces it from a place to which other people could have access, it would not be sufficient to establish his possession even though the property may be concealed, because it is consistent with any other person having done so and the accused might have merely knowledge of it. In the absence of any incriminating statement made by the accused leading to the discovery of property its production alone from another man's property or place or from a place of which he had only



as to *illustration (a)* a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

joint possession would not be sufficient to establish his possession. The possession of the articles must be clearly traced to him in order to justify the presumption under the Illustration. 47 Bom.L.R. 63=A.I.R. 1945 Bom. 292. This illustration does not mean that the burden of proof is shifted on the accused. If the accused gives any explanation which in the opinion of the jury may possibly be true, although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case. 1933 Cr.C. 1523=1933 A. 893. See also 43 Cr.L.J. 911=1942 Pat. 439=1942 P.W.N. 35=23 Pat.L.T. 18. The following propositions regarding the burden of proof in criminal trials may be deduced from the decided cases:—General (1) That in a criminal case the onus of proving the main issue is always on the prosecution and it never shifts on to the accused. Conspiracy:—(2) That in a case of conspiracy, it is not enough that the prosecution theory is one theory which will explain the fact but it has got to be shown that it is the only theory which in a reasonable sense is compatible with the facts. (3) That under Ill. (a) to S. 114 of the Evidence Act, the Court may, but is not obliged to, make the presumption therein mentioned. (4) That even if the Court makes the presumption under Ill. (a) to S. 114 of the Evidence Act, the onus on the general issue is still on the prosecution. (5) That it is not the law that if the accused fails to account for his possession of the goods said to be stolen goods he must be convicted, if the other proved facts of the case do not predicate guilt. (6) That the accused is entitled to acquittal if he can give an explanation which may reasonably be true although the jury may not be convinced that it is true. (7) That the accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so; particularly, if he alone knows the facts, for he cannot give evidence on oath on his behalf. (8) That the accused need not even give any explanation unless he is asked to account for his possession (Query). I.L.R. (1944) 1 Cal. 595=218 I.C. 345=46 Cr.L.J. 465=A.I.R. 1945 Cal. 93. The onus in a criminal case always rests on the prosecution and never shifts on to the accused. Before raising a presumption of guilt under sec. 114 (a) the jury or the Court will be entitled to take into consideration the explanation of the accused in defence, whether supported by evidence or not and to find out for itself whether the explanation given by the accused even though not believed in its entirety is such as to raise a reasonable doubt in the mind of the jury or the Court as to the guilt of the accused. 1941 O.A. 773=1941 O.W.N. 1061 (2)=1941 O. 618; 17

Luck 182. The explanation required of an accused under Ill. (a) of S. 114 is an explanation of possession of stolen property. If he alleges that the so-called stolen property is not in fact stolen property but is the property of his relation, he offers no explanation of his possession of it, and the presumption under the section may be applied to him. 49 C.W.N. 392=A.I.R. 1945 Cal. 421. Where a person is found in possession of stolen property shortly after it was stolen, presumption under sec. 114 (a) arises, and hence Sessions Judge cannot expunge the charge under sec. 379, I.P. Code, without going into the evidence. 150 I.C. 558=1934 A. 495. See also 40 C.W.N. 1090; 1937 A. 47; 17 Mys.L.J. 158; 41 Cr.L.J. 44; 1936 N. 200; 17 P.L.T. 754 (Possession of stolen articles after lapse of a long time). See also 166 I.C. 582=1937 N. 17 (F.B.); 10 O.W. N. 47=1933 O. 117; 17 P.L.T. 754=173 I. C. 450; 1938 M. 477; 40 P.L.R. 58=1938 L. 252. From the mere fact that a deaf and dumb mute was found in possession of articles stolen and obtained by house-breaking, an inference under sec. 114, that that person should have committed the offence of house-breaking and theft cannot be drawn, because such a person cannot be made either to understand what he is asked or to give an explanation. It is only on failure to explain the possession when an explanation is asked for that the presumption under S. 114, arises. No conviction on such a presumption of guilt can be sustained. 58 L.W. 574=1945 M.W.N. 692=(1945) 2 M.L.J. 407. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. Articles like muskets and police great coats are not likely to pass readily from hand to hand, and their possession within 10 weeks of the theft can well be said to be recent. 1945 N.L.J. 17=A.I.R. 1945 Nag. 1. I.L.R. (1945) Nag. 151. The question as to what period is covered by the expression "soon after" in Ill. (a) must vary according to the circumstances of each case. The Court is not bound to draw this presumption and the Court must always ask itself whether in the circumstances of a particular case the presumption is one which in fairness to the accused can be drawn. 196 I. C. 526=43 Bom.L.R. 629=1941 B. 325. See also 47 Bom.L.R. 63. The Court is entitled to presume that a person found in possession of property which had been stolen is either the receiver or the actual thief. The nature of the presumption in each individual case depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered it is often unsafe to as-

as to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

sume that the possessor is the actual thief. 184 I.C. 545=1939 R. 361; 23 P.L.T. 18. See also (1945) 1 M.L.J. 202=(1945) M.W.N. 107; 47 Bom.L.R. 63. (Illus. (a) applies also to property criminally misappropriated, which is also stolen property under this illustration.) Mere physical relation arising from the possession of the object is insufficient to amount to possession which connotes control over the object possessed. The possession of stolen property should be exclusive as well as recent. 149 I.C. 31=35 Cr.L.J. 994=1934 R. 80. A presumption under Ill. (a) is one which can be rebutted by the accused giving a reasonable explanation of his possession of the property in question. He is not bound to establish beyond all reasonable doubt that he obtained the property innocently. There is no question of the onus of proof being shifted on to the accused. If the explanation given by the accused is an eminently reasonable one and one which may well be true, the Court is bound to acquit the accused, even if it is not satisfied affirmatively that it is true. 23 P.L.T. 18. See also 1941 O.W.N. 1061=1941 O. 618; I.L.R. (1943) Kar. 371. (Case where stolen property was produced by the accused.) 1933 M.W.N. 325. Where certain silver pieces of the size of a rupee were found along with counterfeit rupees all bearing the same year and it was shown that all the coins were concealed under bhusa in a locked room of which the accused had the key. Held, that sec. 114 created a presumption of guilt against the accused and that he was liable to be convicted under sec. 243, I.P. Code. 143 I.C. 152=9 O.W.N. 1198=1933 O. 85. See also 32 I.C. 160; 18 I.C. 684=11 A.L.J. 94; 46 I.C. 158=22 C.W.N. 597; 21 I.C. 156=17 C.W.N. 1077; 53 I.C. 819; 26 M.L.J. 389; 19 Cr.L.J. 189=43 I.C. 605; 13 I.C. 828=1912 M.W.N. 97; 12 I.C. 652=21 M.L.J. 1071; 53 I.C. 481=20 Cr.L.J. 753 (N.). The possession by an accused person of jewels belonging to a murdered person if unexplained, is presumptive evidence that he was the murderer as well as the thief. 12 Mys.L.J. 353. Ghee stolen from tins in a train was found in a railway wagon occupied by five porters and a policeman—No presumption can arise. 1929 S. 7=111 I.C. 732. The mere fact that a person points out the place in which stolen property is concealed does not give rise to any presumption under sec. 114, or justify his conviction for the offence of receiving stolen property, still less for the offence of theft. 40 Bom.L.R. 927=178 I.C. 330=1938 B. 463. Charge of murder, robbery and receiving stolen property—Murder and robbery alleged to be simultaneous and part of same transaction—Finding of articles concerned in robbery in possession of accused

—Nature of presumption to be drawn. 20 P.L.T. 420=1939 P. 577. Under Ill. (a) a presumption may be justifiable against a person found in possession of stolen property but not against one who is found in the company of such a person when he is offering it for sale. Unless the prosecution prove circumstances in which by statute a person may be presumed guilty under a particular section of the I.P. Code, the question of presumption of guilt does not arise. 43 Cr.L.J. 353=A.I.R. 1942 Pat. 250. The production of stolen property as a result of pressure or inducement by the Police does not stand on the same footing as an improperly obtained confession. When an involuntary confession leads to the recovery of stolen property, the recovery as regards its admissibility stands on the same footing as a recovery without an accompanying voluntary or involuntary confession and in the absence of an explanation by the possessor is subject to the presumption that the possessor is either the thief or a knowing receiver if the production is shortly after the theft. 44 P.L.R. 545=A.I.R. 1943 Lah 5.

Illustration (b).—[See also Notes under sec. 133.] As to who is an "accomplice," see 1934 S. 185=28 S.L.R. 336; 38 C.W.N. 777=1934 C. 678 (F.B.); 1934 L. 171. It has long been a rule of practice for a Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and it is in the discretion of the Judge to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice, which has virtually become a rule of law has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required as corroboration is some additional evidence rendering it probable that the story of the accomplice is true and that is reasonably safe to act upon it. It is not necessary to require confirmation of all the circumstances of the crime. It is sufficient if there is confirmation as to a material circumstance of a crime and of the identity of the accused in relation to the crime. 31 S.L.R. 82=1937 S. 162=169 I.C. 716. See also 42 P.L.R. 67; 1941 Oudh 163; 45 Bom.L.R. 64=1943 Bom. 74; 1943 Pat. 146; 1943 Bom. 74; 1945 N.L.J. 134; 1941 L. 82; 198 I.C. 78. An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicted with the defendant (principal). The act of a detective in supplying marked money and placing bets with the accused for detection of a crime has not the element of mens rea

as to illustration (b)—a crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

and so cannot be treated as that of an accomplice and hence his evidence does not require corroboration. 1936 N. 245. But see 48 L.W. 322=1938 M. 893. An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicted with the principal. A person who cannot be so indicted owing to the absence of the element of *mens rea* he having acted under pressure exerted by the principal is not an accomplice and his evidence does not require corroboration. I.L.R. (1945) Nag. 315=1945 N.L.J. 134=A.I.R. 1945 Nag. 143. A person cannot be treated as an accomplice merely because he was present when the offence was committed and was fully aware of the person who committed it but did not disclose it to the proper authorities. I.L.R. (1945) Nag. 395=1945 N.L.J. 191=A.I.R. 1945 Nag. 186. A person who assisted the criminals to the extent of keeping a look-out to see whether the police were approaching, is an accomplice whose evidence requires corroboration. The corroborative evidence need not be such as to prove independently that the person named was guilty of the crime. Evidence proving that the accused were, at the time the crime was committed, near the scene of the crime and so placed as to justify the inference that they were accompanying persons whose complicity in the crime has been satisfactorily proved by independent evidence, is sufficient corroboration of the evidence of the accomplice. I.L.R. (1944) 2 Cal. 312. Although sec. 114, III. (b), provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, the word 'may' is not 'must' and no decision of a Court can make it 'must'. 1941 A.W.R. (C.C.) 402=1941 O.A. 1018=1942 Oudh 221; 23 Pat.L.T. 606=1942 Pat. 271; 1943 Bom. 74; 1943 Pat. 146. The mere fact that a witness did not reveal the knowledge of the intended crime to the proper authorities is not sufficient to make him an accessory or an accomplice so as to vitiate his evidence. 1939 C. 335. A wife who is cognisant of the fact that the accused intended to kill her husband but did not disclose that fact to him, must be regarded as an accomplice and her testimony cannot carry any higher value than the testimony of an accomplice. 164 I.C. 700=1936 L. 731. A person who knowingly aids in the disposal of stolen property is an accomplice. 40 L.W. 873=1934 M. 721=67 M.L.J. 693. Even where the object of the person who instigates another to commit crime is to catch him in the act of com-

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mitting the crime, e.g., police decoys, the instigation amounts to an abetment of the offence, and the abettors must be regarded as accomplices when the object of the instigation is to make the offender commit the crime and the person who is instigated actually commits the offence. Even if they are not accomplices in the strict legal sense, their evidence has to be viewed with caution, and it is not safe to act upon their evidence without material corroboration. 48 L.W. 322=1938 M. 893. But see 1936 N. 245. As to corroboration of accomplice evidence, see 5 L.L.J. 572; 1923 L. 76=68 I.C. 821; 20 Cr.L.J. 561=52 I.C. 49 (A.); 19 I.C. 321=15 Bom.L.R. 288; 15 M. 814; 14 Bom.L.R. 367; 3 L. 144; 65 I.C. 622=23 Cr.L.J. 158; 20 P.R. (Cr.) 1919=49 I.C. 607; 35 M. 397=14 I.C. 896; 17 P.R. (Cr.) 195; 16 Cr.L.J. 634; 17 Cr.L.J. 97; 17 Cr.L.J. 107; 1927 C. 63; 1927 C. 536=54 C. 721; 1 Luck. 339=1927 O. 369; 8 L.L.J. 610=1927 L. 78; 31 C.W.N. 554; 8 L.L.J. 616=1927 L. 10; 102 I.C. 500; 120 I.C. 721; 1937 C. 433 (S.B.); 170 I.C. 201; 175 I.C. 465=1938 R. 177 (F.B.). Need for corroboration specially in conspiracy cases. 1935 A. 162=155 I.C. 369. Where a charge of conspiracy depends upon the evidence of an approver, the judge should make up his mind whether he is going to believe the approver and if he thinks that the approver's evidence is unsatisfactory and suspicious, he should disbelieve it altogether. If on the contrary he comes to the conclusion that inasmuch as there is corroborative evidence, it does not matter much whether the approver is telling the truth or not, he would be approaching the case from a wrong point of view. 66 C.L.J. 575. See also 22 Pat. 681=1944 Pat. 67; 166 I.C. 667=1937 O. 259; 165 I.C. 138=1936 O. 413 (accessory after crime); 1937 R. 513. Indian law does not recognise any such thing as an accessory after the fact. A man who does not abet a crime cannot be regarded as an accomplice. Although a person who assists in disposal of the dead body may become liable to punishment under sec. 201, Penal Code, this is quite another offence, and helping to dispose of the body of a man who had been murdered, without having taken any part in the murder itself, does not make a man an accomplice with regard to the murder. 1937 R. 513; 1937 O. 259; 164 I.C. 677=1936 R. 373 (corroboration not necessary in every detail). See also 163 I.C. 681=1936 P.C. 242 (P.C.); 165 I.C. 144=1936 O.W.N. 848; 17 L. 518=162 I.C. 511=1936 L. 400; 1936 A. 337. Without

material corroboration there should ordinarily be no conviction, when accused can explain for articles found with them. 76 I. C. 716=1923 L. 385. An approver is generally regarded as a person of little moral worth who is purchasing his own freedom at the expense of others, and though in law the accused can be convicted upon the uncorroborated evidence of the approver it is only prudent that the evidence of the approver should be corroborated. The corroboration should be with regard to the actual factum of the crime and also the identity of the accused. The corroboration required, however, is to be such as tends to convict the accused with the crime and need not be of such a nature that by itself it should be sufficient proof connecting the accused with the crime. The corroborative evidence may be circumstantial, but if it points clearly to the accused, it can be safely acted upon and made the basis of the conviction. The amount of corroborative evidence varies with the facts and circumstances of each particular case. But much or little the purpose of corroborative evidence is to satisfy the Court that the approver, when he implicates a particular individual, does so truly. I.L.R. (1944) Kar. 456=A.I.R. 1945 Sind 132; 107 I.C. 97; 1930 O. 455. See also 6 Mys.L.J. 419 (Courts require material corroboration as a matter of prudence and practice). The discovery of blood marks on the person and in the house of the accused as well as his suspicious conduct immediately after the murder were held to be sufficient corroboration of the evidence of the accomplice. 4 L.L.J. 405. An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief. 4 L.L.J. 284. To support a conviction on the statement of an approver especially of one whose initial statement was very long delayed the statement requires material corroboration connecting each individual accused with the crime committed. 63 I.C. 612=22 Cr.L. 76 (L.); 10 O.L.J. 280=1924 O. 65. See also 1929 M.W.N. 698 (mere presence of a person in the house is not such a corroboration). See also 1928 C. 309; 6 Mys.L.J. 419; 34 P.L.R. 666; 147 I.C. 1172=1934 C. 114; 150 I.C. 21=1934 L. 346; 56 L.W. 737=(1943) 2 M.L.J. 634 (F.B.); 22 Pat. 681=1944 Pat. 67. It is unsafe but not illegal to convict on the uncorroborated testimony of an accomplice. An accomplice evidence must be viewed with suspicion. 1928 C. 233; 142 I.C. 809=13 P.L.T. 802=1933 P. 96; 1933 P. 100; 1934 S. 185; 1934 S. 78 (2); 9 Luck. 355=11 O.W.N. 62=1934 O. 90; 1938 M.W.N. 1272; 175 I.C. 465=1938 R. 177 (F.B.); 41 P.L.R. 333 (retracted confession of co-accused is no corroboration); 1937 R. 209; 16 Mys.L.J. 147; 41 P.L.R. 333=1939 L. 429. The

testimony of a professed accomplice requires to be carefully scrutinised with anxious search for possible corroboration. 112 I.C. 375 (2)=1929 P.C. 15 (P.C.). See also 1930 C. 430; 1930 A. 740; 145 I. C. 251=1933 R. 116. Only in exceptional cases the corroboration can be dispensed with. The evidence in corroboration of the approver's evidence need not be direct evidence. It is sufficient that it is merely circumstantial. 118 I.C. 423=1929 O. 321 (2); 152 I.C. 934; 146 I.C. 935=1933 P. 112; 35 Bom.L.R. 1040=1933 B. 482; 15 L. 673; 159 I.C. 875=1936 O.W.N. 64=1936 O. 156. See also 1929 L. 850; 1928 O. 207; 1930 O. 353. Corroboration of an approver's evidence by another co-accused amounts to one tainted piece of evidence being corroborated by another tainted piece of evidence and conviction thereon is bad. 1928 C. 745=33 C.W.N. 58; 38 C.W.N. 777=1934 C. 678; 1934 L. 171; 15 L. 491=1934 L. 873; 16 N.L.J. 186=1923 N. 752; 1937 R. 264; 1938 M.W.N. 962; (1937) R. 218; 1937 C. 433 (S.B.); I. R. (1938) N. 516=176 I.C. 853=1938 N. 328; 40 P.L.R. 61=1938 L. 339; 41 P.L.R. 333; 146 I.C. 364=1933 L. 946; 146 I.C. 303=1933 R. 320; 55 A. 91=1932 A.L.J. 1125=1933 A. 31. Where the only witness who corroborated an accomplice was his son aged 7 years who parrot-like repeated what he had been tutored to say, held, that it was unsafe to convict the accused on such evidence. 1929 L. 587. Approver's statement as to identity of accused should be corroborated. 48 C.L.J. 481. See also 1930 C. 430 (most careful scrutiny is needed). Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported. 118 I.C. 512=1929 M. 285. Extent of corroboration varies with the circumstances of each case including the character and antecedents of the approver. 1929 L. 550=107 I.C. 97. See also 1941 L. 82. The question as to whether corroboration is necessary, and, if so, to what extent is a question to be decided on the facts of each particular case. Much depends on the nature of the offence, the extent of the complicity of the witness in it and the circumstances under which the accomplice makes his statement. 1934 S. 185. The corroboration of the evidence of an approver need not consist of evidence which, standing alone, would be sufficient to justify the conviction of the accused person whom he seeks to implicate. If this were the law, it would be unnecessary to examine an approver at all. All that is required is that the corroboration should be sufficient to afford some sort of independent evidence to show that the approver is speaking the truth

as to *illustration (c)*—*A*, the drawer of a bill of exchange was a man of business. *B*, the acceptor, was a young and ignorant person, completely under *A*'s influence;

as to *illustration (d)*—It is proved that a river ran in a certain course 5 years ago, but it is known that there have been floods since that time which might change its course;

with regard to the accused person. I. L. R. (1944) 2 Cal. 327=A. I. R. 1945 Cal. 441. Where an accomplice is coerced and threatened into submission to commit an offence he is not a criminal of the basest kind. The corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous. 150 I. C. 917=1934 S. 78. The force of the presumption to be drawn varies as the malice to be imputed to the deponent. 1934 S. 78. The co-accused against whom a charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in both cases. 144 I. C. 74=1933 C. 148. All persons coming technically within the category of accomplices cannot be treated as precisely on the same footing. 13 P. L. T. 802=1933 P. 96. Where the corroborating witness is apparently interested, he being inimical to the accused, the evidence of the approver cannot form any basis for conviction. 34 P. L. R. 1. Corroborative evidence is a question of law. 32 C. W. N. 945. The evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances, one of these being that he is an accomplice, whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. 1941 O. A. 947=1941 O. W. N. 1255; 1929 C. 822; 1928 P. 630; 11 Pat. L. T. 545. To let the evidence of approvers go to a jury without giving them proper warning is a misdirection. For a Judge to withdraw consideration of the guilt or innocence of the accused from the jury by telling them that a conviction cannot be based upon uncorroborated testimony of an approver would be no less a misdirection and directly contrary to the statute. The Judge is bound to caution the jury and to advise them that generally speaking the natural presumption for them to make is that the evidence of the approvers is unreliable though they are not compelled in law to act on the presumption. Nature of corroboration required pointed out. 1933 P. 500. The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft, 111 I. C. 447=29 Cr. L. J. 863.

The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence the authenticity of which is not open to doubt. 120 I. C. 257 (2)=1930 A. 29. Witness to a crime who does not give information of the same, though not an accomplice in the strict sense of the term, still his evidence is not free from suspicion. 152 I. C. 473=11 O. W. N. 1383; 11 O. W. N. 661=1934 O. 315. See also 49 Mys. H. C. Rep. 444 (Accessory after the fact). Persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices and it is highly unsafe to base a conviction under sec. 161 of the Penal Code on their testimony without independent corroboration. 11 P. L. R. 836. Ill. (b) to sec. 114 is to be read along with sec. 133, and neither rule is to be ignored in the exercise of judicial discretion. It is the duty of the Court which has to deal with an accomplice's testimony to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly, in exceptional cases, in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon other grounds. (21 W. R. Cr. 69, Foll.) 159 I. C. 875=1936 O. 156.

**Illustration (c).**—In a suit on a bond the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves or it is admitted, that the signature or thumb mark (it does not matter which) is the defendant's then the presumption arises and the burden shifts to the defendant. He can then either prove that he cannot be charged because of fraud, etc., or that the presumption under sec. 114 cannot on the facts fairly arise. If he succeeds in doing that, then the burden shifts back. I. L. R. (1939) N. 160=1939 N. 78. Promissory note by Hindu father—Suit after father's death against sons—Burden of proof—Presumption as to consideration—If any—Presumption under sec. 114—Power of Court to raise from omission to adduce available evidence. See 44 L. W. 784=1937 M. 182.

**Illustration (d).**—The presumption mentioned in sec. 114 (d) is a permissive presumption and a Court of fact cannot be compelled to raise the presumption in favour of either party. 194 I. C. 428=1941 P. 536. See also 1931 M. W. N. 1312 (a case of conviction under sec. 69, Provincial Insolvency Act). Common course of events—Theft of revolver in October—Revolver found with accused in following May—Presumption.

as to *illustration (e)*—a judicial act, the regularity of which is in question, was performed under exceptional circumstances ;

1933 A.L.J. 523=1933 A. 461. As to presumption for non-production of old account of continuance of relationship of landlord books, see 1936 A.W.R. 547. Presumption and tenant after decision in rent suit, see 71 C.L.J. 100. On this illustration, see also 1941 P.C. 11 (P.C.).

**Illustration (e).**—S. 114, III. (e) only means that if an official act is proved to have been done, it will be presumed to have been regularly done; but it does not raise any presumption that an act was done of which there is no evidence and proof which is essential to the case. 47 Bom.L.R. 431 =A.I.R. 1945 Bom. 368. Sec. 114, III. (e) simply raises a presumption as to the regularity of the procedure, if the official act is as a matter of fact proved to be done and not otherwise. 45 C.W.N. 44=1941 C. 353. See also 219 I.C. 81. The presumption is only an optional presumption. The Court is not bound to make it and the counter-illustration itself indicates a case in which the Court would not draw it (e.g.) where there are some exceptional circumstances surrounding the doing of the act. 43 Cr.L.J. 791=44 P.L.R. 300=A.I.R. 1942 Lah. 214. Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. 24 Pat. 29=1944 P.W.N. 571=A.I.R. 1945 Pat. 307. See also 47 Bom.L.R. 431. Presumption that oath was duly administered. See 11 A.L.J. 933=35 A. 575. Presumption of publication of official. See 18 I.C. 651=17 C.W.N. 531; 49 I.C. 171=3 P.L.J. 636; 39 P. 1 R. 187; 1937 P. 14 (Presumption of publication of official notification). See also 27 B. 19; 19 A. 493; 9 A. 920; 18 C. 129; 1937 P. 14; 8 Mys.L.J. 257. Notice of rule under Defence of India Rules—Absence of evidence as to direction on manner of publication under R. 119 (1)—No presumption of knowledge arises. See 47 Bom.L.R. 431 =1945 Bom. 368. See also 1945 Pat. 307. But such presumption cannot supply deficiency in the proof. 143 I.C. 285=1933 C. 347. Presumption of correctness of entries in settlement papers. 28 I.C. 239. Official acts—Entries in record of rights—Presumption of due enquiry before making of entries. See I.L.R. (1937) N. 395. Presumption from entry of service of notice in order sheet of Court. 46 C.W.N. 967. One cannot presume against the interest of an accused person that the ordinary official procedure was not carried out. 39 P.L.R. 629. The report of a Revenue Officer conducting a sale is admissible in evidence, and there is a presumption attaching to such report,

it being for the objector to show that anything was done irregularly. 39 P.L.R. 187. If the only evidence available is an order of the Court showing that attachment had been made, it would no doubt be presumed that all the necessary formalities were complied with. But where the execution record is available and the process-server's report regarding the attachment does not show that any copy of the order was posted on a conspicuous part of the Court-house, the initial presumption is what is not mentioned therein was not done. 41 P.L.R. 149. Presumption that things remain in their original state. See 11 M.I.A. at 209; 11 I.C. 472; 9 I.C. 322. Presumption as to the identification parade, see 67 I.C. 271=1922 L. 31. There must be proof that the act was done—No presumption without such proof. 1928 P. 600; 151 I.C. 337=1934 R. 207 (a case of attachment); under sec. 114 (e) if an official act is proved to have been done, it will be presumed to have been regularly done. (Ibid.) See also 7 P. 833=1928 P. 549; 58 C. 598=1931 C. 763. Presumption of correctness of a certified copy of a deposition in a suit of Cutch Court. 30 Bom.L.R. 1519=1929 B. 24. Presumption as to delivery of possession in execution is according to law—Onus is on the defendant to disprove it. 1928 L. 910; 31 P.L.R. 1001. Circular by a public servant stating that it was made on the authority of the superior officer—Presumption. 146 I.C. 572. Registration under sec. 23-A of Registration Act—Presumption that it was in time. 1933 M.W.N. 1148. Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment, it must still be presumed to have performed the judicial act of writing a judgment regularly and properly. 1928 L. 94. Where a notice sent by post in a registered cover is returned by the postman with a notice that the addressee refused to receive it and the posting of the notice has been proved, there is a presumption under sec. 114 that the addressee did refuse to receive it. 121 I.C. 382=1930 L. 439. Where a committing Magistrate writes at foot of the deposition that the cross-examination is being reserved he does not mean that it is being reserved by him and that the accused has not been given an opportunity for cross-examination. 120 I.C. 524=1930 S. 54. Though ordinarily it may be presumed that a Government notification purporting to have been published in a Gazette of a certain date, was in fact so published, yet where the interval between the issue of a notification and action taken on it is so short, as e.g., a night, a Court might require stricter proof that all the formalities requisite to the act of notifying, or, in other words, publishing the notification, had actually been



as to *illustration (f)*—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

as to *illustration (g)*—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;

carried out. 33 Bom.L.R. 82. The presumption that official acts were rightly carried out applies to the return of a process under O. 21, r. 22, C.P. Code, as duly served so that the burden of proving that the record is wrong lies heavily on the judgment-debtor. 36 C.W.N. 242=1932 C. 627; see also 40 P.L.R. 142; 1938 R.D. 883; 1938 M. W.N. 421. It must be assumed that a Court, which passed a decree on a compromise assented to by a pleader of one of the parties, satisfied itself that the pleader was authorised to effect a compromise on behalf of his client, unless the contrary is established. 38 P.L.R. 467. The presumption in favour of official acts being properly done is destroyed when it is established that the investigating officers have not acted in a strict forward manner and have clearly made false statements in Court. 162 I.C. 969=1936 L. 409. See also 39 P.L.R. 187 (Report of Revenue Officer conducting sale). As to presumption regarding entries in jamabandi, see 13 L. 432=1932 L. 586; 29 N.L.R. 273=1937 N. 130. The presumption of correctness cannot apply to papers of a survey until final publication, but the presumption arising from the circumstance that official duties are taken to have been regularly performed applies. 1933 P. 468.

**Illustration (f).**—The mere fact that a cover insured for a certain amount is sent, raises a presumption in law that that cover contains the necessary amount of Government currency notes. 21 A.L.J. 865=1924 A. 205. The question whether, where a registered letter is returned by Post Office as refused, a presumption can be drawn as to due delivery or service of the letter by post must depend on particular circumstances of each case. Though it is open to the court under sec. 114 (f) to presume that the common course of business has been followed, it cannot hold that the posting of the letter proves delivery as it is a matter of common knowledge, that postal servants are not always diligent. 1933 R. 76=146 I.C. 422; 1937 P. 14 (Presumption as to publication of official notification). Where a certificate of posting is put in evidence, the presumption is that the letter was posted and that it reached its destination unless something is shown to the contrary. It is entirely wrong for the Court to work on the presumption that the certificate of posting is a forgery. 190 I.C. 533=1940 C. 227. When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption until the contrary is proved, that the letter is written under instructions. 144 I.C. 996=1933 R. 147.

**Illustration (g).**—As to scope of illustration, see 61 C. 711; 21 Pat. 735. Where the prosecution does not call all available eye-witnesses, the Court may draw an inference adverse to the prosecution. See 42 C. 422=27 I.C. 554; 51 I.C. 679=20 Cr.L.J. 519; but see contra 74 I.C. 434=1923 O. 217. On this point, see also 34 I.C. 987=12 P.R. 1916 (Cr.); 37 C.W.N. 1098=1933 C. 600. (As to presumption from "refusal" of a registered letter, see 3 Bom.L.R. 420). The non-production of material witnesses like the investigation officers is a serious omission which cannot but throw suspicion on the whole prosecution case. 1 P. 630=71 I.C. 219. See also 2 P. 309=74 I.C. 705; 1928 L. 125; 1929 P. 651; 168 I.C. 1=1937 P.C. 152 (P.C.) (Theft of goods from running train, which was covered by Risk-note B—Company withholding evidence of Guard—Adverse inference against railway may be drawn). Criminal trial—Some eye-witnesses not called—No reference favourable to accused can be drawn. 1 O.L.J. 68; 74 I.C. 434=1923 O. 217; 1945 A.M.L.J. 77 (failure to examine witness cited by party—No adverse inference to be drawn). It is a principle of law that if no books of account at all are kept or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a Court every presumption will be made against the party to whose negligence or misconduct the non-production of proper accounts is due. If a party has books of account in his possession and will not produce them, an account may, nevertheless, be arrived at by presuming everything against him. I.L.R. (1943) Kar. 429. It is perfectly open to a party to refrain from producing any documents which he considers irrelevant; and if the opposite party is dissatisfied, it is for him to apply for an affidavit of documents and he can so obtain inspection and production of all that appear to him to be relevant and proper. If he fails to do so, neither he, nor the Court at his suggestion, is entitled to draw any inference as to the contents of such documents. 24 Pat. 541. Where there is a dispute as to the area actually settled with the defendants and the receipts given by the plaintiff for the nazarana paid which would enable the ascertainment of the actual area settled, are not produced by the defendants, it goes to show that the defendants are deliberately keeping them back as they went against them. 1940 R. D. 608=1941 A.W.R. (Rev.) 95=1941 O.A. Supp. 83. Where in a suit for damages for infringement of copyright, even after a notice the defendant fails to pro-



as to *illustration (h)*—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

duce his account book there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits realised by the sale of the books, and the Court is entitled to assume that the entire stock of copies of books published had been sold by the defendants and the sale proceeds appropriated by them. 55 A. 564=1933 A. L.J. 791=1933 A. 474. Where a person fails to produce the accounts in his possession showing the amount of expenses he has incurred which fact is proved by other evidence one would be justified in presuming from the non-production of such account that he was exaggerating the expenses incurred by him; but simply because of this non-production, one could not be justified in coming to the conclusion that no expenses had been proved. 1934 A. 71. See also 1936 A.W.R. 547; 1942 R. 52; 1942 N. 39. Where the non-production of accounts on either side is plausibly explained, no inference can be drawn against either one side or the other from that circumstance. 146 I.C. 31=10 O.W.N. 827=1933 O. 412. See also I. L.R. (1936) N. 142=164 I.C. 740=1936 N. 130 (non-production of evidence which is not relevant and necessary—Prosecution under sec. 408, I.P. Code). Although sec. 114 permits a Court to presume that evidence, which could be and is not produced, would, if produced, be unfavourable to the person who withholds it, it does not allow any such presumption to be made in the case of documents about which there is no certainty that they would even have been relevant evidence in the case. 1943 A.W.R. (H.C.) 256=A.I.R. 1944 All. 5. Several items of breaches of trust charged—Defence contention that interval between first and last charge was more than a year—Non-production of accounts by complainant. Held, that it was a legitimate inference that if they had been produced, they would not have supported the allegation made by complainant that the defalcation covered a period of only one year. 15 Pat.L.T. 647=1934 P. 132. As to presumption from non-production of account books by a company when no explanation for such non-production given, see 31 Bom.L.R. 1310; 1937 M. 816=(1937) 2 M.L.J. 559; I.L.R. (1942) Nag. 543=1942 N.L.J. 121=1942 Nag. 37; 1942 Rang. 52. If a defendant either suppresses his accounts or has falsified them, the Court will presume everything most unfavourable to him consistent with the established facts. 41 L.W. 104=1935 M. 152; 11 O.W.N. 880; 1928 L. 397; 44 A.W. 225=1937 M. 816=(1937) 2 M.L.J. 559. Where a defendant fails to pro-

duce his account books before the Court in time, and they are rejected by the Court when produced as having been produced too late, the penalty for this conduct of the defendant is only to deprive the defendant of the benefit of the evidence afforded thereby. But it is not open to the plaintiff who has opposed their production to contend that an adverse inference ought to be drawn against the defendant from their non-production. 1939 M.W.N. 841. The defendant's failure to go into the witness-box raises a strong presumption against the truth of her case. The fact of her being a pardanashin lady is not a sufficient excuse for her not getting herself examined even on commission. 1937 O.W.N. 1022. The failure to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution. 1928 L. 125. See also 1929 P. 561; 15 L. 407; 159 I.C. 808=1934 R. 130. The non-production of witnesses cited but unnecessarily cannot justify adverse inference. 120 I.C. 606=1930 L. 163. The failure of plaintiffs to go into witness-box goes strongly against them. 11 L. 142=1930 L. 1. Generally speaking there is a good deal to be said for the contention that a suit should succeed on the ground that the defendant had not cared to enter the witness-box and testify as to the truth of his case. But if a defendant is of opinion after the plaintiff's case had been completed that the evidence was so discrepant and doubtful as to make it impossible for any Court to believe it, then if he so liked to take the risk he is justified in not giving evidence. 1940 A.M.L.J. 93. In order to entitle the Court under sec. 114, III. (g), to draw inferences unfavourable to the person withholding evidence, the opposite party must satisfy the Court that such evidence was in existence and could be produced. 37 C.W.N. 657=35 Bom.L.R. 500=1933 P.C. 87=64 M.L.J. 413 (P.C.); 61 I.A. 177=57 M. 443=38 C.W.N. 669=67 M.L.J. 1 (P.C.).

*Illustration (h)*.—Where the Crown withholds relevant documents in its possession, the Court will draw an inference adverse to it. 50 C. 276=1923 C. 233. Presumption from refusal to take oath. See 2 C.L.R. 476; 22 B. 680. But see 1929 M. 399 (where the Government failed to produce original settlement record but no adverse inference was drawn). Persons accused of an offence may not have a very satisfactory explanation to offer for the circumstance in which they were found and they may prefer to say nothing. One cannot in all cases draw an adverse inference from the fact that the persons ac-

as to *illustration (i)*—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

## CHAPTER VIII.

### ESTOPPEL.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

cused refuse to give their account of what happened. 1937 R. 516.

**Illustration (i).**—Where the mortgagor has produced the mortgage-deed with the stamps punched in the ordinary way, such production would raise a presumption that it had been paid up, but it would not help to prove that it had been paid before a particular date. 144 I.C. 175=1933 R. 61 (2). [29 C. 334 (P.C.), Rel. on]. Presumption of discharge of mortgage arising from the mortgagor's possession of the mortgage bond when rebutted. 105 I.C. 263=53 M.L.J. 205 (P.C.); 103 I.C. 481; 121 I.C. 730. Strength of presumption. 29 N.L.R. 298=1933 N. 379.

**Sec. 115.**—Section is not exhaustive, and estoppels are not confined to this section. 15 P. 721=17 P.L.T. 697=165 I.C. 98. See also 22 Pat. 554. The ordinary laws of estoppel that arise out of the conduct of the principals apply equally well to contracts entered into by a District Board through its executive officers, with different bus owners in respect of their licenses. 1937 M.W.N. 1223 (2). Defendant erecting building on debuttar land—Representation by receiver that he would become permanent tenant—Receiver is estoppel from ejecting defendant. 46 C.W. N. 483. Estoppel is nothing more, than a rule of evidence. The law of India and England is the same as regards estoppel. 1933 P. 708; 1939 P. 296=182 I.C. 618. The Law of estoppel which sec. 115 enacts is the same as the English Law. 65 I.A. 75=I.L.R. (1938) M. 360=(1938) 1 M.L.J. 268 (P.C.). Estoppel is both a rule of pleading and evidence and it extends to things which are matters of pleading and not proof. In India there is no room for any application of the doctrine of estoppel outside the provisions of sec. 115. A party is not estopped from suing; he is estopped from making the allegations necessary to enable his suit to suc-

ceed. 22 Pat. 554=A.I.R. 1944 Pat. 30. A party cannot be allowed to approbate and reprobate. Where a person with full knowledge of the facts in unmistakable terms admitted the waqf nature of a house he cannot subsequently be allowed to resile from the position. (1930 L. 686, Foll.) 183 I.C. 645=41 P.L.R. 342=1939 L. 63. There can be no estoppel when the true state of facts is known to the person pleading estoppel. 28 Pat.L.f. 213=A.I.R. 1942 Pat. 317. The principle of estoppel or res judicata has no application to income-tax cases. There is no estoppel against an assessee who makes admissions, but the admissions made by him are undoubtedly pieces of evidence in the case which can be considered. (1943) I.T.R. 16. There can be no estoppel by judgment or decree apart from the doctrine of res judicata unless the same matter is found to be in issue in the former trial as that now in question and unless the judgment was rendered on the merits. 1938 M.W.N. 224 (2)=47 L.W. 374. See also 1940 N. L.J. 1=1940 N. 163. A judgment not only creates a right, it works an estoppel. A judgment creating a charge on immovable property binds not only the parties to the suit but also their privies. The term "privy" is a term of the law meaning a partaker who is not a party, that is, in this connection, it includes all who derive title to the land, the subject of the charge from one who was a party to the suit by the decree in which the land was charged. It follows, therefore, that the charge is effective against a bona fide purchaser of the land for value without notice by reason of the law of estoppel by record. I.L.R. (1938) N. 431=172 I.C. 949=1938 N. 129. If a party persuades a Court to believe a certain false statement, that cannot operate as an estoppel between the parties to that proceeding in a different suit. The party concerned may be liable to other penalties civil or criminal but the statement cannot operate as estoppel. 1942 O. W.N. (B.R.) 578. A person claiming the

benefit of a general estoppel under sec. 115 cannot be placed on exactly the same footing as a person who obtains a transfer from an ostensible owner and claims protection under sec. 41, T. P. Act. Sec. 41, T. P. Act, no doubt deals with a branch of estoppel; but sec. 115 does not impose on the person acting on the faith of a representation made to him the same duty of making inquiries into the truth of the representation as is imposed on a transferee from an ostensible owner by sec. 41, T. P. Act. 11 O.W.N. 1097=1934 O. 460. See 20 C. 296 (P.C.); 46 A. 728 (P.C.). As to conditions of applicability, see 138 I.C. 552. See also (1943) 2 M.L.J. 508; 1932 A. 643. It is not necessary to invoke successfully the defence of estoppel that the representation should be fraudulent. I.L.R. (1943) Kar. 227=A.I.R. 1943 Sind 177. Sec. 115 does not apply when there is no evidence that any representations were made. (1943) 1 M.L.J. 219. Representation—Promissory note by elder brother in Hindu joint family—Debt borrowed for private purpose—Endorsement of payment signed by executant and by younger brother—Liability of latter—Estoppel against denial does not arise. 1943 M.W.N. 26=(1943) 1 M.L.J. 104. A mere representation of intention cannot be the basis of estoppel. 1938 C. 172. The term "representative" in sec. 115 is not limited to a gratuitous transferee or to a subsequent transferee for value with notice. It includes a bona fide assignee for value without notice of the circumstances creating an estoppel. 1934 M. 302=66 M.L.J. 563. A party deriving interest from a person bound by an estoppel before the date on which the estoppel arises is not bound by that estoppel as his representative because an estoppel cannot affect the interests which had been acquired before the date on which the estoppel arose. 23 Pat.L.T. 213=A.I.R. 1942 Pat 317. Estoppel is a rule of civil action. There is no estoppel in Criminal Law. 40 A. 393=45 I.C. 519. Plea open to plaintiffs as well as defendants. 1927 O. 97. Plea open only to person for whom representation was meant, and hence in respect of declarations in sale proclamation only auction-purchaser can plead estoppel and not private purchaser from judgment-debtor. 1927 C. 34. Where plea of estoppel is not set up in the pleadings or issues, it cannot be availed of later, because estoppel is eminently a matter of pleadings. 119 I.C. 152=1929 M. 467; 22 C.W.N. 179; 43 I.C. 556=46 P.R. 1918; 44 I.C. 254; 52 I.C. 739; 23 C.L.J. 122; 16 N.L.J. 248; 14 L. 218=34 P.L.R. 149=1933 L. 179. It is not necessary for the purpose of sec. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one

party and it was acted upon by the other party, the rule of estoppel will apply. 40 P.L.R. 848=178 I.C. 436=1938 L. 558. See also 41 P.L.R. 414=1939 L. 538; 1943 Sind 177. Where the case is one of two competing estoppels, one arising out of the execution of a mortgage and the other arising out of a judgment in the previous suit, the latter estoppel should prevail. In the words of Lord Coke "estoppel against estoppel setteth the matter at large." 8 O.W.N. 809=1931 O. 263. Under sec. 115, a person is estopped only when he has by his declaration or act intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. If a person in suit claims a certain status on the strength of the interpretation put by him on a certain document, he cannot be said to have led the other party to believe a thing or act on its belief, for it was open to the latter to examine the document and to decide for himself whether the interpretation put by the opposite party was correct or not. 1940 O.W.N. 1233=1940 R.D. 582=1941 A.W.R. (Rev.) 80. Judgment-debtor not objecting to low price advertised in proclamation cannot complain of it after sale. 1929 M. 275. Small cause suit transferred to original side—Question of title being raised—Issue of title deleted but suit tried on original side without objection by plaintiff—Plaintiff not raising that objection in grounds of his appeal to High Court—He will not be allowed to do so at later stage. 1929 M. 525. See 1929 P. 717=10 P.L.T. 669. Suit for declaration, accounts and injunction in Court of second class Sub-Judge—Objection to valuation—Finding that valuation beyond Court's jurisdiction—Suit sent to first class Subordinate Judge and tried there—Appeal to High Court by defendant—Objection to forum not competent. 189 I.C. 836=42 Bom.L.R. 443=1940 B. 242 (As to whether sec. 92, proviso 4, of the Indian Evidence Act can override this section). Judgment-debtor's right to dispute executability of decree—Adjournment of sale at his instance on waiver of fresh proclamation—Estoppel. 28 L.W. 20. Anything done by a person in his representative character cannot create an estoppel on what is a personal claim by himself by a perfectly different arrangement. 8 O.W.N. 940=1930 P.C. 249 (1). The representation made by the appellant is a 'thing' within the meaning of the section, not being a question of law, but a mixed question of law and fact. 1929 C. 819=33 C.W.N. 873. See also 173 I.C. 991=1938 O.W.N. 355=1938 O. 110. Rent suit—Appeal—Death of one of the plaintiffs respondents—Representatives not impleaded—Representation by other plaintiffs that they were the representatives—Plaintiffs are estopped from say-

ing that the lower appellate decree was a nullity because of the failure to add legal representatives of the deceased. 1929 C. 819=33 C.W.N. 873. Where a person obtains a release from a liability upon the understanding of foregoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of the third party. 1930 A. 434 (2). A party having by his conduct induced the other party to make an immediate payment of the decretal amount, and having entered into an engagement with him which makes it impossible for him to question the decree, is estopped from acting contrary to his undertaking. 1934 P. 644. A held two mortgages against the same property. He obtained a decree for the sale of mortgaged property in a suit brought on the second mortgage, disclosing the prior mortgage. In the meantime the mortgagor sold the property to B privately and free from incumbrances and the decretal amount was deposited in Court. Held, that as A had disclosed the existence of prior mortgage and as he did not know that the property was sold privately to B free from incumbrances he was not estopped from suing on the prior mortgage. 1936 L. 1020. See also 45 C.W.N. 470. Mortgagee parting with title deeds knowing that they are required for effecting a sale—Estoppel against mortgagee in favour of purchaser, if arises. 1937 M. 195. See also 20 C. 286 (P.C.); 1928 A. 459; 1938 L. 558; 1937 O.W.N. 237; 1937 L. 272. If the owner of the railway allows the railway represented by its manager to deal with third persons as a legal entity and to enter into a contract on that footing, he cannot, when a suit, is brought on such contract, assert his position as the proper party nor can the railway administration repudiate its liability to be sued. 1934 A.L.J. 1093=1934 A. 740. Where during the course of a winding up of a company a certain person gave an undertaking to the Court that he would pay a certain sum of money to the official liquidator if the assets of the company, namely, a mill, be handed over to him and he obtained possession he is estopped from resiling from it. 1930 A. 330. The admission of liability under a decree obtained against the ward does not create an estoppel and debar the Court of Wards from challenging the validity of the decree on the ground that certain formalities under the Court of Wards Act not having been complied with the decree was not validly obtained. 31 Funj.L.R. 749=1930 L. 798. In order to sustain the plea of estoppel it must be proved that the defendants relying on the declaration made by the plaintiffs, were misled to act to their detriment in such a manner as they would not otherwise have done. 14 L. 218=1933 L. 179. See also 38 L.W. 896=1933 M. 471. Legitimacy—Treatment of defendants as members of family—No representation acted upon by defendants—Plaintiff not estopped from questioning legitimacy. 142 I.C. 606

=1933 L. 412; unless the act which the plaintiff did to his own prejudice is referable to the defendant's representation, no estoppel arises. 61 C. 64=151 I.C. 334=1934 C. 441. Sec. 115 is not exhaustive of the doctrine of estoppel by representation. 33 C. 915. See also 20 C.W.N. 1335; 23 Pat.L.T. 213=1942 Pat. 317; 23 M.L.J. 335; 1930 A. 330. But see 35 C. 904=12 C.W.N. 721 (P.C.). There are three kinds of estoppel: (1) by record, see Evidence Act, secs. 40 and 44. 39 C.L.J. 40; 48 I.A. 49. (2) Estoppel by deed. See 12 L. 546. (3) Estoppel in pais or by conduct which is dealt with in secs. 115-117. To bring a case within the section there must be (1) a representation which amounts to an intentional causing or permitting belief in another, (2) a belief on the part of the other in its truth, (3) the declaration must have caused the other to act on the faith of it and alter his position. See 22 C.W.N. 891 (P.C.); 57 I.C. 263; 39 Bom.L.R. 130. See also 1937 L. 272. Where the act of building upon the land of another is not bona fide, a plea of estoppel by acquiescence cannot avail. 15 Luck. 689=1940 O.A. 408=1940 O.W.N. 462=1940 A.W.R. (C.C.) 207=1940 O. 164. See also 189 I.C. 735=1940 R. 172; 15 Luck. 619. The law of estoppel draws a distinction between representations and omissions, and omission to speak will furnish a basis for estoppel, only when the circumstances are such as to throw upon the party sought to be bound by estoppel the duty to speak out the truth. 44 L.W. 859=1937 M. 158. Before an estoppel can take place, it would be necessary for the party relying on the same to establish that he had been led to do something detrimental to his own interests owing to the action of the other person. 119 I.C. 337=1929 O. 494. See also 1937 O.W.N. 423. No case of estoppel can be established by a party if it is not shown that any action of his was induced by any representation or conduct of the other party. 32 S.L.R. 340=172 I. C. 981=1938 P.C. 87 (P.C.). In order that a representation may operate as an estoppel it must be a representation of an existing fact and not of mere intention or future promises. 42 C. 254; 39 I.C. 385; 28 B. 399; 7 Bom.L.R. 184; 41 M. 315; 34 M.L.J. 463. See also 1937 N. 402. Also, estoppel does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person had been induced to act to his detriment. 56 C. 989. The existence of estoppel does not depend on the motive or knowledge of the person making the representation and it is not essential that the intention of the person representing should be fraudulent. A rule of estoppel is purely personal against the person estopped and does not create any substantive right in rem. except against the person estopped or against his representative. No estoppel can ensue on a represen-

tation of a mere opinion or of a point of law. 110 I.C. 665=1928 A. 459. See also 101 I.C. 803. Doctrine of estoppel cannot be invoked by the defendant claiming from her husband, through whose concealed fraud the plaintiff was kept in ignorance of his real rights and was in consequence induced to execute a release of all his claims. 36 C.W.N. 758=55 C.L.J. 420. See also 4 O.W.N. 1019; 1937 P. 280. A statement to found an estoppel should be clear and unambiguous. Certainty is essential. 13 Beng. L.R. 12 (P.C.); 26 B. 75; 25 B. 499; 1926 M. 1052; 11 O.W.N. 1571=1935 O. 121. See also 161 I.C. 514=1936 P. 133. It must be of an existing fact and not of a future act. 39 Bom.L.R. 1257=1938 B. 148. There can be no estoppel when both parties are equally conversant with true facts. 23 B. 182; 35 B. 182 (188); 48 B. 38; 2 P. 585; 1942 Pat. 317; 27 C. 107 (P.C.); 46 P.R. 1912; 13 M.I.A. 585; 47 M.L.J. 622; 2 L. 88; 122 I.C. 871; 143 I.C. 542=14 Pat.L.T. 189=1933 P. 210 (2); 15 Pat.L.T. 596; 191 I.C. 830; 151 I.C. 576=11 O.W.N. 1097=1934 O. 460; 1940 L. 254; or presumed in law to be conversant with true facts. 1926 O. 330; 146 I.C. 873=1933 A. 641; 147 I. C. 715=1934 A. 75. Where a person who has not been appointed executor of a will either expressly or by implication, describes himself as an executor under a mistake about his legal position, this would not make him an executor or raise an estoppel against him. 183 I.C. 885=12 R.P.C. 78=1939 O. L.R. 586=1939 P.C. 238 (P.C.). Recital of receipt consideration in deed does not operate as estoppel. 49 A. 707. See also 1926 L. 471. When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true it is an estoppel upon all. But, when it is intended to be the statement of one party only the estoppel is confined to that party and the intention is to be gathered from construing the instrument. The recital however cannot operate as against a third party. 1933 P. 708. See also 19 P.L.T. 421=1938 P. 431. The onus of establishing facts giving rise to estoppel rests on the party pleading it. 1924 P.C. 212. There can be no estoppel on a point of law. 21 A. 285; 20 N.L.R. 162; 30 C. 883; 35 M. 75; 44 M. 421 (P.C.); 1929 P.C. 32; 140 I.C. 687=1932 P. 267. See also 178 I.C. 288=1938 L. 868. Dispute between co-operative society and its member referred to arbitration under Society's bye-law—Bye-law making award final and not open to appeal—Society cannot challenge validity of bye-law and claim right of appeal, 168 I.C. 483=39 P.L.R. 460=1937 L. 673. Where a municipality owing to some mistake failed to recover a particular tax, it cannot be pleaded that they are estopped from recovering it, when they later on make attempts to collect it. The plea cannot enable a defendant to escape from a statutory obligation. 1939 N.L.J. 265=1939 N. 195. Counsel waiving objec-

tion as to limitation does not estop his client from raising the same. 178 I.C. 288=1938 L. 368. See also 1938 R. 376. The question as to what is the proper basis for the valuation of a suit under O. 21, r. 63 of the C.P. Code by an unsuccessful claimant whether it is the amount of the decree sought to be executed or value of property proceeded against, is one of law and a party who has acted in the lower Court on one basis is not precluded from maintaining the contrary in the appellate Court. 55 A. 315=1933 A. 249 (F.B.). If in a proceeding under O. 21, r. 58, C.P. Code, the decree-holder omits to raise the plea that the proceeding ought to be under sec. 47, C.P. Code and not under O. 21, r. 58, he is not thereby estopped from pleading that in defence in a regular suit filed under O. 21, r. 63. 1934 A. 699. Acquiescence in an invalid and illegal objection does not bind the plaintiff or prevent him from exercising his right. 1933 S. 258. Nor does estoppel arise where statement is due to a mistake, e.g., a policy began by stating that A had paid the company a certain sum by way of premium. Held, that the existence of these words in the policy does not prevent the company from asserting that the premium was not in fact paid. 1934 R. 343. See also 1938 A.W.R. 16=1938 R.D. 4. Where in enhancement proceedings relating to a holding, the landlord, misled by the patwari's entry, described the tenant as also the tenant of an adjacent piece of fallow land, he is not precluded from contesting the status of the occupier and from bringing a suit that the defendant was not a tenant of the fallow land. 14 L.R. 68 (Rev.)=17 R.D. 62. Where certain payments by way of bazaar dues are made by the defendants in ignorance of their legal position, they are not estopped from questioning the right to recover such dues. Further there can be no estoppel against a statutory provision. 190 I.C. 143=1940 A.W.R. (C. C.) 357=1940 O.A. 746=1940 O.W.N. 782=1940 O. 409. There can be no estoppel where a man misconceived the legal effect of an order which was of no legal force. 27 M.L.J. 465. Where two persons not eligible for marriage live as husband and wife, the marriage not being valid cannot be supported by an estoppel. Opinions on the legal effect of an adoption is not a "thing" within sec. 115. 46 P.R. 1912=13 I.C. 482.

**Consent decree—Estoppel—Test.**—The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend upon the answer to the question "Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved, in, or was it the basis of, what was em-

*Illustration.*

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

bodied in the decree"? (35 M. 75, Rel. on). 1941 L. 116. Where under a compromise between a Hindu widow and the reversioners, the reversioners take up the management of the property agreeing to pay off the debts due to the creditors of the widow, they are not estopped from subsequently denying that the debt due to certain creditors is binding on the estate, when the compromise has not influenced the conduct of the creditors in any manner and it cannot be said that they were misled into acting in a particular way which they would not have done but for the compromise. 199 I.C. 425=14 R.C. 19=A.I.R. 1942 Cal. 448. Where an ex parte decree passed against a defendant is directed to be set aside on payment of costs, the mere acceptance by the plaintiffs' counsel of a portion of the costs, paid by the defendant will not preclude the plaintiff from filing an application in revision against the order setting aside the ex parte decree, unless a conscious decision to abandon the plaintiff's right of filing such an application has been taken by his counsel after a full comprehension of all the facts. 1944 N.L.J. 134.

A compromise in contravention of provisions of law cannot operate as estoppel. 1936 R.D. 565. But where in a deed, the term which is in contravention of the statute is separable, the deed is void in respect of that party only, and the rest being severable, estoppels may arise in respect of the parts which are good. 63 C.L.J. 52=1936 C. 774. A party is not bound by his lawyer's admission on a point of law. 11 C.W.N. 341; 24 B. 363; 1938 R. 376; 1938 L. 868; 1939 L. 364; 1939 L. 303. It is well established that a representation on a question of law does not amount to an estoppel. 195 I.C. 428=1941 P. 276. Estoppel by conduct, see 80 I.C. 994; 15 A. 119; 22 A. 83; 18 C.W.N. 420; 46 A. 214; 15 C.W.N. 741 (P.C.); 1927 M. 1066=29 L.W. 220; 55 M. 40=139 I.C. 684=62 M.L.J. 116. See also 140 I.C. 610=34 Bom.L.R. 1252; 42 P.L.R. 249; 1939 M.L.R. 229 (Civ.); 10 O.W.N. 58; 10 O.W.N. 201; 11 R. 79=1933 R. 52; 131 I.C. 669=1931 M. 334 (principle of the doctrine stated). Estoppel by acquiescence, see 23 C.L.J. 82; 29 B. 580; 41 C. 771; 2 L. 258; 2 P.L.J. 600; 1927 O. 89; Ibid. 66; 61 I.A. 18=12 R. 13=38 C. W.N. 337=66 M.L.J. 239 (P.C.); 11 O.W.N. 379=1934 O. 178; 17 Luck. 164; I.L.R. (1943) Kar. 338. There is a distinction between quiescence and mere ac-

quiescence. 1936 A.M.L.J. 81.

Estoppel by silence.—See 6 C.L.J. 601; 7 C.L.J. 604; 9 A. 413; 32 C. 359. See also 31 B. 566 (P.C.). Mere silence cannot amount to a representation so as to give rise to an estoppel, but where there is a duty to disclose, deliberate silence may become significant and amount to a representation giving rise to an estoppel. 47 Bom.L.R. 470=A.I.R. 1945 Bom. 511. A person is not justified in keeping silent when he is aware that another person has encroached upon his land and is erecting a costly building. He will be estopped by his conduct from claiming possession of the area encroached upon by demolition of the construction erected thereon. 41 P.L.R. 573. See also 1940 O. 164; 1939 L. 502; 46 C.W.N. 483. Silence may amount to acquiescence if it is an omission to act according to the circumstances of a particular case. Where a site is sold with a condition attached that it should not be used as a shop, but it is allowed to be used as a shop by the first vendee and his successors and the shop is even re-built without any objection being raised by the vendor, the latter is estopped from raising the objection subsequently. 42 P. L.R. 133. An admission inferred from conduct does neither amount to an estoppel nor is a conclusive proof of the matter admitted, but it is certainly a strong prima facie evidence and may be conclusive when not rebutted by any evidence. 1939 M.L. R. 229 (Civ.). Where after an order for ejectment under sec. 61 of the Oudh Rent Act for arrears of rent, the landlord files a fresh suit for arrears of rent, it operates as an admission on the part of the Zamindar that the defendant is his tenant in spite of the previous decree for his ejectment and operates also as an estoppel under sec. 115 against the landlord seeking execution of his ejectment decree. 1941 R.D. 415. Estoppel by omission. 1 P.L.J. 16; 24 C.W.N. 269; 15 M. 303. No estoppel by representation of an act to be performed in the future. 39 Bom.L.R. 1257=174 I.C. 67=1938 B. 148. Estoppel against a party cannot confer jurisdiction on a Court when it had none. 1931 A.L.J. 715=134 I.C. 236. As between parties in pari delicto there can be no estoppel. 23 C. 962; 33 C. 967; 35 C. 551 (P.C.); 31 M. 27. But see 8 C.W.N. 623; 32 M.L.J. 488; 36 C.L.J. 391. No estoppel against infants. 25 C. 616; 26 C. 381; 1929 B. 201=55 B. 741. Attestation when amounts to estoppel. 49 C. 334=42 M.L.J. 434



(P.C.). See also 42 C. 876; 36 C. 780 (P.C.); 37 A. 350; 15 P. 721=17 P.L.T. 697. Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. Of course, there may be cases in which attestation is made in circumstances when coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them. 1937 P.W.N. 144=170 I.C. 1005=1937 P. 353. See also 1942 O.W.N. (B.R.) 238. Attestation by minor—Effect. 1927 R. 108. Attestation by legatee—Effect. 8 L. 181. A party cannot take up inconsistent positions, approbate or reprobate, to the detriment of his opponent. 15 C.W.N. 724; 16 C.W.N. 736; 1929 N. 79; 1930 A. 15. Suit filed in Small Cause Court—Defendant's contention as to jurisdiction—Suits represented on original side—Defendant estopped from pleading that suit is Small Cause. 1926 A. 664; 1930 A. 15 (case of appeal). Major allowing decree to be passed as minor—Estoppel to question decree in subsequent suit. 48 A. 661. Even if, in sec. 115, the word 'person' includes minors, the general intention of adjective law of the legislature as to the rule of evidence in this section must give way to the particular intention of substantive law in sec. 11 of the Contract Act. A deed executed by minors is a nullity according to Indian Law and that it cannot be the subject of plea of estoppel as against the executant. 31 Bom.L.R. 340=1929 B. 201. See also 45 C.W.N. 906. Minor executing sale deed representing himself as major—No estoppel to plead invalidity of sale. 23 L.W. 521; 1934 M. 560=67 M.L.J. 257 (case of pronote executed by minor); 20 P. 130=1941 P. 433; 139 I.C. 718=1932 A. 710. See also 1926 N. 491; 9 L. 701=1928 L. 609 (F.B.); 1928 A. 626; 31 Bom.L.R. 340=1929 B. 201; 1936 C. 567. But the minor is liable to refund benefit derived or make good loss sustained by other party. But not so, where by using due diligence, the vendor could have found out the age of the vendor and where, as a matter of fact, the vendee knew that a guardian had been appointed for the vendor and no fraud was committed on the vendee. 150 I.C. 968=1934 L. 304 (1). Estoppel is purely personal. 14 C. 406; 1928 A. 459. See also 1937 A. 710 (Agreement to abide by statement of third party—Binding nature of such statement—Right to challenge—Estoppel); 20 N.L.J. 209 (non-

enhancement of assessment of Government land, if operates as estoppel against Government). Equitable estoppel. See 37 M. 270; 25 O.W.N. 29 (F.B.); 48 A. 363; 58 C. 368; 58 I.A. 91=58 C. 1245=60 M.L.J. 538 (P.C.); 1931 A.L.J. 653. Where an agent of an Insurance Company acts as a mere channel of communication in regard to certain representations made by the principal and intended to be communicated to the assured, and the latter takes up a policy of life insurance on the faith of such representation, the provisions of sec. 115 apply and the company is estopped. 1945 O.A. (C.C.) 15=1945 A.W.R. (C.C.) 15=1945 O.W.N. 8=1945 Oudh 152.

**No Estoppel against statute.**—1937 P.C. 114; 40 C.W.N. 341; 146 I.C. 482=1933 O. 542 (F.B.); 15 P.L.T. 661=1934 P. 666 (F.B.); 52 I.A. 126=52 C. 408=49 M.L.J. 136 (P.C.); 49 C. 507; 2 R. 459; 19 M. 200; 44 M. 187; 38 M. 519; 38 B. 709; 22 C.W.N. 894; 36 C. 920; 1930 N. 191; 1929 M. 622; 56 C. 252; 53 B. 676; 58 I.A. 58=10 P. 481=60 M.L.J. 441 (P.C.); 58 C. 1453; 12 L. 367; 27 A.L.J. 889=115 I.C. 642; 21 B. 399; 7 S.L.R. 58. But see 15 P. 589=1936 P. 417 (SB.); 1937 P.C. 114; 1938 O. 110. A promise not to eject against the express provisions of law cannot operate as an estoppel. 1940 R.D. 239=1940 A.W.R. (B.R.) 144. When, therefore, a mortgage is void under the law, there is no rule of estoppel which prevents the mortgagor from pleading and proving the fact of the mortgage being void. 11 O.W.N. 1571=1935 O. 121; 167 I.C. 79=1937 O. 431; I.L.R. (1938) A. 714=1938 A. 418 (F.B.). (Different allegations as to nature of same mortgage—Simple or usufructuary). See also 38 C.W.N. 459=1934 C. 537 (Co-operative Societies Act); 1929 M. 622 (the mandatory provisions of sec. 36, Stamp Act); 1930 L. 1034 (Punjab Land Alienation Act). If an agreement is found to be in contravention of a statute or against public policy a party cannot be held estopped from pleading or proving facts which would render the agreement void ab initio. The fact that a party may thereby be enabled to take advantage of his own wrong cannot be allowed to militate against the mischief which would otherwise follow. There can be no estoppel against pleading or relying upon a statute. 1943 Lah. 268 (F.B.); 22 Pat. 554; I.L.R. (1943) Kar. 227=A.I.R. 1943 Sind 177. See also 1936 R.D. 565. Will in contravention of statute—Devisee acting upon it—Dispute between co-devisees—Invalidity of will—Bar in pleading. See 1938 N.L.J. 181. See also 41 Bom.L.R. 170. There is no estoppel on a statement of law. 43 C.W.N. 1037=1939 P.C. 201 (P.C.). See also 1940 O. 409; 1941 Rang.L.R.



309=1941 R. 234; 1940 A.W.R. (B.R.) 144. There can be no estoppel against an act of the legislature. When therefore the legislature has declared that no adoption would be valid without a registered adoption deed the plaintiff is not estopped by her conduct from disputing the validity of defendant's adoption for want of a registered deed. 1939 A.M.L.J. 60 (C.). See also 1941 R. 234. In case of a statute enacted for the benefit of a section of the public, that is, on grounds of public policy, where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the party suing seeks to do, it is not open to the opposite party to set up an estoppel to prevent it. This conclusion must follow from the circumstances that an estoppel is only a rule of evidence by a party to an action; it cannot therefore avail in such a case to release the party suing from an obligation to obey such a statute nor can it enable the opposite party to escape from a statutory obligation of such kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey law. 1937 M.W.N. 663=1937 P.C. 114 (P.C.). An ultra vires statute cannot be validated by acquiescence but an acquiescing party may be estopped from questioning it. 1939 N. 44=1939 N.L.J. 439. It is true that if there is a representation, by one of the parties to a suit or proceeding, of certain facts which would necessitate some other proceeding, and as a result of that representation being accepted the Court passes a certain order, then the party making that representation would be estopped from stating in separate proceedings that the facts represented were not true. No party can, however, be estopped because of a legal argument put forward on his behalf. (1943) 2 M.L.J. 508. It is quite true that there can be no estoppel against a statute but this well-recognised rule does not imply that there can be no estoppel even against a plea of a fact which has to be established before the application of the statute can be invoked. A man may not estop himself by any conduct of his from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of the Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act. 47 P.L.R. 385. Every body is supposed to know the law or at least to have so much opportunity of knowing the law as another so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another. 173 I.C. 991=1938 C.W.N. 355=1938 O. 110. See also 1943 R. D. 359; (1942) 2 M.L.J. 97. Estoppel under sec. 115 consists not in putting forward a

particular view of the law, but in making a particular representation on a point of fact. In a suit for arrears of rent in a Revenue Court the defendants pleaded that, on the allegations in the plaint, the plaintiff had not established that the property formed part of an estate, and, therefore, no suit lay in the Revenue Court. This plea was upheld by the Court which returned the plaint for presentation to the proper Court. The plaintiff then filed the suit in the Civil Court and the defendants now contended that the Civil Court had no jurisdiction to entertain the suit on the ground that the plaintiff had not made out that the land on which the rent was due was a portion of an estate. Held, that there was no question of estoppel in the case at all and the defendants were not estopped from contending that the Civil Court had no jurisdiction. 55 L.W. 396=A.I.R. 1943 Mad. 22=(1942) 2 M.L.J. 97. Where in answer to a letter from an owner of certain premises, the Calcutta Corporation informed him that a certain amount was due on account of the arrears of the municipal consolidated rates, and the amount mentioned by it was by a mistake less than the amount that was actually due. Held, (i) that the Corporation was not estopped from recovering the sum actually due. It is an elementary principle that there is no estoppel against the law under the provisions of the Calcutta Municipal Act there is a statutory obligation imposed respectively on the corporation and the rate-payer to collect and pay the rates—these rates being secured by a first charge on the premises and there being no power to remit the taxes unless they appear to be irrecoverable; (ii) that a purchaser of the premises from the owner was in no better position than his vendor and could not, therefore, defeat his statutory liabilities by a plea of estoppel. 50 C.W.N. 263.

**Doctrine of Estoppel and Acquiescence, distinguished.**—The doctrine of acquiescence is only another phase of estoppel. The foundation of the doctrine of estoppel and acquiescence is that one party has made to the other representations which were intended to be and were in fact acted upon by that other spending money or doing an act which he would not have otherwise done, which involved expenditure or a change of position. In the case of estoppel the material representations are active, while in the case of acquiescence the representations are to be inferred from silence. The doctrine of acquiescence also goes by the name of the doctrine of standing by. If an owner of land finds another person trespassing upon his land and building on it, mere silence or inaction on his part at the time will not be sufficient to support a case of acquiescence. Mere silence or mere inaction cannot be construed to be a representation. To support a case of acquiescence there must

be something more than mere silence or inaction. Inaction or silence in circumstances which acquire a duty to speak is the foundation of the doctrine. When inaction or silence would amount to fraud or deception, then and then only can the doctrine of standing by or acquiescence be applied. The party seeking the aid of the doctrine has to prove (1) that he made a mistake of his legal rights; (2) that he expended money or did some act on the faith of the mistaken belief; (3) that the legal owner or possessor of the legal right knew of his own right which is inconsistent with the right claimed by the party relying on the doctrine; (4) that the possessor of the legal right knew of the mistaken belief of the other; and (5) that the legal owner encouraged the other party in his expenditure of money or in the other acts, either directly or by abstaining from asserting his legal rights. 40 C.W.N. 1370=1936 C. 711. See also 1937 M. 158; 48 L.W. 908 (Representation as to authority of widow to adopt); 1937 O.W.N. 330=167 I.C. 870=1937 O. 226; 1937 O.W.N. 252=167 I.C. 414=1937 O. 263; 38 P.L.R. 931=1936 L. 700; 15 P. 721=17 P.L.T. 697=165 I.C. 98. See also I.L.R. (1938) L. 296=177 I.C. 198=1938 L. 88. Also 1940 P. 438=21 Pat.L.T. 277. Acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. 1941 O.W.N. 1021=1941 O. 611. A person though not a party to the litigation that effected a division of holding, has nevertheless profited from it and has all along abided by it, cannot later on seek to question the division of holding on the ground that he has not a party to that litigation. 1941 A.W.R. (Rev.) 924=1941 O.A. (Supp.) 798=1941 R.D. 813.

**Equitable estoppel.**—Void lease.—Tenant putting up structures bona fide.—Right to value thereof. 37 C.W.N. 473=1933 C. 612. See also 170 I.C. 944=1937 A.L.J. 793=1937 A. 512; 1937 O.W.N. 352=1937 O. 263. No plea of equitable estoppel can be maintained against a statute. 152 I.C. 508=18 R.D. 590. As to part-performance, see 39 M. 509 (P.C.); 42 C. 801; 40 M. 1134. One's own fraud cannot be pleaded. 1929 A. 237. Fraud committed upon creditors. Judgment-debtor is estopped. 1930 M. 298. Admissions do not operate as estoppel but they must be explained by persons making them. 1929 L. 748. The mere fact that the purchaser from the guardian of a minor of properties belonging to the minor took a letter from the minor stating that there was necessity for the alienation does not estop the minor from impeaching the sale, so long as it is not shown that the minor caused or permitted the vendee to believe that necessity existed. 115 I.C. 175 (2)=1929 N. 211.

Co-sharer intending to sell share.—Other co-sharer refusing to purchase.—Right of pre-emption not assented.—Vendee induced to purchase.—Failure to give notice under sec. 14, Agra Pre-emption Act.—Other co-sharer is estopped. Where certain members of a Hindu joint family, who were fully aware that the suit mortgages had been attached and put to sale in execution, did not raise any objection to the attachment or sale. Held, that the conduct of the members constituted a clear representation to the decree-holder and auction-purchasers that they had no objection to the sale and that they could not sue to set aside the sale. 10 O.W.N. 58=1933 O. 166; 1929 A. 531=51 A. 820. See also 27 A.L.J. 526; 16 Mys.L.J. 32=42 Mys.H.C.R. 669. In a land acquisition proceeding, the owner of land received compensation for the use of the minerals under his land by the Government for the construction of a bridge. It is no estoppel against the owner suing for declaration of his right to the remaining minerals after the completion of the bridge. 8 P. 742. Prior transferee allowing subsequent purchaser to build on land.—Negligence of prior transferee to take necessary steps to protect himself.—Estoppel to assertion of title. 6 R. 643=1929 R. 17. The mere attestation of a deed by a party does not estop him from asserting that he had not the knowledge of the contents of the document or that he was not bound by the recitals in the document. 9 L. 224. Also 1933 L. 551=14 L. 369; 145 I.C. 746=1933 L. 703; 38 P.L.R. 416=165 I.C. 997=1936 L. 978; 1937 P. 353. But if the person attesting asserts the facts that are stated in the document he is estopped. 116 I.C. 716; 54 M.L.J. 254. See also 107 I.C. 20=1928 P.C. 20 (P.C.). The attestation by the reversioner of an alienation by the widow cannot be taken as presumptive proof of necessity where the document contained no recital of the purpose for which the money was required. 145 I.C. 362=1933 M. 637=65 M.L.J. 282. Where an attesting witness is present at the transaction and attests the deed having heard its contents he is estopped from challenging the right of the transferee. 150 I.C. 765=1934 P. 93. See also 15 P. 721=17 P.L.T. 697=165 I.C. 98; 1942 O.W.N. (B.R.) 238. Company assessed to company's tax by Municipality.—Letter by company's agent to Municipal Council assuming validity of assessment.—Suit questioning the legality of the assessment.—Maintainable.—No estoppel. 1929 M. 146 (2)=198 I.C. 216. Party taking advantage under partition estopped from setting up plea of impartibility. 1929 C. 577. Person not included in the cause-title but claiming to be party, taking steps for securing some relief to himself. He is estopped from contending that he was not made a party. 1928 M. 690. Where consent orders in two suits were intended to stand or fall together

quære, whether it is possible for one of the parties to the orders to stand by the order in one suit while repudiating the order in the other. 1929 P.C. 289=57 M.L.J. 429 (P.C.). For purposes of estoppel, an order by consent, is as effective as an order of the Court made otherwise than by consent. In other words the only difference between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by an order of the Court; the second stands unless and until it is discharged on appeal. A consent order even where it has been obtained by fraud or mistake, is not a nullity. The order stands until it has been effectively set aside. (Ibid.) A party to a consent decree is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed. 26 S.L.R. 395. Also see 13 L. 70=1932 L. 281. Estoppel by conduct—Mortgage amount tendered by purchaser of equity of redemption—Refusal to accept—Interest ceasing to run—Claim to recover interest—Maintainability. 29 L.W. 220=56 M.L.J. 255. Where a lease was executed by the Nawab in contravention of the Murshidabad Act, held, that he was not estopped from denying the validity of the lease. 56 C. 252=1929 C. 433. Lease contrary to B. T. Act—Lessor's plea of invalidity—Maintainability. 1928 C. 156. Void alienation of khotsi land to mortgagee—Mortgagor can resile land sale. 53 B. 676=31 Bom.L.R. 778. Although the transfer of property for an immoral object is void, still in a suit for the recovery of the property by the transferor, held, the principle of equity enunciated in *Ayerst v. Jenkins*, L.R. 16 Eq. 275, would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. 35 Bom.L.R. 345=1933 B. 209. A purchaser of mortgaged property at a sale in execution of a decree is estopped from denying the validity of the mortgage if the mortgagor himself could not be permitted to deny its validity. 139 I.C. 695. (36 A. 141, Foll.); 15 P. 721=17 P.L.T. 697=165 I.C. 98. Evidence—Inadmissibility of, by reason of prior decision—No estoppel by reason of. 1929 P. 32. Estoppel against a mahant whether can be got rid of by a suit brought by him formally in the name of idol. 56 M.L.J. 636. Where in a usufructuary mortgage deed the recital states that the plaintiff is mutwalli of the wakf, the property of which is the subject-matter of the mortgage and the document is acted upon and possession is transferred and sums of money are received by the plaintiff, the document amounts to a representation that the plaintiff as mutwalli is competent to make that transfer and he is therefore estopped from denying its validity. 1935 A.L.J. 217=1934 A.W.R. 275. See also 48

C.W.N. 571. Where the wife acquiesced in her husband's acts and allowed him to deal with the property as his own and derived benefit therefrom, held, that she could not be permitted to turn round and impugn the transaction. 7 Mys.L.J. 112. Father purchasing and recording property in son's name, is not estopped from pleading that it is not the son's, if the party pleading estoppel knew or would on inquiries, have known that it was acquired with the father's money. I.L.R. (1936) N. 65=165 I.C. 350=1936 N. 185. Permitting another to build on land—Suit to recover possession of land built upon is not maintainable—Plaintiff estopped only entitled to a fair rent—Rule in *Ramsden v. Dyson*, applied. 31 Bom.L.R. 1310. See also 1937 O. 226. A pre-emptor, party to suit by village landlords challenging sale—Sale conferred by compromise decree—Estoppel. 33 C.W.N. 90 (P.C.). Where there was no evidence of any detriment to the appellants as a consequence of the silence of the respondent or which had caused the appellants to alter their position in any way and there was no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants. Held, that there was no question of estoppel. 163 I.C. 295=44 L.W. 128=1936 P.C. 193 (P.C.). A mere silence cannot operate as an estoppel unless it is established that there was a duty to speak. 119 I.C. 882; 28 N.L.R. 227=140 I.C. 390=1932 N. 165; 148 I.C. 546=38 C.W.N. 344=1934 P.C. 83 (P.C.). See also 1937 M. 158=168 I.C. 842=44 L.W. 859 (Case where the Collector sent a letter intimating to the mortgagee that the entire debt has been paid off, the mortgagee did not inform the Collector that a portion of the debt yet remained unpaid); Tenant making grave on abadi—Zamindar's servants standing by and not objecting—No acquiescence. 1929 A. 386=115 I.C. 628. Widow making gift of her deceased husband's property to her daughter and daughter's husband jointly—Daughter acquiescing for less than 12 years in the position that her husband was co-owner of that property does not constitute estoppel so as to deprive her reversionary right. 1929 M. 467. Where a house left by a Hindu father is mortgaged by his son and the widow of the deceased has signed the mortgage deed after hearing its contents and as token of consent, the widow has acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance, and is estopped from claiming those rights against the mortgagee. 1941 Pesh. 17. Acceptance benefit—Compromise decree—Money paid under—Party repudiating other terms—Permissibility. 35 P.L.R. 315=1934 L. 423. See also 42 P.L.R. 61=1940 L. 100; 42 P.L.R. 749. Where an amendment of plaint is allowed by the Judge on payment of costs the acceptance

of the costs by the defendant without protest precludes him from contesting the validity of the order. 61 C. 433=38 C.W.N. 488=1934 C. 554. A party can challenge the validity of the compromise, when he has not taken advantage of the benefit thereunder. 1928 C. 334. See also 1.L.R. (1938) 2 C. 266=42 C.W.N. 701=1938 C. 500. Double remedies—Election of one—Estoppel as to the other remedy. 1928 S. 40. Where a man has an election between several inconsistent course of action, he will be confined to that which he first adopts; the election if made with the knowledge of facts, is in itself binding. The election must be, however, a voluntary act, not forced upon him by circumstances over which he had no control and notwithstanding his protest. 59 C. 1464=36 C.W.N. 955. In a subsequent suit for rectification of the instrument of guarantee, held that, having elected to take their chance of succeeding upon the terms of the instrument as it stood, the sureties were estopped from re-agitating the question on the basis of the very ground which they had waived on the former occasion. 59 C. 985=1932 C. 889. When a party has asserted a certain position in a previous litigation, he cannot agitate the matter on the assumption of fresh fact against persons who were parties in the previous suit. 106 I.C. 484. See also 40 P.L.R. 243=1938 L. 525. As between the same litigants one party cannot defeat the claim of the other by a plea negating a contention advanced by him successfully in a former suit. A party who has obtained an order of the Court and has succeeded under it cannot after he has enjoyed a benefit under that order say that it was valid for one purpose and invalid for another. 144 I.C. 50=1933 S. 119. See also 14 L.R. 281 (Rev.)=17 R.D. 404. Inconsistent pleas—Execution proceeding—Nature of property—Prior statement of judgment-debtor—Binding effect. 150 I.C. 141=1934 A. 430. Husband and wife—Party once affirming marriage cannot subsequently object to it. 30 Bom.L.R. 523=1928 B. 279. Where the ancestor of a reversioner had admitted the execution of a sale deed by a Hindu widow who was a pardanashin lady but her knowledge and understanding of the document was nowhere admitted, the reversioner was not estopped from pleading want of proper understanding of the transaction by the executant. 10 O.W.N. 147=1933 O. 170 (2). The facts that the reversioner to the estate of a widow's husband had received some items of property from the widow in consideration of relinquishing as reversionary right to the remainder and that his son, himself inherited those items which the father had received, could not operate as estoppel against the son from questioning the subsequent alienation by the widow in favour of others. 1933 M. 637=

65 M.L.J. 282. Reversioners cultivating under the alienees from the widow and getting contribution from them for building a common well while widow is living, insufficient to establish admission of alienees' title. 1928 L. 6. The Official Receiver is not bound by the admission of the validity of a mortgage executed by the insolvent by some of his creditors; nor is he precluded on that account from applying under sec. 54 to have it annulled as a fraudulent preference. 34 P.L.R. 436=1933 L. 354. An executor who has entered upon his duties as such is estopped from pleading immunity from his obligation as executor, on the ground that no probate has been taken out by him. 59 M.L.J. 596. The question of the proper construction to be placed on a deed is one of law and there can be no estoppel by a pleading of law. 2 O.W.N. 1052. Where in a probate proceeding a dispute as to genuineness of the will was referred to arbitration and no objection as to the award was taken but in appeal the point as to illegality of the reference to arbitration was raised, held, that the point could be raised and the doctrine of estoppel was not applicable. 1930 A. 840. Son joining in sale-deed by father in ignorance of legal rights whether estopped. See 1927 A. 838. Sunni Mahomedan conveying more than third of the estate by will—Attestation by heir—Whether estopped. 6 R. 542. There cannot be any estoppel on a point of law going to the jurisdiction of the Court. 1928 J. 802. Person taking possession of property as mutawalli—Wakf discovered to be void—Person estopped from saying property was his. 1928 C. 130. See also 1939 L. 63. Though by reason of having accepted certain benefits under an ekrnama wrongfully disposing of properties belonging to a wakf, a minor may be estopped from questioning the validity of the ekrnama in his personal capacity, it does not preclude him in the capacity of mutawalli to sue for the recovery of the properties of the endowment wrongfully disposed of under the ekrnama. 36 C.W.N. 972. A Burmese wife refrained from making any claim in her husband's payin property but referred to it as her husband's property and attested the mortgage-deed, and made payment of interest thereon. Held her conduct was definitely calculated to induce the mortgagee to believe that she had no interest in the land and that she cannot subsequently claim interest in the mortgaged property or that the decree obtained by the creditor is inoperative against that interest. 1934 R. 17. Where during the life-time of the mother, the daughters who were in possession effected a partition of certain properties and the parties enjoyed the properties in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother

by the executants themselves. Held, that they were estopped from doing so. 1930 A. 687=1930 A.L.J. 688. Conduct—Adoption made under settlement deed—Validity of adoption—Party bringing about settlement and adoption, if can question. 153 I.C. 102=1935 M. 141. A mere presence at an adoption or a mere acquiescence in an adoption does not create an estoppel, so as to preclude the person from challenging the adoption afterwards, when there is no representation made as to any matter of fact on the strength of which the act of adoption can be said to be made. 39 Bom.L.R. 599. As to estoppel by conduct, see also 1940 Bom. 242=42 Bom.L.R. 443; 1940 Cal. 60; 1940 Lah. 100=42 P.L.R. 61. An estoppel does not arise against the maker of a promissory note by the mere fact that after discharge it is left with the payee and he passes it off on others as if it were still a negotiable instrument. 1933 M. 300=64 M.L.J. 241. Where persons to be sued are majors a suit brought without their knowledge against them on the footing that they are minors is wrong, the guardian ad litem appointed to represent them has no legal standing to act for them and his admission of liability is not binding on them. Such persons are not estopped from contesting the validity of the decree even if they became aware of the execution proceeding and did not come forward to prosecute their claims then. 1938 R. 468.

**Landlord and Tenant.**—[See also Notes under sec. 116.] See 1939 Pat. 296. The acceptance by the landlord of rent at uniform rate does not by itself raise any estoppel against the landlord, because there is no representation thereby that it would confer permanent tenancy on the lessee. 58 B. 419=36 Bom.L.R. 359=1934 B. 194. Where in rent receipts given by the agent of the Zamindar, the tenants are described as occupancy tenants, in the absence of evidence to show that the agent had power to confer occupancy rights, the Zamindar is not estopped from asserting that the tenants had no occupancy rights. L.R. 3 A. 517 (Rev.). See also 1939 R.D. 135; 1941 R.D. 678. In order that a tenant may raise the plea of estoppel as against his landlord, there should be a representation believed in by the tenants and it must be a case consistent with the document under which the tenancy was created. Where the alleged representation was contrary to the terms of the document between the parties, held, that the plea of estoppel was not available. 37 C.W.N. 643=1933 C. 682. See also 1937 R.D. 256; 1936 R.D. 541; 1940 R.D. 488=1940 O.A. 1017. The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and

deliberate character as to prevent the former from denying the relationship of tenancy. L.R. 4 A. 174 (Rev.). Where a Zamindar took nazarana and admitted the tenant into land pending the execution of a lease deed, he is estopped from denying that he had admitted the tenant into the land with the intention of giving a lease. L.R. 3 A. 543 (Rev.). See also 1943 A.W.R. (Rev.) 156. The fact that a registered lease was not given does not affect the question. L.R. 3 A. 543 (Rev.). See also 16 R.D. 518; 1940 R.D. 224=1940 A.W.R. (B.R.) 85; 1940 R.D. 197=1940 A.W.R. (B.R.) 65. Tenants recorded as occupancy tenants by order of Collector and treated as such for over 28 years—Subsequent suit for declaration that they were only statutory tenants—Non-maintainability. 14 L.R. 135 (Rev.)=17 R.D. 174. See also 1941 R.D. 415=1941 A.W.R. (Rev.) 475. Landlord and tenant—Estoppel—Suit for rent—Money decree—Execution proceedings taken as if the decree was a rent decree—Objection to the form of execution proceedings not taken by the tenant—Effect—Tenant not barred from contending afterwards that the decree was only a money decree—No estoppel. 119 I.C. 882. See also 1939 R.D. 135=1939 A.W.R. (B.R.) 149. Agreement to pay enhanced rent—Failure to register as required by Agra Tenancy Act—Tenant continuing to pay rent—No estoppel from asserting in a subsequent proceeding that rent was payable only on the old scale. 13 R.D. 859. Covenant against alienation—Transfer recognised by lessor—Effect. 1929 C. 228. Permanent lease of vatan lands—Succeeding vatandar receiving rent for ratifying lease—Suit in ejectment—Estoppel. 31 Bom.L.R. 218. See also 1938 P. 435. Though a tenant can never be estopped from claiming occupancy rights in respect of land in an estate by reason of the Statute he will be estopped from saying that the land is an estate. If he has previously taken it on the footing that it is not an estate it may be that the estoppel extends only up to his surrendering vacant possession; after he surrenders, he may agitate any question he likes. But he cannot keep the possession which he obtained by representing that he will not claim the land to be an estate. 119 I.C. 577=1929 M. 529. Grant of permanent lease by holder of ganti interest—If estopped from saying that he was mere ryot—Purchaser at execution sale is not estopped. 1928 C. 87. Landlord allowing expropriary tenant to continue in possession after ejectment is estopped from denying status of the tenant. 14 R.D. 502; 15 R.D. 39. A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status. 119 I.

C. 568=1929 A. 305. Mortgagee not to question mortgagor's title—Hindu widow effecting mortgage for 99 years—Same cannot be impugned by mortgagee—Widow to be presumed to deal with property as owner. 1928 B. 380=114 I.C. 377. Where a mortgagor refused possession when according to the terms of the contract he was bound to give possession, the mortgagor is precluded from asserting that the property is not liable to sale in satisfaction of the mortgage debt. 116 I.C. 214=1929 L. 289. See also 41 M. 259 (F.B.). Where a person admits his character as mortgagee in civil suit, he cannot subsequently in a revenue suit plead that he was not mortgagee but a proprietor. 15 R.D. 94. See also 14 L.R. 281 (Rev.); 17 R.D. 404. A muafidar who has mortgaged his muafi plots cannot assert against the mortgagee his own want of title. 1928 O. 336. A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property. 31 Bom.L.R. 439=119 I.C. 186=1929 B. 227. Although if a person went into possession of properties under a will conferring a life-estate on him, he may be estopped from denying the title of the remainder-man, a person who entered into possession after his father's death without any title at all cannot be affected by any estoppel to which his father might have been subject, because his father had nothing to pass to him and he took nothing through his father. The mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purpose of the rule of estoppel laid down in *Board v. Board*, (1882) 9 Q.B.D. 48; 59 I.A. 268=1932 P. C. 172=63 M.L.J. 336 (P.C.). See on this section also 1932 A.L.J. 971=1932 P.C. 255=63 M.L.J. 418 (P.C.). The presence of a person at an adoption or his subsequent acquiescence in the adoption cannot estop him from challenging the validity of the adoption. He cannot dispute the fact of the adoption, but its legality cannot be established by mere estoppel. 45 Bom.L.R. 992. The belief induced in the person who sets up an estoppel under sec. 115 must be one in a fact, not in a proposition of law. Hence a Hindu widow's conduct in adopting a boy without the authority of her husband does not estop her from challenging the validity of the adoption on the ground of the absence of her husband's authority. 1943 N.L.J. 514. Estoppel by conduct—Adoption—Widow acting in pursuance of power contained in will and adopting boy—Representation and conduct—Change of position—Will found invalid as such—Widow estopped from questioning validity of adoption. 1939 M.W.N. 1148. Change of position—Will found invalid as Mahomedan will—renouncing of rights of inheritance

—Binding nature of arrangement. 10 O. W.N. 201=1933 O. 142. Omission to object—Arbitration—Clause for reference in voidable contract—Contract treated as valid and reference and award made—Subsequent avoidance of contract—Estoppel. 1933 Sind 207. An agreement between the Government and a grantee under a sanad was based on the assumption that the lands granted were Kadim Inam. The grantee led the Government by his conduct to believe that he accepted the assumption and obtained the benefit of a lower jodi. Held, that the grantee was estopped from contending that the lands were not Kadim Inam. 36 Bom.L.R. 1055. Cases relating to waiver. 11 R. 79=143 I.C. 299=1933 R. 52; 1933 L. 546. See also 171 I.C. 461=1937 P. 399; 20 N.L.J. 209. Mutation proceeding—Offer to be bound by oath—Decree passed on basis of oath—Re-opening of matter in Civil Court. 151 I.C. 973=1934 A.L.J. 92=1934 A. 300. Conduct—Plaintiff permitting a wooden platform to be placed before his shop—If estopped from objecting to erection of building. 1934 L. 900. See also 17 P. 358. The law of estoppel will not be invoked in favour of a party who comes to Court with dirty hands; where a suit between two co-tenants one of whom claims to be sole tenant is compromised and one of them subsequently goes behind it and revives the matter, the other will not be estopped from pleading the true facts. 18 R.D. 507. Where a defendant in his written statement in a former suit makes admission regarding the title of a co-defendant in that suit, those admissions do not operate as estoppel in the absence of proof that the co-defendant owing to the written statement acted in any way in which he would not have acted if the written statement had not been filed. 190 I.C. 609=1940 Rang. 136. The rule in this section is not modified by sec. 43 of the Presidency Small Cause Courts Act. 1940 M. 700=(1940) 1 M.L.J. 605. Carriage of goods by Railway—Declaration of value by consignor—Fixing of rate of carriage on basis of declaration—Loss of goods—Plea that value declared not true value—Estoppel. 17 P. L.T. 268.

Sec. 116.—See notes under S. 115. Scope and principle of. See 19 Mad. 200; 37 A. 557 (P.C.); 44 C. 771; 35 C.L.J. 146; 10 O. W.N. 48=1933 O. 129. "At the beginning of the tenancy"—Meaning of, 15 Pat.L.T. 519=1934 P. 555. See also 186 I.C. 274. Even a mere attornment creates an estoppel against the tenant but such estoppel is not the same as the statutory estoppel under sec. 116. There are other kinds of estoppel between tenant and landlord falling outside the scope of sec. 116. Such an estoppel would not prevent the tenant from showing that he attorned in ignorance of the fact



116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

that the person to whom he attorned had no title. A mere attornment does not create a new tenancy. The only effect of a mere attornment is the substitution of a new landlord in place of the old and the tenancy continues on the same terms. 47 Bom.L.R. 209. I.L.R. (1945) Bom. 343=1945 Bom. 399. Sec. 116 is not exhaustive and does not contain the whole law of estoppel. The section in terms applies only to cases where the tenancy continues. A similar estoppel exists in the case of a tenant holding over and the tenant cannot deny his landlord's title while he continues in possession. He must either give up possession or must have been evicted by title paramount. 22 Pat. 513=A.I.R. 1944 Pat. 77. Sec. 116 presupposes that the person affected by the estoppel is a tenant. Estoppel under the section arises therefore only when or after the tenancy is admitted or proved. I.L.R. (1943) Nag. 340. See also 1944 A.L.J. (Supp.) 15; 1942 N.L.J. 136. It is true that once a valid and subsisting lease is established between the parties, the lessee may be bound by the principle of estoppel and may be debarred from disputing the question of title of the lessor, but that does not prevent the alleged lessee to deny the lease and to deny his own status as a lessee. He is bound by the rule of estoppel only when he acts as a lessee and in that capacity, tries to refuse the title of his own lessor. That well-established principle of estoppel as between lessor and lessee as enacted in sec. 116 of the Evidence Act does not prevent any defendant to make out the case that he has never been a lessee, and the lessee purporting to make him a lessee was never a valid document, and in that behalf, to plead such circumstances as may invalidate the lease or otherwise make it null and void. 223 I.C. 303. Section is applicable to the case of immovable property only. 4 R. 503=1927 R. 94. It is only so long as the tenancy is subsisting and the tenant is in possession, that a tenant cannot set up the title of a third person. Where, before the lease is to take effect the lessee discovers that the lessor had no title and takes a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title. (1937) 1 M.L.J. 679=1937 Mad. 882=I.L.R. (1937) Mad. 638 (F.B.). See also 17 Mys.L.J. 310. The rule of estoppel embodied in sec. 116 of the Evidence Act only applies to the denial of the

title of the landlord at the beginning of the tenancy. The doctrine which operates between landlord and tenant has no application to the same parties, even while the tenancy exists when the question of title arises between them not in the relationship of landlord and tenant, but of vendor and purchaser. 1945 Mad. 321=(1945) 1 M.L.J. 475. Once a complete relationship of landlord and tenant is established, the rule of estoppel comes into operation and prevents the tenant from denying the authority and title which he admitted to rest in the landlord who inducted him into possession of the land. 73 C.L.J. 281=1941 Cal. 408. See also 46 Mys.H.C.R. 547; 49 Mys.H.C.R. 287. A tenant cannot be permitted to show that in granting him the lease, the landlord acted as agent of another person who was the real owner, and that the liability to pay rent to the lessor cannot be discharged by payment to that alleged owner. 53 L.W. 492=1941 Mad. 607=(1941) 1 M.L.J. 554. Sec. 116 only estops a tenant from pleading that at the time of leasing the land his lessor had no title; if the lessor loses possession and the tenant becomes liable to another for the rent, he is not estopped from disputing his lessor's claim. 1936 R.D. 384. See also 186 I.C. 274; 1940 A.W.R. (B.R.). 171. Sec. 116 does not estop a tenant from denying the right, as his landlord, of person who claims to have succeeded to the landlord who put the tenant in possession. 182 I.C. 533=41 P.L.R. 346=1939 L. 49. See also 1940 Lah. 341. There is no warrant for holding that the estoppel under sec. 116 only arises in favour of a landlord who puts the tenant into possession. It is wide enough to cover any case of a grantee who occupies and enjoys under a grant disputing the grantor's title. 47 Bom.L.R. 209. In view of sec. 116, it is not open to a sub-tenant who has executed a kabulyat to deny the title and rights of the sub-tenant to lease land. 1942 O.W.N. (B.R.) 381. In a suit by a landlord for rent, it is open to the tenant to plead in defence that the title of the plaintiff has, subsequent to the commencement of the tenancy, passed to somebody else, and that as such he was not entitled to the rent. Sec. 116 does not prevent a tenant from pleading that the title of the original lessor has since come to an end. 1939 A.L.J. 913=1939 All. 670. If a kanomdar attempts to resist a suit for redemption on



the ground that his landlord has lost his title by reason of a Court sale of his interest in the property, it is not enough for the kanomdar, who is in the position of a lessee and a mortgagee to show that a third party had become the purchaser of the plaintiff's interest in the property. He must go further and prove that as the result of this purchase, there was an eviction of him by title paramount or an equivalent of some such eviction and that he attorned to the holder of the title paramount. If he does not prove these facts he still continues under the original tenancy and the bar imposed by sec. 116, Evidence Act, operates during the continuance of the tenancy which is not determined automatically by the Court sale. He would be estopped under sec. 116, until there is eviction by superior title or until he surrenders possession. 1945 M. W.N. 233 (2) = 58 L.W. 167 (1) = (1945) 1 M.L.J. 269. Party acquiring by adverse possession—Permissive possession after, no estoppel. 1929 R. 170. Section not exhaustive. 32 C.W.N. 867. Sec. 116 does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise, the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, e.g., by attornment, acceptance of rent, etc. In this sense it is true that the principle only applies to the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. There is in English case law some authority for the view that a tenant is only estopped from denying his landlord's title if at the time when he took his lease he was not already in possession of the land. But in sec. 116 the Indian Legislature has formulated no such condi-

tion. 41 C.W.N. 1253 = 1937 P.C. 251 = (1937) 2 M.L.J. 286 (P.C.). A lessee of land is under an obligation to surrender possession of the premises demised to his lessor from whom he derived possession; and until he fulfils that obligation, he is bound to pay his lessor either rent or damages for use and occupation. It is no doubt open to the sub-lessee to show that his title having expired he has surrendered possession to the original landlord from whom his lessor derived possession or to a person claiming by title paramount. In such cases no question of estoppel would arise; but when he is unable to plead a valid defence to his obligation to surrender possession, it would not be open to him to resist his lessor's demand for damages for the use and occupation during the period he has been in possession until he surrenders possession to the lessor. Even though, therefore, the original lessee's title may have expired, by the expiration of the term of his lease, until the sub-lessee shows that he has renounced the obligation of surrendering possession to him by commencing to hold under some other person either the landlord of the original lessee, (i.e., his lessor) or a person claiming by title paramount or by delivering possession to him, the mere fact that the original lessee's title has expired is no defence to a suit by him against the sub-lessee for arrears of rent or damages for use and occupation. 1937 M. 478 = (1937) 1 M.L.J. 566. A tenant cannot escape estoppel merely by saying that his tenancy under the landlord was terminated either by delivery of possession under a decree for possession or by the landlord's own act in determining the tenancy and bringing the suit for ejectment. Nor can he escape it merely by saying that he came to an arrangement with a third person claiming a paramount title and attorned to him. The estoppel, however, disappears if the landlord's title is extinguished subsequent to the inception of the tenancy, or if there is eviction by title paramount. No physical dispossession by the person claiming paramount title is necessary. If the true owner is armed with a legal process of eviction which cannot be lawfully resisted, even though the tenant is put out of possession, the threat to put him out of possession amounts in law to eviction. If, under such circumstances, the tenant, openly and to the knowledge of his landlord, attorns to the true owners, the estoppel is gone. The attornment, however, must be under compulsion, and the party evicting must have a good title and the tenant must have quitted against his will. 22 Pat. 513 = 1944 Pat. 77. Ejectment suit by landlord—Adverse rights claimed by tenant—Independent suit as the remedy. 1928 C. 546; 35 C.W.N. 652. Sec. 116 presupposes a provable contract of tenancy. When there is no denial of the landlord's title but only a de-

nal of a contract of tenancy, the section is not a bar. There can be no estoppel on a matter of law. 164 I.C. 557=19 N.L.J. 179=1936 N. 174. See also 1944 R.D. 377=1944 A.W.N. (Rev.) 200. If once the relation of landlord and tenant is established between the parties, the tenant would be estopped from disputing the landlord's title. There are no words in sec. 116 to show that the tenant must be put into possession by the landlord in order to estop the tenant from disputing the landlord's title. 30 Bom.L.R. 741=1928 B. 265; 139 I.C. 46=33 P.L.R. 799 (2); 36 Bom.L.R. 1074. Sec. 116 does not estop a tenant from denying the right as his landlord, of person who claims to have succeeded to the landlord who put the tenant in possession. 1939 L. 49. Where the rent suit is brought by the daughters claiming to be heirs to the leasehold rights alleged to be the stridhan of their mother, though the tenants cannot dispute the title of their mother at the commencement of the lease they can dispute the derivative title of the plaintiffs. It is in such a case incumbent upon the plaintiffs to prove that the leasehold rights in question were the stridhan of their mother and they are entitled to inherit the said rights according to Hindu Law. 1940 Lah. 341. Sec. 116 of the Evidence Act only estops a tenant from disputing his landlord's title during the continuance of the tenancy. Where the tenancy originated in a lease, the estoppel continues even after the expiration of the period of the lease, unless the tenant has openly surrendered possession or has at least given notice to his landlord that he claims under his own title. But in the absence of evidence to prove that the tenant paid rent to the landlord after the expiry of the lease, or that the landlord assented to the possession of the tenant after the determination of the lease or that the tenant accepted the title of the landlord after that, it cannot be inferred that the relationship of landlord and tenant continued after such determination, and Art. 139 of the Limitation Act bars any suit to recover possession from the tenant after the expiry of twelve years from the date when the tenancy was determined. When the tenant has proved that the tenancy has been determined by efflux of time it is for the landlord to prove that any tenancy was created or arose after such date. 176 I.C. 84=46 L. W. 848=1938 M. 73. A tenant is not estopped merely because, by the tenancy he acknowledges the title of his landlord, and a tenant may always explain and thereby render inconclusive acts done through mistake or misapprehension. It is permissible to a tenant to deny his lessor's title if it is shown that he executed the lease in ignorance. 177 I.C. 599=1938 R. 227. Tenant can set up his own title against third person though not against landlord.

1930 A. 299. If a tenant desires to challenge the title of the landlord, he must quit the land. 1928 R. 162. The tenant is concluded for ever from filing a suit on his title if a suit is filed against him in ejectment during the continuance of the tenancy and is decreed against him. 1928 R. 162. If a tenant has been let into possession by a landlord he cannot deny and set up adverse title. 20 C.W.N. 1335; 34 B. 329; 28 M. 526; 51 B. 43=1927 B. 129; 103 I.C. 421=1927 L. 626. Tenant cannot deny landlord's title until and only until he surrenders possession. 101 I.C. 771; 97 I. C. 992. See also 1938 N.L.J. 317=1938 N. 506; 104 I.C. 892; 55 M. 601=1932 M. 298=62 M.L.J. 313; 1934 L. 445. Where the defendant's father who held shop as a tenant under the predecessor in title of the plaintiff fell in arrears of rent, and the defendant undertook to pay the arrears and to execute a sarkhat it must be deemed that there was surrender by the father of the defendant followed by the defendant being let into possession under the lease executed by him in favour of the plaintiff. The defendant, in such circumstances, is estopped from denying the title of the lessor. 1937 O.W.N. 49=1937 O. 113. See also 42 C.W.N. 1022. However defective it may be, tenant holding over is in no better position. 6 R. 657. See also 32 C.W.N. 867=1934 C. 499. The tenant's estoppel operates even after the termination of the tenancy and even though the defendant is sued as a trespasser. (Ibid.) Where a person in possession of land executes a kabuliyat, he is bound by the kabuliyat and estopped from challenging the title of his landlord unless he can prove fraud, misrepresentation, coercion or mistake. (1935 O.W.N. 449 Foll.) 171 I. C. 84=1937 O.W.N. 1030=1937 O. 505. Where lease was executed through ignorance or fraud, no estoppel. 1926 C. 720. If the lessor loses possession and the tenant becomes liable to another for the rent, he is not estopped from disputing his lessor's claim. 1936 R.D. 384. No estoppel in case of tenant evicted actually or constructively by true owner. 23 L.W. 296. A tenant may dispute his landlord's title if he has been evicted by title paramount or if under threat of eviction by a party having a title paramount he has attorned as tenant. But if the tenant has attorned voluntarily, he is estopped from denying the landlord's title. 1934 M. 197=66 M.L.J. 355. Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance, mistake or the like. 112 I.C. 382; 150 I. C. 898=1934 R. 139; 1937 P. 27=167 I.C. 141; 1937 O. 505=1937 O.W.N. 1030 or that the contract of tenancy is void. 1928 B. 265. Such a tenant may set up adverse possession against

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

*Explanation (1).*—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

*Explanation (2).*—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

## CHAPTER IX.

### OF WITNESSES.

118. All persons shall be competent to testify unless the Court considers

new landlord without surrendering possession to him. 167 I.C. 141=1937 P. 27. Mere attornment after previous possession as proprietor would not raise estoppel. 1928 P. 284=113 I.C. 703. Person attorning to lessors as tenant cannot question title of lessors. 1927 C. 941. See also 1937 O. 505; (1941) 1 M.L.J. 554; 26 A.L.J. 1255=110 I.C. 376=1928 A. 650. Lessors also are estopped from denying validity of lease. 1926 C. 882. Verbal lease for more than one year—Tenants in possession—Liability for rent—Invalidity of lease—Effect of. 148 I.C. 684=1934 P. 369. If a tenant is inducted on a land by a person, the tenant cannot question the title of that person who has so inducted him on the land. The tenant is thus estopped from raising the question that the person letting him into possession is merely a benamidar. 63 C. 763=161 I.C. 468=40 C.W.N. 460=1936 C. 93. See also 41 M. 461; 24 C. 411; 26 M.L.J. 597; 58 C. 1371=1931 C. 167; 36 Bom.L.R. 1074. As to licensee's estoppel, see 39 C. 439; 42 C. 262. See also 60 I.A. 297=60 C. 980=64 M.L.J. 103 (P.C.). The representatives in interest of the lessee are estopped from questioning the title of the lessor, even if the lessee had not been inducted on the land by the lessor. 42 C.W.N. 1032. Adverse possession cannot be set up by the tenant against the landlord. 45 I.C. 656; 30 I.C. 218. Plea of title in third person, see 7 C.W.N. 596; 15 M.L.J. 368. In a suit in ejectment where the defendant relies on the title of a third party having no other title to rely on, it is always open to the plaintiff to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record deed or in pais. 1937 M.W.N. 299=1937 M. 544. A mortgagor cannot deny the title of his mortga-

gor on the date of the mortgage. It is, however, open to him to assert that on the death of the mortgagor, persons who are his heirs under the Hindu law did not succeed to his occupancy rights in accordance with the special rules laid down in Act XII of 1881. 122 I.C. 414=1930 A. 108. See also 38 L.W. 266=1933 M. 635; 53 L.W. 492=(1941) 1 M.L.J. 554. Sec. 116 merely states that the licensee ought not to deny the title of the licensor. It does not state that every license is revocable at the instance of the licensor. Consequently the licensee is not prevented from asserting that he must not be turned out. 7 R. 617.

Sec. 117.—See 36 B. 455=12 I.C. 257 (estoppel between banker and customer). It is not open to the defendant to show that the signatory was in reality acting for an undisclosed principal, whether the defendant is a drawer or an acceptor. 117 I.C. 160=1929 Sind 172 (1).

Sec. 118: Scope of Section.—Sec. 118 suggests that in India the rule generally is in favour of the admission of all the evidence of doubtful character though the weight to be attached will be a matter for the Court's discretion. 34 I.C. 976=18 Bom. L.R. 266. Where a young child is called as a witness the first step for the Judge or Magistrate to take is to satisfy himself by questioning the child that it is a competent witness within the meaning of sec. 118. 1939 Rang. 402. 45 I.C. 497=20 Bom.L.R. 365. See also 15 Mys.L.J. 217=42 Mys. H.C.R. 295. Sec. 118 vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding; but this discretion must be exercised in a judicial manner. No doubt, the proposition that the competency of the witness to understand and give rational answers should be tested by Court by interrogating him before his examination is commenced, is not quite justified by the provisions of the section. But such a course

Who may testify. that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

*Explanation.*—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Parties to civil suit and their wives or husbands. Husband or wife of person under criminal trial.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In Criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

121. No judge or Magistrate shall except upon the special order of some Court to which he is subordinate be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in

should be pursued where the circumstances of the case make it plainly desirable. 43 C. W.N. 1117. Witness may be competent without being compellable. See Field, p. 402 (6th Ed.). Test of competency is that witness should be able to understand questions put to him. 102 I.C. 349=8 P.L.T. 594; 1928 L. 903; 1930 Sind 120 (understanding is the sole test of competency). The absence of such examination does not invalidate the trial. 41 C. 406=14 Cr.L.J. 485. As to competency to testify, see also 23 A. 90; 11A. 180. As to child witness, see also 15 Cr.L.J. 161; I.L.R. (1941) 2 Cal. 180; 20 Bom.L.R. 365; 16 B. 359; 16 M. 105; 10 A. 207; 3 P.L.T. 649=66 I.C. 73; 41 M. 365=34 M.L.J. 460; 1928 L. 903; 1930 L. 337. Should not be examined if unable to give relevant information. Notwithstanding sec. 5 of the Oaths Act, a child's evidence is not inadmissible merely on the ground that no oath was administered to it. Sec. 13 of the Oaths Act governs such cases. 22 I.C. 737=38 M. 550. When two persons though accused of complicity in the same offence are tried separately, each is a competent witness at the trial of the other, though the case could be different if they are tried together. 45 C. 720=22 C.W.N. 405. Evidence of husband to disprove access on the question of legitimacy of child born during wedlock. See 38 M. 466=25 M. L.J. 594. As to competency to testify of a person who is unable to understand oath and its significance, see 10 O.C. 337=7 Cr. L.J. 89; 20 Bom.L.R. 305. Police officers as witnesses. 6 C.P.L.R. (Cr.). 1 Accomplice evidence. 8 P.R. 1904 (Cr.). Evidence of witness illegally pardoned by police. 16 B. 661=Rat. 776. See also 19 B. 363. Unless there is something shown against the witness, his evidence should not

be discarded merely because he is related to the party when he is a man who *prima facie* must be regarded as respectable and reliable. 145 I.C. 330=1933 R. 162.

Sec. 119.—See 5 O.C. 245. Sec. 119 applies to the case of a witness who has taken a religious vow of silence and gives his evidence in writing to questions put to him. It is not the practice of the Courts to force any man to act contrary to his religious convictions so long as his acts are legal, and if a witness's religion forbids him to speak the Court will not compel him to speak and he must be deemed "unable to speak" within the meaning of sec. 119. The evidence of such a witness given and taken in writing in open Court is properly taken and is not inadmissible, 20 Pat. 898=1942 P.W.N. 23=23 Pat.L.T. 332=1942 Pat. 183. When a witness is so deaf and dumb, that it is impossible to make him understand the question put to him, in cross-examination, he cannot be a competent witness and his evidence ought to be struck out and a conviction based solely on his evidence ought to be quashed. 14 I.C. 655=1912 M.W.N. 100.

Sec. 120: Illustrative Cases.—Where the husband in divorce proceedings relied on the birth of a child as evidence of adultery under secs. 118 and 120, his evidence as to non-access was admissible. 38 M. 466=25 M.L.J. 594. A child born 11 months after the marital intercourse between its parents had ceased, is illegitimate. (Ibid.) A person against whom are launched proceedings for order for maintenance under sec. 488, Cr.P. Code, is competent witness on his own behalf in such proceedings. 18 A. 107. See also 16 C. 781; 5 P.R. 1914 (Cr.); 7 C. P.L.R. 127; 19 P.R. (Cr.) 1903.

Sec. 121.—As to the principle of the section, see 3 A. 573; 3 M. at 177; 2 Weir 777

Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

*Illustrations.*

(a) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(c) *A* is accused before the Court of Session of attempting to murder a police officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

122. No person who is or has been married shall be compelled to disclose

Communications during marriage.

any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married person, or proceedings in which one married person is prosecuted for any crime committed against the other.

123. No one shall be permitted to give any evidence derived from unpub-

Evidence as to affairs of State.

lished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

=6 M.H.C.R. App. 42; 12 Cr.L.J. 277=10 I.C. 917; 20 C. 857.

**Scope of Sections.**—Questions mentioned in secs. 121, 124 and 125 are not barred. The witness has simply a privilege of refusing to answer them and a Magistrate may warn the witness of his privilege. But he cannot disallow such questions. 10 I.C. 917=12 Cr.L.J. 277. As to whether a Judge can be witness in a case tried by himself, see 4 B.L.R. (Cr.) 15; 20 W.R. (Cr.) 76; 2 C. 405; 23 W.R. (Cr.) 60; 23 C. 328; 24 C. 167; 19 M. 263; 10 B.H.C.R. 81; 28 C. 709; 5 C.W.N. 846; 4 C.W.N. 604; 7 W.R. 190.

**Sec. 122: Scope of Section.**—See 22 M. 1 at 3; 35 Bom.L.R. 174=1933 B. 153.

**Application of Section.**—The restriction in sec. 122 is not one that can be waived or that a Court can relax, so that disclosure by a widow of certain communications made to her by her husband immediately before his death cannot only be not compelled but should not be permitted at all. 23 I.C. 511=40 C. 891. Under sec. 122, the consent to the evidence being given cannot be implied. It is incumbent upon the Court to ask a party against whom the evidence is to be given whether he or she would consent to the evidence, being given and not to admit it unless such consent is given. 171 I. C. 529=38 Cr.L.J. 1089=1937 R. 347; 27 P. R. (Cr.) 1913=19 I.C. 1004. No statement of an incriminating nature made by the accused as to her guilt under sec. 302 to her husband could be received in evidence. 1923 L. 40 (10 P.R. 1914, Foll.) See also 27 I.C. 664=34 P.R. 1914 (Cr.); 14 Cr.L. J. 273=19 I.C. 705. A woman's confession to her husband is inadmissible in view of sec. 122. An offence against a person in the

section does not include an offence against a son though it may cause grief to the father. 10 P.R. (Cr.) 1914; 25 I.C. 525. Communication by an arbitrator to his wife shortly before his death that he accepted bribe from a party can be permitted to be disclosed only if sec. 122 is fulfilled. 1930 L. 280 (2). On a trial for breach of trust by a public servant, a letter of the accused to his wife found by the police was held admissible against him in evidence. 22 M. 1. **Secs. 122 and 123.**—See 45 L.W. 470= (1937) 1 M.L.J. 613.

**Sec. 123.**—The privilege in respect of official and State documents from production in Court is a narrow one, most sparingly to be exercised. Scope of privilege pointed out. 35 C.W.N. 1121=61 M.L.J. 943 (P. C.). See also 1944 Sind 145. Under sec. 123 when a Government official desires to claim privilege, it is desirable, even if it is not essential, that he should put in a statement stating that he has considered the documents carefully and has come to the conclusion that they cannot be produced without injury to the public interests. He ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damaged, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. 1946 N.L.J. 205. For the purpose of sec. 123 the Court cannot be invited to discuss the question if a particular document falls within the description of "an unpublished official record." The decision of the public officer concerned is final on that question. (8 Q.B. 255; 48 C. 304; 1930 M. 342, Foll.) 8 Mys.L.J. 474.

The Zaildari book and an application by the Zaildar to the Collector praying for the deletion of certain remarks therein, are not in their very nature unpublished official records, and no privilege in respect of these documents can, therefore, be claimed under sec. 123. The Head of Department may be the final judge as to whether a certain document does or does not relate to matters of state but he cannot be the final Judge as to whether the document has been published or not and whether it is official or not. 48 P.L.R. 41. The use of the word 'concerned' in relation to the head of the department shows that the affidavit must contain a sworn statement by the head of the department in whose custody the documents happen to be at the time when discovery and production is claimed. The principle and the foundation on which sec. 123 rests is concern for the public interest. If an affidavit is made by the head of the department that he does not wish to produce certain documents as they constitute unpublished official records relating to affairs of State he is deposing by implication that the production of those documents will be prejudicial to public interest. The words "Head of the Departments concerned" are not only applicable to the Ministers in the case of Provincial Government and to the Members of the Viceroy Executive Council so far as the Central Government is concerned. Therefore the affidavits by the Chief Secretary of Provincial Government or Home Secretary of Central Government are good. A.I.R. 1944 Lah. 209. See also 1944 Sind 145. Record evidencing interference by Government with pending judicial proceedings—If privileged. Departmental enquiry papers are not unpublished document relating to affairs of State. See 161 I.C. 668=1936 N. 25.

**Secs. 123 and 124: Public officer—duty of Court.**—Where a public officer declines to produce certain document, claiming privilege under secs. 123 and 124, it is for the Court to satisfy itself that the documents relate to any State affair or that their production will be detrimental to public interests and it is not for the public officer to decide whether the documents are privileged. The privilege regarding production of documents is a narrow one and the mere fact that their production is likely to prejudice the Crown's case is no reason for their non-production. 161 I.C. 668=1936 N. 25. Statements made to and recorded by a Forest Range Officer in the course of an investigation into an offence under the Madras Forest Act do not relate to any affairs of State nor can they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. No privilege can be claimed in respect of such statements under secs. 123 and 124. It will be for the Court after perusing the statements and considering the objections as to their admissibility to decide whether they are admissible or not. 1937 M.W.N. 322=45 L.W. 470=(1937)

C.C.M.—307

1 M.L.J. 613. Where the State is not a party, the following rules govern the question of production of records, claim of privilege, etc.—(1) All documents called for must be produced. (2) In case of State documents the privilege should be claimed by the witness who is summoned to produce them. (3) When objection is taken the Court cannot inspect the document but can take other evidence to determine its nature. (4) Ordinarily it is enough if the head of the department certifies that it refers to an affair of state. (5) The Court need not accept it as final but may require further evidence. (6) If the Court decides that it is not privileged, the document should be tendered in evidence. (7) If the Court considers it a State document, it cannot be admitted in evidence unless with the permission of the head of the department. 1938 N. 358. The accidents' register kept by a medical practitioner is not a privileged document, and a Magistrate cannot therefore refuse to cause production of the same. 1939 M.W.N. 1128 (2)=50 L.W. 796=1940 Mad. 240. Under sec. 123 it is only when the document deals with affairs of State that privilege can be rightfully claimed under the section. The diary of a foot constable who was shadowing the movements of a suspect could not possibly become an affair of State within the accepted meaning of the words. 188 I.C. 717=42 P.L.R. 484=1940 Lah. 217.

**Secs. 123, 124 and 125.**—A Police witness in proceedings under Ch. VIII, Cr. P. Code, cannot claim privilege when asked about a statement made or given to him by one of the witnesses. If such a statement was given in the course of an investigation, the plea of privilege might be based on sec. 124 of the Evidence Act, as sec. 125 refers to information given before the initiation of proceedings and sec. 123 cannot apply. Such a plea of privilege cannot be allowed, for a statement by a person who afterwards gives evidence as to the facts in that statement cannot be said to have been a statement made in official confidence, nor can a police officer be heard to say that the public interest will suffer if the accused are allowed their right of cross-examination. I.L.R. (1942) Kar. 252=A.I.R. 1942 Sind 122=44 Cr.L.J. 378.

**Secs. 123, 124 and 162.**—Sec. 162 deals with the production of documents in answer to summons and it is obligatory on a witness so summoned, to produce the documents called for by the Court; he has no right to determine whether the documents shall be produced. When producing them, it is for him to claim privilege, if the documents are privileged, and it is the duty of the Court to determine whether the documents shall be admitted and exhibited. Secs. 162 and 123 protect the discovery of documents relating to matters of State. There is difference between a private witness called upon to produce documents and a public officer summoned to produce









*Explanation.*—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.]

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [illegal]<sup>1</sup> purpose ;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader]<sup>2</sup>, attorney or vakil was or was not directed to such fact by or on behalf of his client.

*Explanation.*—The obligation stated in this section continues after the employment has ceased.

#### *Illustrations.*

(a) *A*, a client, says to *B*, an attorney—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) *A*, a client, says to *B*, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A*'s account book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

#### LEG. REF.

<sup>1</sup>Substituted for the word "criminal" by Act XVIII of 1872, sec. 10.

<sup>2</sup>Inserted by *Ibid.*

it protects the name of a spy or informant not the nature of the information and it has no application to an informant who lays a sworn information and thereby initiates criminal proceedings. This rule is clearly applicable to gambling cases. 29 I.C. 79=16 Cr.L.J. 447. In criminal prosecutions the witnesses for the Crown are privileged from disclosing the channel through which they received or communicated information. But this privilege cannot be claimed by a detective. 42 C. 957=19 C.W.N. 676.

Sec. 126.—Sec. 126 is not restricted only to oral communications made to the pleader by the client, but extends also to facts observed by the pleader in the course of and for the purpose of his employment and he is not bound to disclose them without the consent of the client. 152 I.C. 164=1934 L. 269. The privilege afforded to a legal adviser under sec. 126 is of a very limited character. It protects only such communications as are made to the legal adviser in confidence, in the course and for the purpose of his employment. And if the communication is not made in

confidence then, communication is in no sense privileged. 1933 Sind. 47. A failure on the part of a client to claim privilege when he is under cross-examination does not amount to "express consent" given by him to his legal adviser to disclose a communication which is otherwise privileged under the section. (*Ibid.*). There is no privilege to communications made before the creation of the relationship of pleader and a client. Where two persons have a dispute about a claim made by one of them upon the other and both seek the help of a pleader, and one of them makes a statement to the pleader, the statement so made to the pleader by one of the parties is admissible. The test is whether the communication is made to the witness in his character of legal adviser. Further, in order to attract sec. 126 the communications by the party to his pleader must be confidential. 58 C. 1379=1932 C. 148. But the mere presence of friends of clients specially when such friends occupy more or less the same position as he himself, does not destroy the privilege. 1933 Sind. 47. There must be definite charge of fraud and something to support the charge before the claim of privilege can be overruled; and the legal practitioner can then be rightly compelled to answer the question with regard to the contents of the document at the instance

Section 126 to apply to interpreters, etc.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

128. If any party to

Privilege not waived by volunteering evidence.

a suit gives evidence therein at his own instance or, otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader],<sup>1</sup> attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

129. No one shall be compelled to disclose to the Court any confidential

Confidential communications with legal advisers.

communication which he has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case, he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

130. No witness who is not a party to a suit shall be compelled to produce

Production of title deed of witness, not a party.

his title deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

131. No one shall be compelled to produce docu-

Production of documents which another person, having possession, could refuse to produce.

ments in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

132. A witness shall

Witness not excused from answering on ground that answer will criminate.

not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose or tend, directly or indirectly to expose, such witness to a penalty or forfeiture of any kind :

#### LEG. REF.

<sup>1</sup>Inserted by Act XVIII of 1872, sec. 10.

that it was in his possession. 144 I.C. 175 =1933 R. 61 (2). The Court cannot rule out the evidence of a counsel as inadmissible on the ground of the incompetency of the counsel to be a witness. 24 I.C. 165 = 12 Cr.L.J. 429. On this section, see also 3 A. 91; 28 B. 263; 4 Bom. 376; 4 Bom.L.R. 460; 12 A.L.J. 285. Where a Hindu widow applied through her pleader for a succession certificate to the estate of her husband and the same was granted without the production of the will, the contents of which had been disclosed to the applicants' pleader, and in a later proceeding the pleader was sought to be examined with reference to the will, held, that as the pleader, became acquainted with the will in the course of and for the purpose of his professional employment he was privileged under sec. 126. The circumstance that the widow was willing to tender the will in Court or that its contents had otherwise been made known, was entirely immaterial. 31 Bom. L.R. 2046 = 1929 B. 414. Communications between a prosecutor in a Crown case and

his attorney are not privileged. 27 S.L.R. 72 = 1933 Sind 47. There is no protection afforded by the Evidence Act to a doctor as such. It is his duty to assist the Court in every way possible and to disclose to the Court all the information in his possession relevant to the matter in issue. 55 A. 134 = 1933 A.L.J. 14 = 1933 A. 56.

Sec. 127.—Protection to interpreters is of peculiar importance in India as there are so many races speaking different languages. 26 C. 53 = 2 C.W.N. 640.

Sec. 129.—See 4 B. 576; 2 Bom. 453; 11 C. 655; 21 C. 392; 29 Bom.L.R. 414.

Sec. 130.—Witness present in Court, if can be compelled to produce document. See 12 Cr.L.J. 250; 14 C.L.J. 120. Effect of non-production. 15 C.L.J. 7 = 17 C.W.N. 108 = 13 I.C. 120.

Sec. 132.—"Compelled to answer question," meaning of. 28 S.L.R. 251 = 152 I.C. 346 = 1934 Sind 114; 41 Cr.L.J. 48. The compulsion contemplated in the proviso to sec. 132 is something more than being put into the box and being sworn to give evidence; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or

Provided that no such answer which a witness shall be compelled to give, shall be subject to any cross-examination or to any other question or to any other process of law, except a prosecution for giving false evidence or for any other offence.

133. An accomplice shall be a competent witness against an accused person; and a confession made by an accused person may be proved by him in his defence. It is not necessary that the corroborated testimony of an accomplice should be proved by other evidence.

134. A witness who has given evidence in a criminal case shall not be liable to be called as a witness in any civil case, and a witness who has given evidence in a civil case shall not be liable to be called as a witness in any criminal case.

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when approver is a scoundrel, is not warranted. 77 I.C. 429=1924 R. 173. The probative value of the evidence of an accomplice is practically the same as the confession of a co-accused. 24 F.C. 156 (38 B. 156, Foll.). A conviction based on the evidence of an accomplice or the confession of a co-accused is not illegal, though it is not safe to act on such testimony, unless corroborated in material particulars. 24 I.C. 153=15 Cr.L.J. 417; 1929 N. 215; 7 O. W.N. 862.

..What is good corroboration and what is not.—Corroborative evidence should confirm in some material particulars not only the evidence that the crime has been committed but also that the accused committed it. 1933 L. 295=1933 Cr.C. 394. The nature of corroboration necessarily varies according to the particular circumstances of the offence charged. The corroboration need not be such as to confirm the accomplice in every detail of the crime; nor need it be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. (Ibid.) In all cases depending upon informer's evidence the degree of support required for the evidence depends in each case upon the individual's credit. 15 I.C. 987=16 C. W.N. 669. All persons coming technically within the category of accomplices cannot be treated as precisely on the same footing. 13 P.L.T. 802=1933 P. 96. An approver's evidence supported by the retracted confession of co-accused behind the back of the accused is not sufficient to convict the accused. Such a retracted confession is not a corroborated one of a high value. 18 I.C. 672=11 A.L.J. 73. It is unsafe to rely upon the uncorroborated testimony of the approver; the corroboration must be of the statement connecting the accused with the offence. 12 I.C. 513=12 Cr.L.J. 537 (A.); 1929 M.W.N. 794. There is nothing in sec. 133 to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation this corroborative value would be greatly diminished. 1923 L. 666. See also 76 I.C. 698=1923 L. 335; 1923 L. 152; 96 I.C. 127=1926 A. 705; 146 I.C. 364=1933 L. 946. Courts must exercise great caution. If there are circumstances which indicate inducement or pressure which is not recognised by law. 148 I.C. 745=1934 L. 583. See also 34 P.L.R. 2. Confession of one accused cannot be said to be corroborated by the confession of another as against a third accused who has not confessed at all. But between the first two the confession of one may be said to be corroborated by the confession of the second and vice versa. 60 I.C. 786=22 Cr.L.J. 290 (L.). (38 B. 156, Dist.) The rule that testimony of an approver must be corroborated not only as to the crime but

also as to the identity of each accused person and that the corroboration must proceed from an untainted source is not a technical rule, but is founded on long judicial experiment. 38 C. 559=10 I.C. 582=15 C.W.N. 593; 1929 N. 222; 1929 L. 850=34 P.L.R. 866. The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. The evidence of one approver cannot be said to corroborate another except where both have, at the earliest opportunity and before there has been any chance of consultation, deposed to the same acts as having been committed by particular accused person. 3 L. 144=68 I.C. 113=1922 L. 1. An accused should not be regarded as convicted on the statement of an approver unless such testimony is strongly corroborated and the corroboration distinctly implicates the accused with crime committed. 40 I.C. 696=9 P.W.R. (Cr.) 1917; 39 I.C. 680=9 P.R. (Cr.) 1917; 1930 P. 164=11 P.L.T. 545; 146 I.C. 701=1933 N. 352; 147 I.C. 1172=1934 C. 114. The evidence of one accomplice is not sufficient corroboration of the evidence of other accomplices, nor are previous statements, made by the same person sufficient. 21 M.L.J. 283=9 I.C. 897; 1928 N. 215; 1929 L. 850; 1933 C. 146; 146 I.C. 1064=1933 O. 355. Accomplices in different stages of crime.—Their evidence is not mutually corroborative. 1933 M.W.N. 1129. See also 146 I.C. 701=1933 N. 352. Corroboration.—Nature and extent of.—Whether English and Indian Law on the point are the same. See 69 I.C. 257=17 N.L.R. 113; 5 P. 63=93 I.C. 884; 1929 M.W.N. 698. In cases where a judge combines the functions of a judge and jury, he is bound under law to scrutinise the accomplice's evidence—with the same degree of care and caution, which is required of him in a trial by jury; and, just as he is bound to give a warning to the jury, he must warn himself that it is unsafe to convince a person on accomplice evidence in the absence of substantial corroboration by independent evidence. 114 I.C. 457=1929 N. 215; 1934 C. 114=37 C.W.N. 934. It is mainly the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record. An accused is under no legal obligation to do so. (Ibid.). See also 1941 O.A. 1018=1941 A.W.R. (C.C.) 402. An accomplice is a competent witness against an accused and a conviction will not be illegal if it proceeds upon his uncorroborated testimony; but this absolute rule of law as regards the evidence of accomplice is subject to a rule of guidance contained in Ill. (b) of sec. 114 that an accomplice is unworthy of credit unless it is corroborated in material particulars. 114 I.C. 609=1929 N. 233. The foremost essential condition for accepting the approver's statement is that it must

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

## CHAPTER X.

### OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law, by the discretion of the Court.

be a trustworthy statement. 114 I.C. 623 =1929 N. 222. Where the accomplice's evidence is found to be truthful, there is no need for corroboration. 9 P.L.T. 672; 1930 M.W.N. 169. Credibility of approver's testimony depends upon the extent of removal of "taint" in his evidence. 1929 L. 850. Where the evidence of an accomplice is corroborated only as regards some accused, conviction of others is bad. 1929 M. 222. See also 146 I.C. 934=1933 P. 121. Corroboration may be circumstantial. 1930 N. 97; 1933 L. 294. If the evidence of an approver is discarded, it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution. 1930 P. 164. The rule in sec. 114, illus. (b) that an accomplice is unworthy of credit unless, he is corroborated in material particulars has become a rule of practice of so universal application that it has now almost acquired the force of law. 120 I.C. 721=1930 N. 97. See also 184 I.C. 545=1939 Rang. 361.

The practice of tendering witnesses for cross-examination in a criminal trial is inconsistent with sec. 183 and ought not to be employed in the case of a witness whose evidence is not merely formal; such a practice leads to confusion and does not conduce to the discovery of the truth. I.L.R. (1942) Bom. 384=43 Cr.L.J. 529=44 Bom.L.R. 27=A.I.R. 1942 Bom. 71 (F.B.). See also 43 Bom. L.R. 946=1942 Bom. 71; 1942 Bom. 37.

RETRACTED STATEMENT IS ADMISSIBLE.—A retracted statement of an approver is admissible as evidence against an accused person. 61 I.C. 528=12 L.W. 385. May be sufficient corroboration of the approver's story as against himself but not against a co-accused. 20 Cr.L.J. 188=49 I.O. 604. If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. 55 A. 91=1933 A. 31.

DELAY IN MAKING STATEMENTS.—Long delay in making their statements would make their evidence liable to grave suspicion. 67 I.C. 828 (2)=2 L.L.J. 296.

SEC. 134: SCOPE AND PRINCIPLE OF SECTION.—EXPLAINED.—10 W.R. 286; 22 C.W. N. 408. Court may believe one witness in preference to a larger number on the other side. 24 W.R. 18 (Cr.). Evidence in case of perjury—Necessity for more than one witness. 5 W.R. (Cr.) 23; 23 Bom.L.R. (Sup-Vol.) F.B. 457. Case of two contradictory statements—Conviction of alternative charges.

See 4 B.L.R. (Ap. Cr.) 9; 13 C. 435; 8 W. R. (Cr.) 79; 9 W.R. (Cr.) 52; 9 W.R. (Cr.) 25; 12 W.R. (Cr.) 11; 12 W.R. (Cr.) 66; 4 B.L.R. (A.C.) 4; 3 B.L.R. (Ap.Or.) 36; 12 W.R. (Cr.) 31; 22 W.R. (Cr.) 2; 4 B.L. R. (Ap. Cr.) 9; 10 B. 124; 11 B. 702. See Field, 6th Ed., p. 433. Under sec. 134 no minimum number of witnesses is prescribed by law to prove a fact. At the same time the law does not lay down that the statement of witnesses must necessarily be accepted as true unless the opposite party produces evidence of its own to contradict them. 1942 O.W.N. (B.R.) 397 (2)=1942 E.D. 486 (2).

SEC. 135.—Order of examination of witnesses generally left to discretion of counsel. 5 C.W.N. 15. Where at the trial the prosecution witnesses who had been summoned were present in the Court as also the complainant and though the accused for certain reasons of his own wanted to cross-examine the witnesses before the complainant the Court insisted on the complainant being examined first on the ground that his state of health necessitated that course. *Held*, that the Magistrate should have acceded to the request of the pleader of the accused and directed the cross-examination of the witnesses before the complainant. 37 C.W.N. 288=1933 C. 189. Where the witnesses are not summoned at the instance of the accused for cross-examination, but are summoned for examination in a *de novo* trial, the order in which these witnesses are to be examined in chief rests at the discretion of the prosecution. (1933 C. 189, Dist.) 151 I.C. 236=1934 N. 209. Power of Court to regulate order of examining witnesses. 30 C. 245=16 C.W.N. 265. See also 8 B. 200; 12 B. 459; 7 C. L. R. 274. Witness present during examination of previous witness—Power of Court to exclude the witness—C. P. Code, sec. 151. 1934 A.L.J. 750=1934 A. 840. Effect of Judge's suggestion that further evidence need not be given. 6 Bom.L.R. 686. "No matter how often the same case comes before Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo*". See W.R. 1864 (Cr.) 38; *ibid.*, 1; 18; 18; 28 W. R. (Cr.) 28; 1 B.L.R. (O. Cr.) 37; 9 M. 83. Omission to do this though illegal, yet if it has not occasioned a failure of justice, a new trial need not be ordered. 9 M. 83. Where a party to a suit was present in Court when his witnesses were examined and later on claimed to be examined as a witness in support of a contention put forward by him and





The examination of a witness by the adverse party may be called his cross-examination. Re-examination. The cross-examination, by the party who called him, may be called his re-examination.

138. Witnesses shall first be examined-in-chief, then (if the adverse party desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination may relate to the facts to which the witness testified in his examination; and, if new matter is introduced in cross-examination, the witness may be re-examined upon the matter.

144 I.O. 331=1933 L. 561. The examination and cross-examination must relate to relevant facts, but the cross-examination may relate to the facts to which the witness testified in his examination; and, if new matter is introduced in cross-examination, the witness may be re-examined upon the matter.

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Cross-examination of person called to produce a document.

Witnesses to character.

Leading questions.

When they must not be asked.

The Court shall permit leading questions as to matters which are introductory or undisputed, or, which have, in its opinion, been already sufficiently proved.

When they may be asked.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitled the party who called the witness to give secondary evidence of it.

ness and not merely on the matters arising in the cross-examination on the second day. The law does not contemplate the placing of any such restriction on the right of re-examination conferred by sec. 138 and it is not open to the Court to take it away. If the matter elicited in re-examination gives rise to any suspicion that it has been the result of tutoring with regard to any matter covered on the last day of the cross-examination, it would be open to the Judge to draw the attention of the jury to the fact that the lapse of time may have given an opportunity for preparation; but this would not be a ground for refusing to let questions in re-examination being put. 195 I.O. 107=1941 P.W.N. 255=22 P.L.T. 327=1941 P. 362. To tender a witness for cross-examination in a Sessions trial is a very irregular course. The practice of tendering a witness for cross-examination is inconsistent with sec. 138. Such a course should, if at all, be adopted only in the cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court, but at the same time do not want to deprive the accused of his right of cross-examining such witness they tender him for cross-examination. But the witness should, strictly speaking, be asked by the prosecution, with the consent of the accused's pleader and the leave of the Court, whether his evidence in the lower Court is true. If he gives a general answer as to the truth of his evidence

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

140. Witnesses to character may be cross-examined and re-examined.

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

143. Leading questions may be asked in cross-examination.

in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. In any case the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important witness. 43 Bom.L.R. 946; 1942 Bom. 37=I.L.R. (1942) Bom. 115; 1942 Bom. 71=I.L.R. (1942) Bom. 381. See also 44 Bom.L.R. 27 (F.B.).

Sec. 139.—See 12 Bom. 63.

Sec. 142.—A leading question to the prosecution witness by the prosecution cannot be allowed nor can the reply be used. 1 P. 630=4 P.L.T. 76. On this section, see also 12 M.I.A. 380.

Sec. 143.—In the course of cross-examination by the defence for eliciting facts in their favour from the prosecution witnesses the defence are entitled under sec. 143 to ask leading questions. 19 G.W.N. 676=42 C. 957. The Court may, in its discretion under sec. 143, permit the prosecution to cross-examine a witness even though he had been originally called by them with regard to the matters elicited by the defence. 42 C. 957. Leading questions such as can properly be put in cross-examination of a hostile witness cannot be put by the Public Prosecutor in examination-in-chief. 2 P.L.T. 757. If a Judge disallows a question, the pleader should have the question, and order disallowing it recorded, if such a refusal is illegal. 36 L. C. 468=9 Bur.L.T. 133. On this section, see 37 C. 487.

Sec. 144.—See 35 C. 141; 19 A. 390 at 421; 12 Or.L.J. 214.

**Explanation.**—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

*Illustration.*

The question is whether *A* assaulted *B*.

*C* deposes that he heard *A* say to *D*—" *B* wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing *A*'s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing

Cross-examination as to previous statements in writing. being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Sec. 145.—As to applicability of section to police diaries, *see* Cr. P. Code, sec. 172. Scope and application of the section. *See* 19 A. 390; Rat. 610 and 924; 11 B.H.C.R. 120; 20 C. 642; 31 O. 142; 33 C. 1023; 28 C.W.N. 587; 74 O.L.J. 547. Without complying with the procedure laid down in sec. 145 an admission contained in a previous statement cannot be used as legal evidence against a party. 47 P.L.R. 391=1946 Lab. 65 (F.B.). A previous statement made by a witness can be admitted in evidence although the provisions of sec. 145 have not been strictly complied with, where the witness has been cross-examined generally as to the circumstances under which the previous statement was made and in some detail as to particular statements made, and the failure to put each individual statement has not resulted in any miscarriage of justice. 200 I.C. 328=43 Cr.L.J. 693=74 O.L.J. 547=A.I.R. 1942 Cal. 277. In order that previous statement reduced to writing may be used for the purposes of cross-examination under sec.

145, it is not necessary that it must have been reduced to writing by a person having jurisdiction to do so. 24 Pat. 623. Where documents are desired to be used for the purpose of contradicting a witness under sec. 145, they should be filed immediately after the examination of the witness and his attention must be drawn to them before they could be proved. It is not permissible to prove them at a hearing subsequent to the examination of the witness. 1944 R.D. 349. An illiterate person is not immune from the processes of law with regard to contradiction by a previous statement, because sec. 145 makes not the slightest difference whether the witness is literate or illiterate. 182 I.C. 935=41 P. L.R. 775=1939 L. 268. Where an approver goes back upon his confession, it can be used to contradict him when he is treated as a hostile witness, but it is not substantive evidence and cannot be used to contradict a co-accused's confession. 184 I.C. 274=1939 N.L.J. 442=1939 N. 295=I.L.R. (1941) N. 506. Before a previous statement of a witness in writing can be used to contradict his evidence, his attention must be specifically drawn to the statement sought to be used under sec. 145. That is however neces-

sary only if the document containing the statement becomes relevant solely under the section and is otherwise irrelevant and inadmissible. If the document is otherwise relevant and admissible as an admission under sec. 21 of the Act, it is not necessary to observe the provision of sec. 145 before using it. 17 P.L.T. 621=1936 P. 588. *See also* 1939 M.L.R. 76 (Or.); 1944 R.D. 349. Where the whole of the previous statement made by the witness is read out to him and he is cross-examined in respect of it but he gives evasive replies, sec. 145 is fully complied with although the witness is not specifically asked about particular portions of that statement. 40 P.L.R. 471. There is no duty cast upon counsel who wishes to cross-examine a witness by putting to him a previous statement, first to prove that statement. Sec. 145 has to be read with sec. 162, Cr. P. Code, and quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statements thereafter to be proved. On the other hand if the statement still requires to be proved that can be done by calling the person before whom it was made. I.L.R. (1939) L. 509=41 P.L.R. 775=1939 L. 268. A document which is used to contradict a witness must be put to the witnesses. Simply because the witness does not go into the witness-box, the Court is not entitled to break the law and admit such document. 150 I.C. 841=1934 P. 55 (2). Section can be used only to show that the witness is contradicting something he has said before; but not to show that he had omitted to state in former inquiry to the Police what he was stating at the trial. 56 M. 475=1933 M. 372 (2)=64 M.L.J. 519. It is open to counsel for the accused to bring out by questions in cross-examination discrepancies between the evidence of the witnesses as given in Court and the statements as made to the police with a view to throwing doubt on the credibility of their testimony. 45 P.L. R. 155. Sec. 145 does not militate in any way against previous statements being used by way of corroboration of statement put in under sec. 288, Cr. P. Code, which are







149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

*Illustrations.*

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait; the informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any

Procedure of Court in case of questions being asked without reasonable grounds.

barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or

attorney is subject in the exercise of his profession.

151. The Court may forbid any questions or inquiries which it regards as

Indecent and scandalous questions.

indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue,

or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or, which, though proper in itself, appears to the Court

needlessly offensive in form.

153. When a witness has been asked and has answered any question which

Exclusion of evidence to contradict answers to questions testing veracity.

is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with

giving false evidence.

*Exception (1).*—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

*Exception (2).*—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

*Illustrations.*

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

SEC. 149.—Counsel for prisoner should not state as existing facts matters which he had been told in his instructions on the authority of the prisoner but which he does not propose to prove by evidence or suggest in cross-examination of prosecution witnesses. 30 I.O. 128=19 C.W.N. 923=21 C.L.J. 396. See 18 C.W.N. 185.

SEC. 150.—See 19 B. 340.

SEC. 151.—Indecent or scandalous question—Latitude to Counsel. 52 I.O. 54=30

Cr.L.J. 566.

SEC. 152.—See 18 B. 468 (470); 3 M.H.C. R. 372; 3 Weir 819.

SEC. 153.—See 11 B.H.C. 169; 9 Cr.L.J. 226. The principle of this section should be observed in examination on commission also. 47 C. 1040. Secs. 153 and 155 must be strictly construed and narrowly interpreted. 6 B. 142=1928 P.O. 54=54 M.L.J. 545 (P.O.).



Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) *A* affirms that on a certain day he saw *B* at Lahore.

*A* is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that *A* was on that day at Calcutta.

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the date in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) *A* is asked whether his family has not had a blood-feud with the family of *B* against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

154. The Court may, in its discretion, permit

Questions by party to his own witness. the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

SEC. 154.—*See* 28 C. 594; 13 C. 53; 12 M.I.A. 380. The circumstances in which a witness may be cross-examined by the party calling him are not laid down in sec. 154, which leaves the matter entirely to the discretion of the Court. The mischief begins when the grant of permission itself is considered to be equivalent to an adjudication or to an expression of opinion by the Court adverse to the veracity of the witness instead of being treated merely as a permission to test veracity of a witness, a permission which can hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. 144 I.C. 936=1933 P. 488; 166 I.C. 726=38 Cr. L.J. 271=1937 P. 34. *See also* 14 Pat. L. T. 494=1933 P. 517. If a party calling a witness wants to challenge his veracity or to get certain admissions detracting from the value of his evidence given beforehand, the proper procedure is to resort to sec. 154, which gives the discretion to the Court to permit the party calling the witness to put questions to that witness by way of cross-examination. There is no provision in the Evidence Act or in the Criminal Procedure Code which justifies a Magistrate recording the evidence of a witness to make at the end of his deposition a note to the effect that he is "declared hostile". Such a note has absolutely no significance in law. The opposite party is entitled to rely on the evidence of such witness. (1945) P.W. N. 241. As to the evidence of hostility and principles governing discretion of Court, *see* 1933 N. 384; 152 I.C. 1021=1935 P. 1033. When a witness becomes hostile it would in certain cases be unsafe to accept any portion of the testimony which he has rendered in examination-in-chief. To pick and choose between the statements which such a witness makes in examination-in-chief would sometimes be an unsound proceeding. But it would be quite wrong to hold that a Court is entirely debarred from bringing its judicial discretion to bear on materials which cross-examination elicits and of deciding whether the truth lies there. 44 C.W.N. 999=

1940 C. 586. It is now settled that the evidence of a witness who is cross-examined by the party calling him is still evidence and can be relied on by either party, the credibility of the facts deposed being a matter for the jury. There is no legal objection to permission to treat a witness as hostile being granted freely, although it is preferable to avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance. 39 P. 369=1940 P. 289=22 P.L.T. 93. The power given by sec. 154 is a discretionary one and will not be reviewed by the appellate Court provided there was some material on which such discretion can be exercised. The mere fact however that a witness does not adhere to or subsequently makes a statement different from his previous statement does not of itself justify the employment of the power given by sec. 154. 11 B. 4=1933 B. 57. *See also* 166 I.C. 726=1937 P. 34; 1945 Cal. 159. That the answer of the witness is in direct conflict with other evidence is no ground to treat him as hostile and allow cross-examination. 55 M. 904=1936 M. 516=71 M.L.J. 231. Hostile witness, who is a witness is not necessarily hostile because in an absent-minded moment he admits the truth. Before a prosecution witness can be declared hostile, there must be good ground for believing that the statement he made in favour of the defence is due to enmity to the prosecution. 44 I.C. 33=3 P.L.J. 419. *See also* 61 C. 399=38 C. W.N. 659=1934 C. 636. A witness who is unfavourable is not necessarily hostile; a hostile witness is one who from the manner in which he gives his evidence show that he is not desirous of telling the truth. 49 C. 93=1922 C. 267. (47 C. 1043, Ref.) 34 C.W.N. 536=1930 C. 276. Where a witness has been tendered but not examined by the prosecution, the prosecution cannot cross-examine that witness. Sec. 154 does not authorise such cross-examination. 7 P. 55=1938 P. 203. A prosecution witness who was declared hostile and permitted to be cross-examined by the prosecution in the committing

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him—

- (1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
- (2) by proof that the witness has been bribed, or has <sup>1</sup>[accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;
- (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
- (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

*Explanation.*—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

#### LEG. REF.

<sup>1</sup> Substituted by Act XVIII of 1872, sec. 11.

Court, cannot be treated at once as a hostile witness and cross-examined by the prosecution in the Sessions Court without being examined-in-chief. 196 I.C. 439=45 C. W.N. 763=1941 C. 533. Where a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness need not be rejected *in toto*. It is a question for the Judge to decide whether in spite of the witness having been discredited on one point his testimony may be considered on another. 1933 M. 137=56 M. 7=64 M.L.J. 208. Before a party calling a witness can cross-examine him it is not necessary that the witness should first of all be declared hostile. In this respect sec. 154 gives an unqualified discretion to the Judge quite apart from any question of the hostility or otherwise of the witness. It is, however, necessary before the procedure of sec. 154 can be adopted, either for permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should be signified if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him. 56 M. 7; 1933 N. 389. See also 58 C. 1404. A party is allowed to cross-examine his own witness because the witness displays hostility and not necessarily because he displays untruthfulness. The fact that the witness is being cross-examined does not imply an admission that all the witness's statements are falsehoods. On the other hand, the main purpose of cross-examination is to obtain admission. Consequently the prosecution is entitled to rely on a part of the witness's evidence even though he has turned hostile. 9 P. 474=1930 P. 247. Secs. 143 and 154 do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of sec. 154 is that they

may, with the permission of the Court, treat a witness as hostile and cross-examine him. The wording of sec. 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England. 50 C.L.J. 467=1930 C. 139. It must be understood that a witness should be cross-examined to be discredited altogether and not merely to get rid of part of his testimony. 71 I.C. 657=37 C. L.J. 173=1923 C. 463. Result of cross-examining one's own witness. 53 C. 372; 33 C. W.N. 872.

Secs. 155-157.—See also Notes under sec. 145. See 45 C.W.N. 763; 1945 Mad. 358= (1945) 1 M.L.J. 197.

IDENTIFICATION IN JAIL—VALUE OF, AS EVIDENCE.—Evidence of identification in the jail cannot be treated as substantive evidence in the trial as it is not on oath, and is made in extra-judicial proceedings. 19 A. L.J. 947. When a person, who makes such an identification, states in Court that he can identify no one, the evidence of identification is not admissible. (*Ibid.*) Where, in the Sessions Court, witnesses retracted the statements made before the committing Magistrate, *held*, under sec. 155, the statements made to the police and to the committing Magistrate were relevant to contradict their evidence before the Sessions Court given in place of their retracted statements. 46 B. 97=23 Bom.L.R. 820=1922 B. 108. Statements of witnesses made to the police should be used to corroborate them except in very special circumstances. The evidence of a witness hostile to the Crown may be impeached by reference to the police diary. 45 I.C. 272=3 P.L.R. 568. S. 162, Cr.P. Code, allows the credit of a witness to be impeached, by a statement which he is alleged to have made to the police in the course of an investigation under Chapter XIV of the Code though no person is bound to state the truth to the police in the course of the above investigation. 41 I.C. 668=18 Cr.L. J. 844. See also 14 P.L.T. 543=1933 P.

*Illustrations.*

(a) *A* sues *B* for the price of goods sold and delivered to *B*.

*C* says that *A* delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(b) *A* is indicted for the murder of *B*.

*C* says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any

Questions tending to corroborate evidence of relevant fact admissible.

other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if

proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

*Illustration.*

*A*, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

589. The statement to the police is not evidence like a statement made on oath before a competent authority. (*Ibid.*) Receiver's report to the District Judge that he was wrongfully confined and obstructed in the discharge of his duties about 24 hours after the occurrence did not come under the provisions of sec. 157, as it was not made at or about the time of, occurrence but 24 hours after, and as it was not made to a person who had power to investigate the fact, and that therefore the prosecution could not have used it to corroborate the witnesses, but that it was open to the defence to have used sec. 155 to impeach the credit of the Receiver. 55 C. 879=111 I.C. 327=1928 C. 732.

SEC. 155.—On this section, see 104 I.C. 377=1927 R. 247; 25 A.L.J. 994; 1939 N. 13; 54 M.L.J. 545 (P.C.). Section if affected by sec. 162, Cr.P. Code. 4 R. 72. See also 14 Pat.L.T. 543=1933 P. 589. Witness not believed in judgment in previous case does not necessarily impeach his credit. See 162 I.C. 300=1936 Pesh. 106. Statement made before Coroner is admissible at trial. 28 Bom.L.R. 775=1926 B. 404. First Information Report admissible in defence to impeach information's veracity. 1927 C. 17=44 C.L.J. 253; 1936 L. 833=165 I.C. 146. A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and a *fortiori* that it is inadmissible as a piece of substantive evidence in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused it is admissible for the purpose of impeaching his credit in respect of the later

statement made by him in his evidence in Court under the provisions of sec. 155. 61 C. 967=38 C.W.N. 1005=1934 C. 616. The language of sec. 155 (3) is *prima facie* wide enough to permit such question as asking the investigating officers if certain witnesses made certain statements. But where the evidence has been reduced into writing it is undesirable to permit the putting of such questions. In such a case the written record made by the police officer is the only proper and right thing to prove to discredit the witnesses. If the police diary is used the provisions of sec. 145, Evidence Act, and sec. 162, Cr.P. Code, will have to be borne in mind. A copy of the statement made before the police cannot be used as against the witness till he has been confronted with it. The right procedure then when a prosecution witness is contradicting himself is to ask the Judge to look into the diary and decide whether the accused person should not have a copy of the statement. 26 A.L.J. 139. Sec. 162 (1), Cr.P. Code, by enacting that no statement made to the police officer or any record thereof shall be used "for any purpose at any enquiry or trial" repeals by implication sec. 157 so far as concerns statements made by a police officer in the course of an investigation. 14 P.L.T. 543=1933 P. 589. sec. 155 (3) does not render nugatory the clear and explicit provisions of sec. 145 and in fact takes for granted the existence and binding effect of those provisions. 32 P.L.R. 259=1931 L. 38. See also 147 I.C. 591=1934 A. 226. The previous statement of a witness put in under S. 155 (3) for the purpose of contradicting him, cannot be used as substantive evidence. 50 C. W. N. 206. Where in a dispute about the ownership of

Former statements of witness may be proved to corroborate later testimony as to same fact.

competent to investigate the fact, may be proved.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally

a piece of land, the lower Court granted the plaintiff a decree on the strength of the statement made by a witness in the box which was corroborated by a recital in the mortgage bond between two strangers to the suit about the boundaries of the suit property. *Held*, that such recital was not evidence and as the document was not produced by that witness his testimony could not be relied on. 146 I.C. 192=34 P.L.R. 917.

SEC. 157: MEANING OF WORDS.—The words "legally competent" mean having power under some law, statutory or otherwise. The section is controlled by sec. 162, Cr.P. Code. 50 I.C. 834=10 L.W. 239. *See also* 35 M. 397=14 I.C. 896 (F.B.); 4 R. 72=27 Cr.L.J. 881=1926 R. 116. A statement of raped girl in answer to a person who saw her weeping is admissible. 5 L. 324=82 I.C. 129=25 Cr.L.J. 1201=1924 L. 609. *Kanungo* is a person in authority. 12 Cr.L.J. 480. Document showing ownership of land adjacent to disputed land is admissible to corroborate the testimony of ownership. 44 C.L.J. 582=99 I.C. 907=1927 C. 230. *See also* 1940 M.W.N. 80. The words 'former statement' in sec. 157 mean a previous statement of the witness who is to be corroborated made on another occasion, (i.e.) an occasion other than that at which the subsequent statement requiring corroboration is made. 174 I.C. 36=39 Cr.L.J. 395=1928 C. 125. *See also* 1944 Sind 38.

SCOPE AND APPLICATION OF SECTION.—12 Bom.L.R. 663; 25 M. 183 (210); 7 A.L.J. 458; 53 B. 699 (P.C.); 34 C. 129; 2 C.W.N. 704; 4 Bom.L.R. 434. Sec. 157 provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception, the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement. 110 I.C. 676=1928 L. 647. Ordinarily before the corroborative evidence is admissible, the evidence sought to be corroborated must be given. Where in support of the plaintiff's case a witness for the plaintiff produces a letter written to him by another witness but before the production of such letter the witness does not make any statement whatsoever, which is sought to be corroborated by the letter, the letter cannot be admissible in evidence under Sec. 157. 1937 M. 861. Reference by witness to deed to which he was not party not permissible. 40 P.L.R. 968=1938 L. 635. In a charge under sec. 161, I.P. Code, of having received a bribe, the bribe-giver is in the position of an accomplice, and as a matter of expediency, his

evidence must be corroborated in material particulars implicating the accused. It is highly doubtful if an accomplice can corroborate himself; assuming that he can, statements made by the bribe-giver to third parties are inadmissible in evidence if made long after the event. The statements to be admissible must have been made at or "about the same time," which means within a reasonably short time after the event, when a reasonable opportunity for making presented itself, whether the statements were so made is a question of fact in each case. 1945 M.W.N. 114=58 L.W. 171= (1945) 1 M.L.J. 197. Under sec. 63 (1) of the Bombay City Police Act, although the documents containing statement of witnesses made before the police in the course of investigation cannot be tendered in evidence on behalf of the prosecution, yet the oral statements of witnesses recorded in the panchanama in the presence of the police at an identification parade in the course of investigation are admissible in evidence to corroborate the statements of those witnesses at the trial, under S. 157. 47 Bom.L.R. 992.

ILLUSTRATIVE CASES.—Where a party files a petition on the date of hearing asking for adjournment on the ground that his pleader cannot attend Court that day on account of hartal, the fact of filing the petition as well as its contents can be proved and are admissible, though not perhaps sufficient to charge the pleader with professional misconduct. 49 C. 732=26 C.W.N. 589 (F.B.). First information report is admissible. 54 C. 237=99 I.C. 227=1927 C. 17. *See also* 165 I.C. 146=38 P. L.R. 203=1936 L. 833. Statements in the first information report can only be used for the purpose of the contradicting or corroborating a witness and for no other purpose. 31 L.W. 51=1930 M. 632 (2). Where a statement made to a police officer is not the first information under sec. 154 of Cr. P. Code, the Magistrate must take from the police officer a statement that the particular statement was made to him. 61 I.C. 650=22 Cr.L.J. 410 (C.). *See also* 5 L. 324=82 I.C. 129=1924 L. 609. A *kanungo* deputed to make inquiry under sec. 148 of the Cr.P. Code may give his deposition and his report is admissible to corroborate his sworn testimony. 12 I.C. 88=12 Cr.L.J. 480 (C.). A statement made to the Deputy Superintendent of Police in which the informant gave an account of what occurred is admissible in evidence as the Deputy Superintendent of Police is an officer legally competent to investigate the facts of a murder and dacoity, within the meaning of sec. 157. 45 M.L.J.

158. Whenever any statement, relevant under section 32 or 33, is proved, all

What matters may be proved in connection with proved statement relevant under section 32 or 33.

matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved, if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

279=75 I.C. 695=1923 M. 694. Statements by witnesses recorded by a Police Superintendent during investigation are not admissible in evidence nor oral evidence based on such statement. 45 M. 766 (35 M. 397, Ref. to). The 'local area' of an officer of C.I.D. is the Presidency of Madras and he is therefore competent to investigate an offence under the Cr.P. Code. An Inspector of the C.I.D. is not one of the officers legally entitled to investigate an offence under secs. 157 to 167 of the Cr.P. Code, and so his evidence is not admissible under sec. 157. 35 M. 247=22 M.L.J. 490=14 I.C. 859. But see 1927 C. 17=44 C.L.J. 253. An officer of the C.I.D. who investigates a matter under the order of his superior is not an officer "legally competent" within the meaning of sec. 157 as he does not derive his power from the Police Act or the Cr.P. Code. 35 M. 397=13 Cr.L.J. 352=14 I.C. 896 (F. B.). A headman cannot examine witnesses on oath in the course of an inquiry in a criminal case. The statement made to headman can only be used in the manner provided for in secs. 145 and 157, Evidence Act. 144 I.C. 349=34 Ch.L.J. 781=1933 R. 119. A *panchanama* is not evidence of the statements contained therein and it should be proved and exhibited as relevant evidence of those statements. 12 I.C. 209=12 Cr.L.J. 489. See also 1939 M. W.N. 465=1939 M. 766. Anybody who has seen a place may be examined as to what he saw under the general provisions of law. 12 I.C. 88=12 Cr.L.J. 480 (C.). A statement admissible under sec. 157 can be proved by a person to whom it was made. Evidence of a person who hears a statement being made is as direct proof of the same as the evidence of a person who sees a deed in proof of the deed being done. 58 I.C. 344=21 Cr.L.J. 760. In the absence of substantive evidence, first information report cannot be used as corroborative evidence. 6 R. 481=1928 R. 295. A letter written by a police officer to his superior expressing that a certain person would make a certain statement for a certain sum of money is not under sec. 157 receivable in evidence for any purpose. 6 R. 142=1928 P. C. 54=54 M.L.J. 545 (P.C.). Prior whole statement of a witness cannot be admitted—Even admissible parts cannot be admitted before witness is examined. 22 S.L.R. 309. See also 1933 M.W.N. 1148. Where a person has been examined as a witness, a statement said to have been made by him to another is not admissible when no question is

put to the witness as to whether the particular statement had been made to such other person. 151 I.C. 437=35 C.L.J. 1332=1924 S. 100. Sec. 157 cannot be invoked to let in statements made by somebody else as evidence for the purpose of corroboration of a witness examined in the case. 110 I.C. 521=1928 C. 893. Any Magistrate is competent to hold a test identification and can prove the statements made before him under sec. 157 even though he is not empowered to deal with the matter under enquiry. 33 C. W.N. 616=1928 C. 50. Recital as to date of birth of the mortgagor contained in an application by his brother is admissible. 1929 A. 550. But a statement by father in vaccination register made 3 years after birth of child cannot be relied upon to prove paternity of the child. 1929 M.W.N. 696. A recital of the date of birth of a minor in a guardianship application can be used as a corroborative evidence under sec. 157, in support of the oral testimony of the applicant in a subsequent suit, if the application was made before a competent authority and long before the subsequent dispute arose. 199 I.C. 19=A.I.R. 1942 Cal. 438. Oral evidence of what the witness had said on the occasion of an identification parade held by the Bombay Police in the course of investigation and recorded in a *panchanama* written on that occasion in the presence of a competent police officer is admissible for purposes of corroboration under sec. 157. 32 Bom.L.R. 327=1930 B. 158. On this see also 180 I.C. 239=1939 Pesh. 4. In proceedings under sec. 107, Cr.P. Code, *sanchas* or reports made by the prosecution witnesses on various dates against the accused in the absence of the latter are not substantive evidence of the matters mentioned in them; but under sec. 157, such reports can be used in order to corroborate what the witnesses testify to in Court when they are examined in Court. 21 P.L.T. 652=1940 P. 252.

RECITAL AS TO BOUNDARIES.—A recital regarding boundaries in a document executed between strangers to the suit relating to lands, adjoining the suit lands and in which the suit land is referred as a boundary is not admissible under sec. 13 but may be admissible if the executant is called and depose to the boundary to corroborate him under sec. 157, or if he is dead under sec. 32. 145 I.C. 944 (2)=1933 P. 636; 1940 M.W.N. 80=1940 M. 450.

SEC. 158.—Statements made before the Sub-Registrar by the deceased attestors to a will are admissible under sec. 32 (7) taken

159. A witness, may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

with sec. 158 but not under sec. 33. Under sec. 158, even prior statements of deceased persons can be admitted both for contradiction and corroboration. 1933 M.W.N. 1148. See 8 P.L.T. 510=5 P. 777=1927 P. 91. As to scope of section, see 1926 L. 122.

**SECS. 158 AND 159: LIST OF STOLEN THINGS GIVEN BY INFORMANT—ADMISSIBILITY.**—A list of the stolen things given to supplement the first information report is admissible and can be referred to under sec. 159 and proved under sec. 159. The fact that a copy of such a list had been given to the police would not affect the admissibility of the informant's list. 1933 Cr.C. 1503=1933 L. 987.

**SEC. 159: REFRESHING MEMORY.**—A witness can be allowed to refresh his memory by reference to any memorandum or other writing prepared by the witness, if there is a lapse of memory on a point asked of the witness. On this section, see also 8 C. 732; 19 C.W.N. 890; 11 B.H.C. 123; 11 B. 657; 32 M. 384; 1926 L. 51; 1930 N. 24 (1). Where the writing brings to the mind of the witness neither any recollection of the facts mentioned in it or any recollection of the writing itself but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing, which he knows to be genuine, the witness may refresh his memory by referring to the writing. 49 C. 573=26 C.W.N. 680=35 C.L.J. 279. Sec. 159 does not render the notes of a speech inadmissible in evidence. 1930 L. 867. Where a witness refreshing his memory refers to notes taken by another of a speech made at a meeting, it is necessary under sec. 159, that such notes should have been read by him immediately after the meeting and not merely read out to him. If the witness had read the notes himself, there would be naturally greater guarantee of their correctness. 44 P.L.R. 167. For purposes of sec. 159, it is not requisite that the writing used to refresh memory of a witness should have been admitted in evidence. 47 B.L.R. 992; 55 I. A. 107=7 P. 305. Accordingly, a document not produced in Court within the proper time and in consequence rejected as evidence under the provisions of O. 13, r. 2, C.P. Code, may nevertheless be referred to by the party producing it or his witness to refresh his memory of the document if otherwise within the purview of sec. 159. "The weight of the evidence, the objection to the document upon the ground that it not having been produced at the proper time, renders its authenticity, the subject of suspicion and all other grounds upon which a

document can be successfully impeached still remain open but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice." 55 I.A. 107=7 P. 305=32 C.W.N. 565 (P.C.). Memoranda kept by a witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory. (10 N.L.R. 44, at p. 47, Rel. on.) 120 I.C. 224=1930 N. 24 (1). When a witness wants to refresh his memory under sec. 159, he is to do so by referring in Court to the document which he had read at or near the time of the transaction, and it is the fact that he had known it to be correct when he read it that is the justification of his doing so. It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction, to which it relates. 120 I.C. 798=1930 L. 371. The word "writing" used in sec. 159 includes also printed matter. (*Ibid.*) There is a common practice in the Punjab of referring to statements in the first information reports, medico-legal reports and so forth as if they were evidence. This is not justified by law. The proper course is for the witness to refer to the document which he has prepared at the time under sec. 159 and state in Court everything which the prosecution or counsel for defence or the trying Magistrate, or Judge considers material. 39 P.L.R. 290=1927 L. 475.

**HOROSCOPE—ADMISSIBILITY.**—A horoscope is admissible in evidence in proof of age and though it may not be relied on as a probative document in itself, it can be used for the purpose of refreshing the memory of the witness under sec. 159. 12 Mys.L.J. 133=39 Mys.H.C.R. 406. There is no provision in the Evidence Act by which *panchayatnamahs* prepared by the police for the recovery of articles on information given by the accused can be used as substantive evidence. If they are prepared at the time, they can be used by the witness for the purpose of refreshing their memories in the witness-box under sec. 159 but in themselves they are not evidence. 1939 M.W.N. 465.

**POST MORTEM REPORT.**—Secs. 159 to 161 permit a limited use being made of *post mortem* notes of Medical Officer, namely, that they may be used by the witness who made them for refreshing his memory or by a party for the purpose of contradicting the witness. It is extremely undesirable that such notes of *post mortem* examination be put in evidence through the medical Officer



The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it, he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document :

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159 although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

#### Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept although he has forgotten the particular transactions entered.

161. <sup>1</sup>Any writing referred to under the pro-

#### LEG. REF.

<sup>1</sup>As to the application of sec. 161 to Police diaries, see Cr.P. Code, sec. 172.

*en bloc* as it is prejudicial to both parties. 1930 S. 225.

SECS. 159 AND 160: POLICE INVESTIGATION—ADMISSIONS MADE BY ACCUSED IN PRESENCE OF MAGISTRATE—ORAL EVIDENCE OF MAGISTRATE—USE OF MEMORANDUM.—Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate, the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of sec. 164 of the Cr.P. Code but makes a memorandum of the conduct and admissions of the accused, the oral evidence of the Magistrate is admissible to prove the admissions of the accused. Ordinarily the written memorandum of the Magistrate is not admissible though the Magistrate under the provisions of sec. 159 can refresh his memory when under examination by referring to the memorandum. It must be shown to the adverse party and the witness may be cross-examined on it. Where the Magistrate has, however, no specific recollection of the facts themselves but he is sure that the facts were correctly recorded in the document, both the testimony of the witness and the contents of the memorandum are admissible under sec. 160, the two being the equivalent of a present positive statement of the witness affirming the truth of the memorandum. The fact that the Magistrate is empowered to record the confession of an accused person under sec. 164 would not affect the question of the admissi-

bility of such evidence. 14 L. 290=1933 L. 716 (F.B.). See also 1936 B. 42. (Statement of deceased person); 1943 M.W.N. 222=(1943) 1 M.L.J. 343 (Proof of shorthand notes of speech at a meeting taken by a Police Officer).

SECS. 159 AND 161: PANCHANAMAS CONTAINING CONFESSION, HOW TO BE USED.—No doubt an entry in any public record stating a relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by the law is itself a relevant fact. But where panchanamas contain confession which cannot be given in evidence because of sec. 26, the proper way of dealing with a panchanama containing such an entry is to place it into the hands of a witness and to allow him to use it to refresh his memory. If he finds in it anything of which evidence can lawfully be given, he may give such evidence in the ordinary way; but the document itself should be excluded. 144 I.C. 772=1933 S. 220. See also 1939 M.W.N. 465.

SEC. 160.—See also notes under sec. 159. See 19 A. 390 (Special Diary); 11 B. 657; 31 C. 1050; 32 M. 384; 11 B.H.C. 120 (Statement to police officers); 97 I.C. 300=1926 C. 998=43 C.L.J. 479 (Engineer's report); 1936 R. 42 (Statement by deceased person). Where no attempt is made by a witness to state orally before the Court, what the accused in the case was alleged to have said, nor does he state before the Court, that although he has no specific recollection of the facts themselves, he was sure that the facts were correctly reported by him in his report, the evidence of such witness is inadmissible in evidence. 40 P.L.B. 872=177 I.C. 707=1938 L. 629.

SEC. 161.—See 8 C. 745; 5 L.B.R. 40=2 I.C. 535.



Right of adverse party as to writing used to refresh memory.

witness thereupon.

visions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of state, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobey such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

Sec. 162.—*See* 41 Bom.L.R. 391, cited under secs. 123 and 124. Sec. 162 refers to official as well as private documents, and provides in the second paragraph that when a document, in respect of which an objection to production or admissibility is raised refers to matters of state, the Court has no power to inspect the document, with regard to other documents, in respect of which privilege is claimed, the Court, if it thinks, fit, may inspect the documents. The officer claiming the privilege must appear and produce the document in Court and satisfy the Court that his claim is well founded. It is not for him to decide whether the document should or should not be produced. It is for the Court to decide it. Once the Court holds that the document is one with regard to which privilege can be claimed, in other words, that it is a communication made to a public officer in official confidence or that it is an unpublished official record relating to affairs of state which it would not be in the public interest to disclose, the question whether privilege should be claimed for it or not is entirely within the discretion of the officer in charge of the document. The Court, for the purpose of deciding whether the claim to privilege is well founded or not, is not entitled to look at the document. It must decide the question of the validity of the objection without looking at the document. 46 Bom. L.R. 802=219 I.C. 290=1945 Bom. 122. The privilege claimable is in respect of official and confidential documents is a narrow one and is based on the principle that the information contained in official documents cannot be disclosed where the disclosure would not be in public interest. The circumstance that the documents are confidential or official is by itself no reason for their non-production and the Court is always entitled to summon them and to examine how far the privilege claimed is reasonable and is justified. 11 Mys.L.J. 171.

*See* 3 C. 742; 16 C.W.N. 431=15 I.C. 77; 45 I.C. 898. *See also* I.L.R. (1940) N. 280; 47 C.W.N. 928=1943 Cal. 539. Police during an investigation seized account books of a certain person and made copies of it in their diary. In a later civil suit that person denied that he kept accounts and hence the other party called for the copies of the account books made by the police to be produced in evidence. Police refused to produce the copies claiming the privilege of "State document". *Held*, where account books were not state documents, copies of them could not assume this important shape simply because they were written in the course of a police investigation. Neither the police nor any other person can evade the normal rules of disclosure by the simple expedient of entering matter for which no privilege can be claimed into an otherwise privileged document. 1938 N. 358.

QUAERE.—Whether and how far sec. 162, which disentitles the Court from inspecting state documents, has been abrogated or modified by necessary implication by O. 11, R. 19 (2), C.P. Code, which places no limitation on the power of the Court to inspect documents. 47 C.W.N. 928=A.I.R. 1943 Cal. 539. Sec. 162 has divided privileged documents into two categories. The Court can inspect documents for the purpose of deciding the question of privilege only if those documents do not refer to matters of State. In other words an exception is made in respect of documents that refer to matters of State. The provisions of O. 19, R. 2, C.P. Code, being general and the provisions of sec. 162, Evidence Act, being restricted so far as they relate to documents relating to affairs of State the special provisions of sec. 162 relating to documents of State must be enforced in preference to the general provisions embodied in the Code of Civil Procedure. It is therefore not open to the Court to peruse the documents for which privilege

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving, as evidence, of document called for and produced on notice.

Using, as evidence, of document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

*Illustration.*

*A* sues *B* on an agreement and gives *B* notice to produce it. At the trial *A* calls for the document and *B* refuses to produce it. *A* gives secondary evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, in order to or show that the agreement is not stamped. He cannot do so.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor

Judge's power to put questions or order production.

is claimed in order to determine whether the documents constitute official records relating to affairs of State. A.I.R. 1944 Lah. 209. See also I.L.R. (1945) Lah. 219=46 P.L.R. 273=1944 Lah. 434.

Sec. 163.—Production of documents by defendant.—Inspection by plaintiff.—Court cannot admit without proof. 72 I. C. 459=18 L.W. 165=1923 M. 607. Sec. 163 does not render proof of the document unnecessary nor alter the normal incidence of burden of proof. Quære, whether sec. 163 is applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun. 1923 M. 607. Under sec. 163 it is the duty of the plaintiff to require the defendant who has taken inspection to tender the account books as evidence of both parties. Such account books need no further proof and are admissible in toto. 106 I.C. 395 (2)=1928 N. 119. Under sec. 163, an inspection of documents by the adversary entitles the party producing them to tender them as evidence of both parties. Such documents must be admitted in toto. 43 P.L.R. 123; 195 I.C. 275=1941 L. 228. Sec. 163 is applicable to criminal trials as well as to civil actions. If during cross-examination of a witness the counsel for the accused calls for the statement of that witness recorded by the police in Calcutta during investigation and inspects it for the purpose of contradicting the witness, the Government Counsel is entitled to require the counsel for the accused to give the whole of the statement as evidence excluding only such portions as are not relevant to the case, although that would bring on the record those parts of the statement which are corroborative of the witness's evidence at the trial in addition to those brought on the record by counsel for the accused as being contradictory of that evi-

dence. But where there is no formal notice or requisition from the accused calling for the police diary and the Government counsel produces it stating that he will not "rely on the strict technicality" thereby giving the impression, although the impression is unintended, that he will not require counsel for the accused to put in the document as a whole, the accused cannot be compelled to give as evidence the entire statement in question. I.L.R. (1939) 2 C. 429=187 I. C. 138=41 Cr.L.J. 408=1940 C. 167. See also 1930 C. 370.

Sec. 165: Object of Section.—Under S. 165 the Court cannot order the production by a party of any document or thing, no matter how irrelevant, into Court, unless the object is to obtain indicative evidence which may lead to discovery of relevant evidence of any fact in any matter then before the Court. 57 M. 635=1934 M. 199 (2)=66 M.L.J. 498. The provisions of the section cannot be used in contravention of sec. 162, Cr.P. Code. 4 R. 371=99 I.C. 1019=1927 R. 74; 27 Cr.L.J. 277=92 I.C. 453. Power of Judge to send for additional witness to summon material witness, and to examine persons present. See 6 C. 279. Judge not to cross-examine on points which pleaders will examine upon. (Ibid.) Whether Judge can put irrelevant questions, see 10 B. 185. Right to cross-examine witnesses summoned by Court. 3 B.L.R. (A.C.) 158; 5 C. 164; 24 C. 288; 29 C. 287; 10 B. 185; 11 B.H.C.R. 166. Mere sending for document does not make evidence in the case. 11 B.H.C.R. 166. In criminal cases, the moment witness commences giving evidence which is inadmissible, he should be stopped by the Court. 7 W.R. (Cr.) 25. See also Field, 5th Ed., p. 482. Even though a document is not produced at the first hearing of a case the Court can call for the document under sec. 165. 25 O.C. 286=70 I.C. 278=1923 O. 59.

their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question :

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved :

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party ; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the

Power of jury or assessors to put questions.

Judge, which the Judge himself might put and which he considers proper.

## CHAPTER XI.

### OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground

No new trial for improper admission or rejection of evidence.

of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient

evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

## SCHEDULE.

### ENACTMENTS REPEALED.

[*Repealed by Act I of 1938.*]

Sec. 167: Scope of Section.—Sec. 167 applies to second appeals on the civil side or cases tried by a jury on the criminal side; and not to first appeals where the facts are a matter for decision of the Appellate Court. 1934 P. 605. Under sec. 167, improper admission is no ground for a new trial if there is other evidence sufficient to support the conviction. 59 I.C. 560=22 Cr. L.J. 128. See also 1940 N. 118; 82 I.C. 283=25 Cr.L.J. 1275; 89 I.C. 189=1927 C. 1=31 C.W.N. 32; 95 I.C. 273=1926 P. 211=7 P.L.T. 673. See also 35 Bom L.R. 174=1933 B. 153; 152 I.C. 829=1934 P. 617 (2). Where there has been an improper admission of evidence, a Judge would be acting correctly under sec. 167 if he comes to the conclusion that the rest of the evidence is sufficient to justify the conviction. 39 Cr. L.J. 427=174 I.C. 523=1938 N. 325. The acceptance of inadmissible evidence is not a ground to set aside a judgment or grant a new trial, if there is other evidence upon which the finding could be arrived at. And the High Court can in second appeal see whether there is such other evidence justifying the decision, and if there is such evidence, it cannot order a new trial. 150 I.C. 841=1934 P. 55 (2). See also (1943) 2 M. L.J. 672. A document was proved in the trial Court by a person who had obtained it from the writer and admitted in evidence, without the writer being examined and no objection was raised to such admission.

Held, the non-examination of the writer would not make it inadmissible and the objection in revision had no weight. 59 C.L. J. 467=1934 C. 834. Where the High Court after excluding the evidence improperly admitted, found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it, the conviction and sentence were set aside. 1 C. 207; 2 B. 61; 9 B.H.C.R. 358. Duty of appellate Court where evidence has been improperly admitted in the lower Court. See 15 W.R. (P.C.) 8; 6 B.L.R. 495; 14 M.I.A. 86; 6 M.I.A. 232; 8 M.I.A. 199; 7 C. 293; 8 C. 739. Effect of relevant evidence improperly proved. See 11 B. 320; 6 C.L.R. 497. Effect of evidence admitted at improper stage of the case. See 13 M. I.A. 83. Additional evidence in appellate Court, where relevant evidence was improperly shut out in lower Court. 4 A. 306. A Magistrate cannot import his personal opinion about the personal character, in the decision of the case before him nor can he refuse to believe evidence in the accused's favour on that account. 20 Cr.L.J. 283; 50 I.C. 171. A misdirection to the jury is strictly not a case of improper admission or a rejection of evidence within the meaning of sec. 167. 42 I.C. 161=18 Cr.L.J. 929 (F.B.).

Grounds on which review re-hearings are allowed.—[See secs. 114 and 115 and

**THE EXCESS PROFITS TAX ACT (XV OF 1940).**

[Amended by Acts XLII of 1940, VII of 1941, XI of 1941, XXIV of 1941, Ordinance XVI of 1943, Ordinance VIII of 1944, Finance Act 1944, Finance Act 1945, Act VI of 1945. *See also* Ordinance LX of 1942 and Act VII of 1946 (Finance Act 1946) ].

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*An Act to impose a tax on excess profits arising out of certain businesses.*

WHEREAS it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called **THE EXCESS PROFITS TAX ACT, 1940.**

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

**Definitions.**

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “accounting period” in relation to any business means—

(a) where the accounts of the business are made up for successive periods of twelve months, each of such periods;

[O. 48, C.P. Code, supra.] The High Court upon the hearing of second or special appeal have remanded cases for reconsideration and fresh decision by the lower appellate Court where important evidence had not been carefully considered by such Court (1 Jur.N.S. 35); where the judgment of the lower appellate Court was based on part of the evidence only (24 W.R. 160; 24 W.R. 293); where the importance of a particular piece of evidence has been much under-rated (24 W.R. 192); where witnesses were discredited for general reasons not affecting the credit of any individual deponent (24

W.R. 251). In second appeal the finding of the lower Courts cannot be interfered with, however erroneous they may appear to be unless there be an error or defect in procedure, provided they had before them evidence proper for their consideration in support of their findings. But a finding without evidence to support it is a substantial error in the proceedings and a good ground for second appeal. 14 C. 740=14 I.A. 101 (P.C.); 17 C. 297=16 I.A. 233 (P.C.); 18 C. 23; 19 C. 249=19 I.A. 1 (P.C.); 20 C. 93; 9 C. 309; 17 C. 875=17 I.A. 65 (P.C.).

(b) in any other case, such period as the Excess Profits Tax Officer may determine :

Provided that in determining any accounting period under sub-clause (b) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922 ;

(2) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Excess Profits Tax under section 3 ;

(3) "average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule ;

(4) "Board of Referees" means a Board of Referees appointed under section 3 ;

(5) "business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts :

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society :

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act ;

(6) "chargeable accounting period" means—

(a) any accounting period falling wholly within the term beginning on the 1st day of September, 1939, and ending on the 31st day of March, 1946, and ;

(b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term ;

(7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under section 3 ;

(8) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act ;

(9) "deficiency" of profits means—

(i) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the standard profits ;

(ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the amount of the standard profits ;

(10) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

#### LEG. REF.

<sup>1</sup>Substituted by Finance Act 1945.

**Sec. 2 (5) and (19).**—Income derived from properties taken over in discharge of loans made in the course of a foreign money-lending business and treated as assets of the business can be assessed as part of the profits of that business when remitted to British India. In respect of such income the assessee is liable to excess profits tax by reason of sec. 2 (5) and (19) of the

Act read with r. 4 (2) of Sch. I to the Act. Similarly, income from rubber estates owned by an assessee in a foreign country must be held to represent profits and gains of a business within the meaning of the Act and liable to excess profits tax under sec. 2 (5) and (19) read with the first schedule to the Act. I.L.R. (1945) Mad. 693=1945 M.W. N. 294 (2)=1945 I.T.R. 49=58 L.W. 70 =A.I.R. 1945 Mad. 223=(1945) 1 M.L.J. 194.

(i) is a manager of the company or concerned in the management of the business; and

(ii) is remunerated out of the funds of the business; and

(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company;

(11) "dividend" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under section 3;

(13) "income" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(14) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax;

(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Commissioner of Excess Profits Tax under section 3;

(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;

<sup>1</sup>[(16-A) "ordinary share capital" has the meaning assigned to that expression in sub-section (8) or section 9;]

(17) "person" includes a Hindu undivided family;

(18) "prescribed" means prescribed by rules made under this Act;

(19) "profits" means profits as determined in accordance with the First Schedule;

(20) "standard profits" means standard profits as computed in accordance with the provisions of section 6;

(21) "statutory percentage" means—

(a) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

<sup>2</sup>[(b) in relation to a business carried on by a partnership of which one or more partners is a body corporate (other than a company the directors whereof have a controlling interest therein), such a rate per cent. as is equivalent to—

(i) eight per cent. per annum on so much of the average amount of the capital employed in the business during the chargeable accounting period as represents the share of any such body corporate; and

(ii) ten per cent. per annum on the remainder of that amount;

(c) in relation to a business to which neither sub-clause (a) nor sub-clause (b) applies, ten per cent. per annum :]

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent. :

Provided further that where the business was commenced on or after the 1st day of July, 1938, the foregoing percentages shall be increased from eight, ten and six per cent. to ten, twelve and eight per cent. respectively;

(22) "written down value" has the meaning assigned to that expression in sub-section (5) of section 10 of the Indian Income-tax Act, 1922.

3. (1) There shall be the following classes of excess profits tax authorities for the purposes of this Act, namely :—

(a) the Central Board of Revenue;

(b) Commissioners of Excess Profits Tax;

(c) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Assistant Commissioners of Excess Profits Tax;

(d) Excess Profits Tax Officers;

LEG. REF.

<sup>1</sup>Sec. 2 (16-A) added by Act XI of 1941.

<sup>2</sup>Sec. 2 (21) (b) substituted by Act XLII of 1940.

Sec. 2 (19).—See (1945) 1 M.L.J. 194 supra.

(e) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them :

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that nothing in this sub-section applies to a Board of Referees :

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business experience, and one shall be a judicial officer who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and who has held judicial office for a period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Boards of Referees.

<sup>14</sup>. (1) Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any

chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") which shall, in respect of any chargeable accounting period ending on or before the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as may be fixed by the annual Finance Act :

#### LEG. REF.

<sup>1</sup> Sec. 4 has been re-numbered as sub-S. (1) and to the section as so re-numbered sub-S. (2) has been added by Act XI of 1941.

**Sec. 4.**—Where the Managing Agency Agreement between a company and its Managing Agent provides for payment of commission to the Managing Agent to a certain percentage of the annual net profits of the company, excess profits tax payable or paid by the company under the Excess Profits Tax Act should be deducted in ascertaining the annual net profits of the company for the purpose of the calculation of the managing agent's commission, though there is no provision in the agreement for

deduction of any tax on income. Although Excess Profits Tax Act has some of the features of income-tax and the assessment is made on the same principles as assessment of income-tax and the tax has to be recovered in the same manner also, yet there is a vital distinction between the two taxes. Income-tax is a tax on all income with certain exceptions, whereas excess tax is a tax levied only on a certain profits of the owner of a business. The object of the excess profits tax is not merely to raise revenue, but also to prevent the owner of the business from making a large fortune out of what is a national danger; in effect, though not in form, it is partly of a prohibitive character: it prohibits the owner of a business from retaining more



Provided that any profits which are, under the provisions of sub-section (3) of section 4 of the Indian Income-tax Act, 1922, exempt from income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.<sup>1</sup>

[Provided further that, in the case of any business which includes the mining of any mineral, any bonus paid by or through the Central Government in respect of increased output of the mineral shall be totally exempt from excess profits tax under this Act.] (Added by Ordinance VIII of 1944).

<sup>2</sup>[ (2) Where a chargeable accounting period falls partly before and partly after the end of March, 1941, the foregoing provisions of this section shall apply as if so much of that chargeable accounting period as falls before, and so much of that chargeable accounting period as falls after, the said end of March were each a separate chargeable accounting period, <sup>3</sup>[and as if the excess of profits of that separate chargeable accounting period were an apportioned part of the excess of profits arising in the whole period determined\* in accordance with the provisions of section 7-A].]

5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India unless the business is controlled in British India :

Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident, accrue or arise in British India or are deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business :

<sup>3</sup>[Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State, and where the profits of a part of business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in an Indian State, and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business.]

6. (1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of the business during the standard period, if ~~is~~.

#### LEG. REF.

<sup>1</sup>N.B.—“The excess profits tax imposed by sec. 4 of the Excess Profits Tax Act, 1940, shall in respect of any chargeable accounting period beginning after the 31st day of March, 1941, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.” [Finance Act VII of 1941, sec. 8, cl. (2).]

<sup>2</sup>Substituted by Act XXIV of 1941.

<sup>3</sup>Last proviso to sec. 5 added by Act XXIV of 1941.

than a certain proportion of profits may be deemed to have arisen on account of the

war. 45 Bom.L.R. 951=A.I.R. 1944 Bom. 5=I.L.R. (1944) Bom. 105. Where under the managing agency agreement between a company and its managing agent provision is made for payment to the managing agent of “a commission of ten per cent. on the rent on the net annual income of the company before setting aside any sum to reserve or depreciation funds or for payment of income-tax or super-tax or any other tax on which commission is to be based, no deduction is to be made for excess profits tax. The excess profits tax is a tax on income within the meaning of the expression “any other tax on income.” 47 Bom.L.R. 774.

Sec. 6: Scheme and object of—Standard profits—Computation of—Average amount

respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period :

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease :

Provided further that in the case of a business which was commenced on or after the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

(2) For the purposes of this section the standard period shall, at the option of the person carrying on the business, be—

(a) the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938 ; or

(b) the "previous year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939; or

(c) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939 ; or

(d) the "previous year" as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March, 1940 :

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) If, within the period specified in the notice issued under sub-section (1) of section 13, <sup>1</sup>[or within the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section] the person carrying on the business makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might at the beginning of that period have been reasonably expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just :

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed :

<sup>2</sup>[Provided further that a determination on an application under this sub-section—

(a) shall have effect with respect to all subsequent chargeable accounting periods ;

(b) shall exclude any further application under this sub-section.]

(4) The standard profits shall be taken to be rupees thirty-six thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum :

#### LEG. REF.

<sup>1</sup> Inserted by Act XLII of 1940.

<sup>2</sup> Added by Act XLII of 1940.

**of capital.**—The object of the Excess Profits Tax Act is to tax the excess profits over the standard profits. The scheme of sec. 6 is to compare the average amount of capital during the standard period with the average amount of capital during the chargeable accounting period, and make adjust-

ments in the standard profits on the footing of the increase in the capital during the chargeable accounting period. What is relevant for this purpose is the average amount of capital for the standard period and not amount of capital ascertained as in use on the last date of the standard period. The object of Sch. II is to prescribe rules for computing the average amount of capital. 1945 I.T.R. 445=47 Bom.L.R. 797.

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees thirty-six thousand shall for the purpose of this sub-section be increased or decreased proportionately.

(5) Where the standard period includes any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was part of British India, there shall, in computing the standard profits of a business under this section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

7. Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions :—

(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise ;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.

<sup>1</sup>[ Provided that a deficiency of profits occurring in a chargeable accounting period beginning on or after the 1st day of April, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period beginning on or after the said 1st day of April, and a deficiency of profits occurring in a chargeable accounting period ending on or before the 31st day of March, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period ending on or before the said 31st day of March ; and where owing to an insufficiency of profits for chargeable accounting periods ending on or before the said 31st day of March, or, as the case may be, beginning on or after the said 1st day of April, the whole or any part of the deficiency is applied otherwise than as aforesaid,—

(a) the application shall be treated as provisional only ; and

(b) if it thereafter appears that there is no longer such an insufficiency as aforesaid, such adjustment shall be made as the Central Board of Revenue may, by written order direct :

Provided further that where a chargeable accounting period falls partly before and partly after the end of March, 1941, the provisions of the preceding proviso shall apply as if so much of the chargeable accounting period as falls before, and so much of the chargeable accounting period as falls after, the said end of March, were each a separate chargeable accounting period, and as if the deficiency of profits of that separate chargeable accounting period were an apportioned part of the deficiency of profits occurring in the whole period ; and any apportionment required to be made by this proviso shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period.]

<sup>2</sup>[7-A. (1) In the case of a chargeable accounting period such as is referred

Special provision for chargeable accounting period falling partly before and partly after the end of March, 1941.

to in sub-section (2) of section 4, the excess of profits of each of the separate chargeable accounting periods into which the whole chargeable period is deemed to be divided for the purposes of that sub-section, shall be determined in accordance with the provisions of sub-sections (2), (3) and (4) and, in those sub-sections—

(a) references to the whole period, the first part of the period, and the second part of the period shall be construed, respectively, as references to the whole of the chargeable accounting period deemed to be divided, so much thereof as falls before the end of March, 1941, and so much thereof as falls after the said end of March;

(b) "excess profits" means the amount by which the profits for any period exceed the standard profits for that period.

(2) The profits or loss of, and the standard profits for, the whole period shall be computed first on the basis that rule 5-A of the First Schedule and rule 2-A of the Second Schedule do not apply to the period, and secondly on the basis that the said rules do apply to the period, and it shall then be ascertained, on each basis, whether there are excess profits or a deficiency of profits for the whole period, and, if so, what is the amount thereof.

(3) There shall be deemed to be for the first part of the period excess profits or a deficiency of profits, as the case may be, equal to an apportioned part of the excess profits or deficiency of profits ascertained under sub-section (2) on the first basis mentioned therein, and there shall be deemed to be for the second part of the period excess profits or a deficiency of profits, as the case may be, equal to an apportioned part of the excess profits or deficiency of profits ascertained under sub-section (2) on the second basis mentioned therein; and, for the purpose of giving relief for deficiencies of profits under section 7, the first part of the period and the second part of the period shall each be treated as if it were a separate chargeable accounting period.

(4) Any apportionment required to be made by sub-section (3) shall be made by reference to the number of months and fractions of months in each of the parts of the whole period.]

8. (1) As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced.

(2) Where the change took place before the 1st day of September, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits Tax Officer, elect that, for the purposes of the provisions of this Act relating to the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, <sup>1</sup>and in considering, for the purposes of computing the profits of, and the capital employed during any chargeable accounting period, whether any and, if so, what deductions are to be made in respect of depreciation of buildings,

#### LEG. REF.

<sup>1</sup>Inserted by Act XLII of 1940.

Sec. 8 (1).—Dissolution of firm on partner's death—New firm constituted with dif-

ferent persons—New firm taking over assets and liabilities of old after some time—Profits of old firm—Excess profits tax on—Liability of new firm. See 47 Bom.L.R. 204.

plant and machinery]; no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of the provisions of this Act relating to the computation of standard profits as if—

(a) it had been in existence throughout the period during which there were in existence any of the former businesses;

(b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting businesses; and

(c) any assets of any of those former businesses had become assets of the resulting businesses when they became assets of the former business; and, in particular, in computing the capital employed in the resulting business, [and in considering, for the purposes of computing the profits of, and the capital employed during, any chargeable accounting period whether any and, if so, what deductions are to be made in respect of depreciation of buildings, plant and machinery]<sup>1</sup>; no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where on or after the 1st day of September, 1939, part of a business is transferred as a going concern, by the person theretofore carrying it on to another person, the part transferred and the part not transferred shall each be deemed for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this section relating to amalgamations, shall apply accordingly, [\* \* \*]:

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, [\* \* \*].

(7) Where, on or after the 1st day of September, 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

<sup>4</sup>[(8) Where—

(a) a business is, by virtue of sub-section (2) or sub-section (3), deemed not to have been discontinued; or

LEG. REF.

<sup>1</sup>Inserted by Act XLII of 1940.

<sup>3</sup>The words "subject to any necessary

modifications" omitted by Act XLII of 1940.

<sup>3</sup>Omitted by Act XLII of 1940.

<sup>4</sup>Sec. 8, sub-sec. (8) added by *ibid*.

(b) a business, is, by virtue of sub-section (4), to be treated as if it had been in existence throughout the period during which there was in existence any other business ; or

(c) a business is, by virtue of sub-section (5) to be treated as a continuation of another business ; or

(d) any person who is carrying on a business after a transfer is treated, by virtue of sub-section (6), as having carried on the business as from a date before the transfer,

the provisions of this Act relating to the computation of profits and capital for the purposes of excess profits tax shall, both as respects the standard period and any chargeable accounting period, have effect subject to such modifications, if any, as the Excess Profits Tax Officer may think just, and the Excess Profits Tax Officer may make such alterations in the periods which would otherwise be the chargeable accounting periods of the business as he thinks proper :

Provided that if the Excess Profits Tax Officer makes any such modifications and the person carrying on the business is dissatisfied with the modifications so made, or if the person carrying on the business is dissatisfied with the refusal of the Excess Profits Tax Officer to make any such modifications, he may, at any time before the expiry of forty-five days from the date on which the order of the Excess Profits Tax Officer is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer.]

9. (1) Where any interest, annuity, or other annual payment, or any royalty, or rent, is paid by one company to another company and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital profits and losses of both companies shall be computed for the purposes of this Act as if—

(a) the interest, annuity, annual payment, royalty or rent were not payable ;

(b) any debt in respect of which any such interest is payable did not exist ; and

(c) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.

<sup>1</sup>[ (1-A) Where—

(a) any debt is owing to any company by another company ; and

(b) one of those companies is a subsidiary of the other, or both are subsidiaries of a third company ; and

(c) no interest is payable in respect of the debt, but the circumstances in which the debt came into existence or is allowed to continue to exist are such that the debt represents in substance capital employed in the business of the debtor company,

the capital of both companies shall be computed as if the debt did not exist.]

(2) Where—

(a) a company (hereinafter referred to as “ the principal company ”) is resident in British India and is not a subsidiary of any other company resident in British India ; and

(b) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as “ the subsidiary company ”) is a subsidiary of the principal company, the following provisions of this section shall, subject to the provisions of section 5, have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

(i) the chargeable accounting period ; or

(ii) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

In this sub-section, the expression "excess" and "deficiency" mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company.

(5) In any case to which sub-section (3) or sub-section (4) applies, such alteration, if any, of the periods which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the Central Board of Revenue may direct.

(6) For the purposes of this section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly or partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

(9) The principal company shall be entitled to allocate to its subsidiary company or companies the respective proportionate shares of the excess profits tax payable by the whole group.

(10) The excess profits tax payable by virtue of this section by the principal company in respect of the profits of any subsidiary company shall, for the purposes of section 12, be deemed to have been paid by the subsidiary company and not by the principal company.

<sup>1</sup>[10. (1) In computing profits for the purposes of this Act no deduction shall be made in respect of any transaction or operation of any nature if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the profits.

(2) If the Excess Profits Tax Officer is satisfied that any person has entered into or carried out any transaction or operation by which the profits have been or would be artificially reduced, he may, with the previous approval of the Inspecting Assistant Commissioner, direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to be evaded.

<sup>1</sup>[10-A. (1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected [whether before or after the passing of the Excess Profits Tax (Second Amendment) Act, 1941] was the avoidance or reduction

Transactions designed to avoid or reduce liability to excess profits tax.

#### LEG. REF.

<sup>1</sup>New sec. 10 substituted for old sec. 10 and sec. 10-A inserted by Act XXIV of 1941.

Sec. 10-A: "Transaction"—Meaning of —Formation of new partnership to carry



of liability to excess profits tax, he may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.

(2) Without prejudice to the generality of the powers conferred by subsection (1), the powers conferred thereby extend—

(a) to the charging with excess profits tax of persons who but for the adjustments would not be chargeable with any tax or would not be chargeable to the same extent ;

(b) to the charging of a greater amount of tax than would be chargeable but for the adjustments.

(3) Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal.]

11. (1) The Central Government may by notification in the Official Gazette

Relief in respect of double excess profits taxation.

make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions have been paid upon the profits of any business if it appears to the Central Government that the laws of the United Kingdom or of that Indian State or of that other part of His Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India :

Provided that where under section 19 of the Finance (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu of excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the laws of which do not provide for any relief in respect of excess profits tax charged in British India proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal to one-half thereof or to one-half of the excess profits tax payable in the said country, whichever is the less.

12. (1) The amount of the excess profits tax payable in respect of a business for any chargeable accounting period diminished by

Allowance of excess profits tax in computing income for income-tax purposes.

any amount allowable by way of relief under the provisions of section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period <sup>1</sup>[to the extent to which such profits are liable to excess profits tax under this Act] after diminishing such amount by any amount which is allowable by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable

#### LEG. REF.

<sup>1</sup>Submitted by Act XLII of 1940.

on same business—Effect of.—It cannot be held that the word "transaction" in sec. 10-A, of the Act is not confined to a transaction in the course of the business of the assessee and does not cover the formation of a new partnership for the carrying on of

the same business. "Transaction" has a very wide meaning and can be applied to any particular act done in the carrying on of a business. It includes the carrying on or completion of an action or a course of action. I.L.R. (1945) Mad. 618=1945 I.T.R. 24 =58 L.W. 37=1945 M.W.N 286 =A. I.R. 1945 Mad. 131=(1945) 2 M.L.J. 175.

providing for the granting of relief in that country where excess profits tax has also been charged in British India :

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the said country without British India, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the <sup>1</sup>[previous year (as determined for that business for the purposes of the Indian Income-tax Act, 1922)] in which the deficiency or profits occurs.

13. (1) The Excess Profits Tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay excess profits tax, to furnish within such period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of section 6 or the amount of deficiency available for relief under section 7 :

Issue of notice for assessment. Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom a notice has been served under sub-section (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require :

Provided that the Excess Profits Tax Officer shall not require the production of any accounts relating to a period prior to the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the Income-tax assessment for the year ending on the 31st day of March, 1937.

14. (1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 13, assess to the best of his judgment the profits liable to excess profits tax and the amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Excess Profits Tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

<sup>2</sup>[14-A. (1) The Excess Profits Tax Officer, before proceeding to make an assessment (in this section referred to as the regular assessment) under section 14, may, at any time after the expiry of the period specified in the notice issued

Power to make provisional assessments.

under sub-section (1) of section 13 as that within which the return therein referred to is to be furnished, and whether the return has or has not been furnished, proceed to make in summary manner a provisional assessment of the amount by which the profits of the chargeable accounting period exceed the standard profits, and the amount of excess profits tax payable thereon.

(2) Before making such provisional assessment the Excess Profits Tax Officer shall give notice in the prescribed form to the person on whom assessment is to be made of his intention to do so, and shall with the notice forward a statement of the amount of the proposed assessment, and the said person shall be entitled to deliver to the Excess Profits Tax Officer at any time within fourteen days of receipt of the said notice a statement of his objections, if any, to the amount of the proposed assessment.

(3) On expiry of one month from the date of service of the notice referred to in sub-section (2), or earlier if the assessee agrees to the proposed assessment, the Excess Profits Tax Officer may, after taking into account the objections, if any, made under sub-section (2), make a provisional assessment, and shall furnish a copy of the order of assessment to the assessee :

Provided that assent to the amount of the assessment, or failure to make objection to it, shall in no way prejudice the assessee in relation to the regular assessment.

(4) In making any such provisional assessment the Excess Profits Tax Officer shall make allowances for any deficiencies of profits for previous chargeable accounting periods which are under the provisions of section 7 to be set off against the excess profits of the chargeable accounting period in respect of which the assessment is being made :

Provided that where such deficiencies of profits have not been determined under sub-section (1) of section 14, the Excess Profits Tax Officer shall estimate the amount thereof to the best of his judgment.

(5) There shall be no right of appeal against a provisional assessment made under this section, and it shall, until a regular assessment is made in due course under section 14, determine the amount of excess profits tax due from the assessee.

(6) If, when a regular assessment is made in due course under section 14 the amount of excess profits tax payable thereunder is found to exceed that determined as payable by the provisional assessment, it shall be reduced by the amount determined as payable by the provisional assessment.

(7) If, when a regular assessment is made in due course under section 14, the amount of excess profits tax payable thereunder is found to be less than that determined as payable by the provisional assessment, any excess of tax paid as a result of the provisional assessment shall be refunded to the assessee together with interest at 5 per cent. per annum calculated from the date of payment of such excess tax to be the date of the order of refund, both days inclusive.]

15. If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits escaping assessment, profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been underassessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that section.

16. If the Excess Profits Tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that section, or has concealed particulars of the profits made by or capital employed

in the business, or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

(a) where the person has failed to furnish the return required under sub-section (1) of section 13, the amount of the excess profits tax payable; and

(b) in any other case, the amount of excess profits tax which would have been avoided if the return made had been accepted as correct:

Provided that the Excess Profits Tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner.

17. (1) Any person aggrieved by a decision made in pursuance of section 8,

or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax

Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner:

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the <sup>1</sup>[second proviso] to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule:

<sup>2</sup>[Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of section 8, against any <sup>3</sup>[refusal to make modifications or against any modifications] made by the Excess Profits Tax Officer under sub-section (8) of section 8, against any decision of the Excess Profits Tax Officer under rule 11 of the First Schedule or against any decision of the Board of Referees or the Central Board of Revenue.

(2) An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal, and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made in this behalf by the Central Board of Revenue.

18. (1) Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under section 16 or enhancing his assessment or enhancing a penalty under section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

Appeal to Commissioner against Appellate Assistant Commissioner's orders, imposing penalties or enhancing assessments or penalties.

LEG. REF.

<sup>1</sup>Substituted by Act XI of 1941.

C.C.M.—312

<sup>2</sup>Substituted by Act XLII of 1940.

<sup>3</sup>Inserted by Act XI of 1941.

(2) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

(3) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this section shall cease to have effect.

19. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit :  
 Power of revision.

Provided that he shall not pass any order prejudicial to a person to whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any Excess Profits Tax Officer or any person in respect of whose business an order under section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under section 16 or section 17 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

20. The Commissioner may, at any time within four years from the date of any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies :  
 Rectification of mistakes.

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

21. The provisions of sections 4-A, 4-B, 10, 13, 24-B, 29, 36 to 44-C (inclusive) 45 to 48 (inclusive), 49-E, 49-F, 50, 54, 61 to 63 (inclusive), 65 to 67-A (inclusive) of the Indian Income-tax Act, 1922, shall apply with such modifications, if any, as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of section 3 as he exercises in relation to income-tax under the said Act :  
 Application of provisions of Act XI of 1922.

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

22. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.  
 Income-tax papers to be available for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

23. If any person fails, without reasonable cause or excuse, to furnish in due time, any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under section 19, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees,  
 Failure to deliver returns & statements.

and with a further fine which may extend to fifty rupees for every day during which the default continues.

24. If a person makes in any return required under section 13 any statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

25. (1) A person shall not be proceeded against for an offence under section 23 or section 24 except at the instance of the Inspecting Assistant Commissioner.

(2) No prosecution for an offence punishable under section 23 or section 24 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner may, either before or after the institution of proceedings, compound any offence punishable under section 23 or section 24.

26. (1) If <sup>1</sup>[on an application made to it through the Excess Profits Tax Officer] the Central Board of Revenue is satisfied in the case of any business that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of sub-section (1) of section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just :

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded, by the Board of Referees under sub-section (3) of section 6 is inadequate :

<sup>2</sup>[Provided further that a determination on an application under this sub-section—

(a) shall have effect with respect to all subsequent chargeable accounting periods ;

(b) shall exclude any further application under this sub-section.]

(2) Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following circumstances, namely :—

(a) that the capital employed in a business commenced on or after the 1st day of July, 1938, is so small in relation to the volume of the activities of the business that to compute the standard profits in accordance with the provisions of section 6 would be inequitable, taking into account the normal profits made in similar businesses ;

(b) that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax ;

(c) that the business is of a pioneer nature, that is to say, is concerned with an industrial process or a form of manufacture or production not undertaken in British India before the 1st day of April, 1932, and has not been in existence long enough to have paid income-tax for the previous year as determined for the purpose of the income-tax assessment for the year beginning on the 1st day of April, 1937.

(3) If <sup>1</sup>[on an application made to it through Excess Profits Tax Officer] the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to any of the following circumstances, namely :—

(a) any postponement or suspension, as a consequence of the present hostilities of renewals or repairs, or

(b) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities, or

(c) difficulties in bringing into British India income arising outside British India where the country in which the income accrued prohibits or restricts by its laws the remittance of money to British India, and loss in the remittance to British India of such income because of fluctuations in the rate of exchange between that country and British India <sup>2</sup>[or]

[(d) in the case of any business which includes the winning of any mineral (including mineral oil) the winning of which is of exceptional importance for the prosecution of the present war, an increase in the output of the mineral which was essential in the national interest and which has had the effect of shortening the period during which but for such increased war-time output the source of the mineral might have been expected to be exhausted.]

The Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just :

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

<sup>3</sup>[(4) An application to the Central Board of Revenue under this section shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section, but in the case of an application under sub-section (1) of this section, if the person carrying on the business has made or is making an application under sub-section (3) of section 6, the application shall be presented to the Excess Profits Tax Officer before the expiry of forty-five days from the date on which the order of the Board of Referees disposing of the application under sub-section (3) of section 6 is communicated to the person who has made that application].

27. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds ;

(b) provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by section 21 ; or of any rules made under any such provision ;

(c) provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investments for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the profits of which have been subjected to excess profits tax in British India ;

(d) provide for any matter which by, or under, this Act is to be prescribed.

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income-tax Act, 1922.



## SCHEDULE I.

[See section 2 (19).]

*Rules for the computation of profits for purposes of Excess Profits Tax.*

1. The profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under section 10 of the Indian Income-tax Act, 1922 :

<sup>1</sup>[Provided that any sums, <sup>2</sup>[(other than any interest paid by a firm to a partner of the firm)], excluded under the proviso to clause (iii) of sub-section (2) or clause (a) of sub-section (4) of that section from the allowances made in computing the profits of the business for the purposes of income-tax shall, if paid, be included in those allowances when computing the profits of business for the purposes of excess profits tax :]

Provided <sup>3</sup>[further] that where the profits during any standard period have already been determined for the purpose of an assessment under the Indian Income-tax Act, 1922, such profits as so determined shall, subject to the adjustments required by this Schedule, be taken as the profits during that period for the purpose of excess profits tax :

Provided further that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the business during any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof shall be made as appears necessary to arrive at the profit during the standard period or chargeable accounting period : and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

2. The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period.

3. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies.

(3) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of the excess profits tax, of the provisions of sub-section (2) of section 24, of the Indian Income-tax Act, 1922.

4. (1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-rules (2), <sup>4</sup>[(2-A)] and (4) of this rule and not otherwise.

(2) In the case of the business of a building society, or of a money-lending business, banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments the profits shall include all income received from investments, whether or not such income is included in the profits charged under section 10 of the Indian Income-tax Act, 1922, or is charged under any other section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

## LEG. REF.

<sup>1</sup>Added by Act XLII of 1940.

<sup>2</sup>Inserted by Act XI of 1941.

<sup>3</sup>Inserted by Act XLII of 1940.

Sch. I, R. 1: Construction—Computation of profits.—R. 1 of Sch. I cannot be read as providing that the computation of capital has to be according to the schedule. The plain meaning of the rule is that the profits of a business shall be computed according to sec. 10 of the Income-tax Act, but subject to the rules found in the schedule. It is not correct to say that no reference should be made to the Income-tax Act to ascertain the profits under the Excess Profits Tax Act. 1945 I.T.R. 445=47 Bom.L.R. 797.

Sch. I, R. 5: Construction and scope—Computation of profits—Mode of.—By virtue of r. 5 of Sch. I, the Legislature has provided that borrowings from banks of the type mentioned in the rule and in the

shape of debentures issued to the public should not be excluded in arriving at the average amount of capital for the chargeable accounting period. The opening words of r. 5 deal with the increase contemplated after the closure of the standard period. It does not deal with the question of amount at all. "Increase" necessarily means "more than." If r. 5 is read naturally, it must be held that it grants a certain privilege to the assessee who had increased his capital after the standard period had come to an end. The interest paid by the assessee in respect of that portion of the increased capital (consisting of borrowings from the Banks mentioned in the rule and the debentures) has to be retained on the debit side and not excluded. The increase or decrease of capital has to be considered, and on the ascertainment of that the statutory percentage to the standard profits has to be applied. 1945 I.T.R. 445=47 Bom.L.R. 797.

<sup>1</sup>[(2-A) In the case of a business part of which consists in banking, insurance or dealing in investments, not being a business to which sub-rule (2) of this rule applies, the profits shall include all income received from investments held for the purposes of that part of the business, being income to which the persons carrying on the business are beneficially entitled.]

(3) Notwithstanding anything contained in sub-rule (2), <sup>1</sup>[or (2-A)] where the profits of a subsidiary company are under the provisions of section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

(4) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under section 9 of the Indian Income-tax Act, 1922, or under any other section of that Act.

5. If at any time after the close of the standard period, any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a *bona fide* banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and, notwithstanding the provisions of rule 2 of Schedule II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business.

<sup>2</sup>[5-A. (1) In computing for any chargeable accounting period ending after the end of March, 1941, and in relation thereto for the standard period, if any, the profits of a business other than a business to which sub-rule (2) of rule 4 of this schedule, applies or the profits of a part of a business other than a part of a business to which sub-rule (2-A) of the said rule applies, no deduction shall be made in respect of interest on borrowed money or in respect of any other consideration given for the use of borrowed money :

Provided that, as respects any such chargeable accounting period which commences before the said end of March, the application of this rule shall be subject to the provisions of section 7-A of this Act :

Provided further that this rule shall not apply to the computation of profits of any business for any chargeable accounting period the standard profits for which are ascertained by reference to the minimum amount specified in sub-section (4) of section 6 of this Act :

Provided further that where a direction has been given by a Board of Referees under sub-section (3) of section 6, or by the Central Board of Revenue under sub-section (1) of section 26 of this Act, that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just, such amount shall be increased by the amount of the interest on or other consideration for the borrowed money during the standard period.

(2) In this rule and in rule 2-A of the Second Schedule "borrowed money" means borrowed money which, apart from the provisions of the said rule 2-A, would have been deductible in computing capital].

6. No deduction shall be made on account of liability to pay, or payment of, income-tax, super-tax, or excess profits tax.

7. <sup>3</sup>[(1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have throughout that accounting period a controlling interest therein,—

(a) In computing the profits for that accounting period ; and

(b) if the standard profits of the business are computed by reference to the profits of a standard period, also in computing in relation to any such chargeable accounting period, the profits for the standard period, no deduction shall be made in respect of directors' remuneration.]

<sup>4</sup>[(2) In sub rule (1) of this rule the expression " directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of excess profits tax.]

<sup>5</sup>[(3) If, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company—

(a) have during any part of that accounting period, or

(b) had during the whole or any part of any previous accounting period which includes the whole or any part of any chargeable accounting period, or the whole or any part of the standard period (if any),

a controlling interest therein, and the case is not one to which sub-rule (1) of this rule applies, then, except in so far as the Central Board of Revenue otherwise directs, no deduction shall be made in respect of directors' remuneration either in computing the profits for the first-mentioned accounting period or in computing in relation to any chargeable accounting period wholly or partly included in that accounting period, the profits of the standard period (if any).]

8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period, except where such remuneration is subjected to excess profits tax in the hands of the managing agent.

9. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein :

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

10. In respect of any building erected on or after the 1st day of September, 1939, which during any chargeable accounting period has ceased to be required for the purposes of the business or has been sold, any amount by which the value of the building at the date when it ceased to be required for the purposes of the business or the price obtained for the building, as the case may be, falls short of the written down value of the building shall be allowed as a deduction in arriving at the profits of that chargeable accounting period.

<sup>1</sup>[11. Where in respect of any accounting period a deduction would, apart from the provisions of this rule, be allowable in computing profits, and, in the opinion of the Excess Profits Tax Officer, the deduction does not represent a sum reasonably and properly attributable to that accounting period, only such part of the deduction shall be allowable as a deduction for that period as appears to the Excess Profits Tax Officer to be reasonably and properly attributable to that period, and any balance of the deduction shall be treated as attributable to such other accounting period or periods (whether or not they include, or fall wholly or partly within, the standard period, if any, or any chargeable accounting period) as the Excess Profits Tax Officer thinks proper.

Any person who is dissatisfied with a determination of the Excess Profits Tax Officer under this rule may, at any time before the expiry of forty-five days from the date on which such determination is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer.]

<sup>2</sup>[12. (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned :

Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax.

(2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal.]

<sup>3</sup>[(3) In relation to chargeable accounting periods ending after the 31st day of December, 1942, the Central Government may make rules for determining the extent to which deductions shall be allowed in respect of bonuses or commissions paid.]

## SCHEDULE II.

[See section 2 (3).]

### *Rules for computing the average amount of capital.*

1. (1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—

(a) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;

(b) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;

(c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.

(2) The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value <sup>4</sup>[and to such other deductions in respect of reduce values of assets as are allowable in computing profits for the purpose of income-tax] <sup>4</sup>[and, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.]

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

## LEG. REF.

<sup>1</sup> Added by Act XLII of 1940.

<sup>2</sup> Added by Act XXIV of 1941.

<sup>3</sup> Added by Ordinance XVI of 1943.

<sup>4</sup> Inserted by Act XLII of 1940.

Notes.—Sch. II.—The object of Sch. II is to prescribe rules for computing the average amount of capital. 47 Bom.L.R. 797.

2. (1) Any borrowed money and debts shall be deducted, [and in particular there shall be deducted any debts incurred in respect of the business for income-tax or super-tax or excess profits tax, or for advance payments due under any provision of the Indian Income-tax Act, 1922 (XI of 1922) or for any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943):]<sup>1</sup>

Provided that any such debt for income-tax or super-tax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(a) in the case of income-tax and super-tax on the last day of the period of time within which the tax is payable under section 45 of the Indian Income-tax Act, 1922 ;

(b) in the case of excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.

<sup>2</sup>[(c) in the case of any advance payment due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), on the date on which under the provisions of that section, the payment first became due ;

(d) in the case of any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943), on the date on which under the provisions of that section, the further sum became payable.]

<sup>3</sup>[The debts to be deducted under this sub-rule shall include any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period ; and the said sums shall be deducted notwithstanding that they have not become payable.]

(2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

<sup>4</sup>2-A. In computing for any chargeable accounting period ending after the end of March, 1941, and in relation thereto for the standard period, if any, the average capital of a business other than a business to which sub-rule (2) of rule 4 of the First Schedule applies, or the average capital of a part of a business other than a part of a business to which sub-rule (2-A) of the said rule applies, no deduction shall be made in respect of borrowed money :

Provided that, as respects any such chargeable accounting period which commences before the said end of March, the application of this rule shall be subject to the provisions of section 7-A of this Act :

Provided further that the same deduction shall be made in respect of accruing liabilities for interest as would have been made if this rule had not been enacted.]

3. (1) Any investments the income from which is by virtue of the provisions of the First Schedule not to be taken into account in computing the profits of the business, and moneys <sup>5</sup>[or as regards any chargeable accounting period ending after the 31st day of December, 1942, any trading stock or stock of raw materials] not required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under <sup>6</sup>[rule 2 of this Schedule] in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

<sup>7</sup>[(2) The Central Government may make rules defining for the purposes of this rule the principles to be followed in leaving out of account trading stock and stocks of raw materials.]

4. Notwithstanding anything contained in rule 3, in the case of the business of shipping, to which this Act applies, the sale proceeds of any tonnage sold or the amount of compensation in respect of loss of ships or the amount of accumulation of reserves, whether invested or not, shall be taken into account in computing the average amount of capital employed in such business :

Provided that any income received from investment of such funds shall be included in computing profits for purposes of the excess profits tax.

5. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits or losses made in that period shall, except so far as the contrary is shown be deemed—

(a) to have accrued at an even rate throughout the period ; and

(b) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the business.

6. Where, in accordance with the [2nd or 3rd proviso] to section 5 of this Act, this Act is applicable to part only of a business, the capital employed in that part shall be computed separately

#### LEG. REF.

<sup>1</sup>Substituted by Finance Act, 1944.

<sup>2</sup>Inserted by Finance Act, 1944.

<sup>3</sup>Inserted by Act XLII of 1940.

<sup>4</sup>Inserted by Act XXIV of 1941.

<sup>5</sup>Inserted by Ordinance XVI of 1943.

<sup>6</sup>Substituted by Act VI of 1945.

<sup>7</sup>Added by Ordinance XVI of 1943.

from any other capital of the person carrying on the business, and all references to capital employed in a business shall be construed as references to capital employed in that part of the business only.

<sup>1</sup>[7. (1) If—

(a) the Central Board of Revenue is satisfied, as respects any assets of any business the standard profits of which are computed by reference to the profits of a standard period, that during that period or any part thereof those assets were inherently unproductive, and

(b) an application that this rule shall have effect is made through the Excess Profits Tax Officer to the Central Board of Revenue by the person carrying on the business, then, in computing the average amount of the capital employed in the business in the standard period and in all chargeable accounting periods, those assets, and any other assets of the business, shall be treated as not having been assets thereof during any part of the period during which, in the opinion of the Central Board of Revenue, they were inherently unproductive :

Provided that in the case of a business the standard profits of which depend directly or indirectly upon a direction of the Board of Referees under sub-section (3) of section 6, or of the Central Board of Revenue under sub-section (1) of section 26 of this Act the provisions of this rule shall have effect to such extent only as the Central Board of Revenue thinks proper :

Provided further that an application to the Central Board of Revenue under this rule shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 of this Act or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section.

(2) Where sub-rule (1) of this rule has effect on the application of the person carrying on any business, any computation of capital of the business made before the making of the application, and any assessment affected by that computation shall be revised accordingly.]

### SCHEDULE III.

[See Section 9 (7).]

#### *Rules of determining the amount of capital held by a company through other companies.*

1. Where, in the case of a number of companies, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital of the third through the second and, if the third directly owns ordinary share capital of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall be deemed to own ordinary share capital of the fourth through the third, and so on.

2. In this Schedule—

(a) any number of companies of which the first directly owns ordinary share capital of the next and the next directly owns ordinary share capital of the next but one and so on, and, if they are more than three, any three or more of them, are referred to as “a series” ;

(b) in any series—

(i) that company which owns ordinary share capital of another through the remainder is referred to as “the first owner” ;

(ii) that other company the ordinary share capital of which is so owned is referred to as “the last owned company” ;

(iii) the remainder, if one only, is referred to as an “intermediary” or, if more than one is referred to as a “chain of intermediaries” ;

(c) a company in a series which directly owns ordinary share capital of another company in the series is referred to as an “owner” ;

(d) any two companies in a series of which one owns ordinary share capital of the other directly, and not through one or more of the other companies in the series, are referred to as being directly related to one another.

3. Where every owner in a series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own through the intermediary or chain of intermediaries the whole of the ordinary share capital of the last owned company.

4. Where one of the owners in a series owns a fraction of the ordinary share capital of the company to which it is directly related, and every other owner in the series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own that fraction of the ordinary share capital of the last owned company through the intermediary or chain of intermediaries.

5. Where—

(a) each of two or more of the owners in a series owns a fraction, and every other owner in the series owns the whole, of the ordinary share capital of the company to which it is directly related ; or

(b) every owner in a series owns a fraction of the ordinary share capital of the company to which it is directly related ; the first owner shall be deemed to own through the intermediary or chain of intermediaries such fraction of the ordinary share capital of the last owned company as results from the multiplication of those fractions.

6. Where the first owner in any series owns a fraction of the ordinary share capital of the last owned company in that series through the intermediary or chain of intermediaries in the

series and also owns another fraction or other fractions of the ordinary share capital of the last owned company either—

- (a) directly; or
  - (b) through any intermediary or intermediaries which is not a member or are not members of that series; or
  - (c) through a chain or chains of intermediaries of which one or some or all are not members of that series; or
  - (d) in a case where the series consists of more than three companies, through an intermediary or intermediaries which is a member or are members of the series, or through a chain or chains of intermediaries consisting of some but not all of the companies of which the chain of intermediaries in the series consists;
- then, for the purpose of ascertaining the amount of the ordinary share capital of the last owned company owned by the first owner, all those fractions shall be aggregated and the first owner shall be deemed to own the sum of those fractions.

### THE EXCESS PROFITS TAX ORDINANCE (XVI OF 1943).

[17th May, 1943.]

*An ordinance to make certain provisions in connection with the tax on excess profits.*

WHEREAS an emergency has arisen which renders it necessary to make certain provisions in connection with the tax on excess profits;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 (26 Geo. 5, c. 2), the Governor-General is pleased to make and promulgate the following Ordinance:—

Short title extent and commencement. 1. (1) This Ordinance may be called THE EXCESS PROFITS TAX ORDINANCE, 1943.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

2. (1) When excess profits tax charged under the provisions of the Excess Profits Tax Act, 1940 (XV of 1940) in respect of any chargeable accounting period ending after the 31st day of December, 1942, becomes payable under that Act after assessment made under section 14 of

that Act, the person liable to pay such excess profits tax shall deposit with the Central Government, before such date as may be specified in a notice in this behalf in such form as may be prescribed by rules made under sub-section (5) issued to him by the Excess Profits Tax Officer, a further sum equal to one-fifth of the amount of the said excess profits tax; and the provisions of section 10 of the Indian Finance Act, 1942 (XII of 1942), shall, save in so far as they are inconsistent with this section, apply in respect of such deposits as they apply in respect of the voluntary deposits for which provision is made in the said section 10:

["Provided that, in respect of any chargeable accounting period ending after the 31st day of December, 1943, the provisions of this sub-section shall have effect as if, in relation to any person who is a company, for the words 'one-fifth' the words 'nineteen-six-fourths' were substituted and as if, in relation to any other person, for the words 'one-fifth' the words 'seventeen-sixty-fourths' were substituted:

Provided further that if, in respect of any chargeable accounting period ending after the 31st day of December, 1943, a person who has deposited a further sum equal to seventeen-sixty-fourths of the excess profits tax payable shows that the amount of the income-tax and super-tax payable in respect of the excess profits arising in such period exceeds fifteen-sixty-fourths of the amount of the excess profits tax payable, so much of the deposit shall be refunded as will secure that the total of the deposit made and the income-tax and super-tax payable in respect of the excess profits arising in such period does not exceed one-half of the excess profits tax payable."] (Added by Finance Act, 1944).



["(1-A) In respect of any chargeable accounting period ending after the 31st day of December, 1943, in respect of which a provisional assessment of excess profits tax is made under section 14-A of the Excess Profits Tax Act, 1940 (XV of 1940), the person liable to pay such excess profits tax shall deposit in the manner laid down in sub-section (1) a further sum equal to nineteen-sixty-fourths of the amount of the said excess profits tax if such person is a company and seventeen-sixty-fourths of the said amount if such person is not a company; and the provisions of sub-sections (6) and (7) of the said section 14-A shall apply to any payment made under this sub-section as they apply to a payment of excess profits tax.] (*Inserted by Finance Act, 1944.*)

(2) The provisions of sub-section (1) of section 10 of the Indian Finance Act, 1942 (XII of 1942), in so far as they enable the making of voluntary deposits, shall cease to have effect except in relation to excess profits tax charged in respect of a chargeable accounting period ending on the 31st day of December, 1942, or earlier.

(3) Any further sum such as is referred to in sub-section (1) deposited in accordance with that sub-section shall be repaid by the Central Government within twelve months of the date of termination of the present hostilities or within twenty-four months of the date on which the deposit was made, whichever is later.

(4) The provisions of law applicable to the payment and recovery of excess profits tax contained in sections 45 and 46 [except sub-sections (1) and (1-A) thereof] of the Indian Income-tax Act, 1922 (XI of 1922), as applied by section 21 of the Excess Profits Tax Act, 1940 (XV of 1940), shall apply to the payment and recovery of the deposits required by <sup>1</sup>[sub-section (1) (1-A) of this section] as if the notice referred to in sub-section (1) of this section were a notice of demand under section 29 of the Indian Income-tax Act, 1922 (XI of 1922), and as if a default in making payment of such deposit were a default in making payment of excess profits tax.

(5) The power to make rules for carrying out the purposes of section 10 of the Indian Finance Act, 1942 (XII of 1942), conferred by sub-section (3) of that section shall include a power to make rules for carrying out the purposes of this section.

(Secs. 3, 4 and 5—*Repealed by Ordinance I of 1946*).

## THE INCOME-TAX AND EXCESS PROFITS TAX (EMERGENCY) ORDINANCE (LX OF 1942).<sup>2</sup>

[14th November, 1942.]

*An Ordinance to remove certain difficulties caused by the destruction of documents and records pertaining to the collection of Income-tax and Excess Profits Tax.*

WHEREAS an emergency has arisen which makes it necessary to remove certain difficulties caused by the destruction of documents and records pertaining to the collection of Income-tax and Excess Profits Tax;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

1. (1) This Ordinance may be called THE  
Short title and commence- INCOME-TAX AND EXCESS PROFITS TAX (EMERGENCY)  
ment. ORDINANCE, 1942.

(2) It shall come into force at once.

LEG. RE.

<sup>1</sup>Substituted by Finance Act, 1944.

<sup>2</sup>N.B. See English Excess profits Tax Regu-

lation, 1940, in B. C. Worth's Emergency Legislation, Title "Income-tax" [18] 1-3.



2. (1) Where documents or records pertaining to the assessment, collection or payment of income-tax or excess profits tax and to secure returns. have been damaged, lost or destroyed as a result of riot or civil commotion, the authority authorised under the Indian Income-Tax Act, 1922, or the Excess Profits Tax Act, 1940, as the case may be, to issue any notice for any of the purposes of either Act, may, notwithstanding anything contained in either of the said Acts, and notwithstanding that such notice has already been issued or has already been issued and has been or is alleged to have been complied with, or where such notice has already been issued, that the time within which the notice is to be issued has already expired, may re-issue such notice, and any notice so re-issued shall in all respects have the same effect as if it were the original notice, and any proceedings that could have been taken in pursuance of or subsequent to the original notice may be taken in like manner in pursuance of or subsequent to the notice so re-issued:

Provided that in respect of assessments or re-assessments made in the course of any proceeding taken under the powers conferred by this sub-section the periods of eight and four years mentioned in sub-section (2) of section 34 of the Indian Income-tax Act, 1922, shall be deemed to commence on and to run from the date on which the notice under sub-section (2) of section 22 or sub-section (1) of section 34 of that Act is re-issued under the powers conferred by this sub-section:

Provided further that where a person proves to the satisfaction of the Income-tax Officer or the Excess Profits Tax Officer, as the case may be, that he has already been assessed in respect of the income or the excess profits in respect of which notices under section 22 or section 34 of the Indian Income-tax Act, 1922, or under section 13 or section 15 of the Excess Profits Tax Act, 1940, have been re-issued and that he has paid the tax, he shall not be subject to fresh assessment.

(2) Any return or information required or which could be required under the provisions of either of the said Acts to be furnished by any person shall, if the Income-tax Officer or the Excess Profits Tax Officer so requires at any time, be again furnished by such person notwithstanding that it may have been or is alleged to have been already furnished, and any failure to comply with any such requirement by an Income-tax Officer or Excess Profits Tax Officer shall involve the same consequences as if the return or information had been altogether withheld.

3. If any question arises whether a document or record has been damaged, lost or destroyed as a result of riot or civil commotion, the matter shall be referred to the Commissioner of Income-tax or to the Commissioner of Excess Profits Tax, as the case may be, and his decision shall be final.

4. The Central Government may make rules providing for any matter necessary to carry into effect the purposes of this Ordinance.

### THE CENTRAL EXCISES AND SALT ACT (I OF 1944).

[20th February, 1944.

[N.B.—Amended by Finance Acts 1944, 1945 and 1946 and Act VI of 1945].

*An Act to consolidate and amend the law relating to central duties of excise and to salt;* [24th February, 1944.

WHEREAS it is expedient to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in British India and to salt;

It is hereby enacted as follows:—

## CHAPTER I.

Short title, extent and commencement.

1. (1) This Act may be called THE CENTRAL EXCISES AND SALT ACT, 1944;

(2) It extends to the whole of British India;

(3) It shall come into force on such date as the Central Government may, by notification, in the official Gazette, appoint in this behalf.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “broker” or “commission agent” means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others;

(b) “Central Excise Officer” means any officer of the Central Excise Department, or any person (including an officer of the Provincial Government) invested by the Central Board of Revenue with any of the powers of a Central Excise Officer under this Act;

(c) “curing” includes writing, drying, fermenting and any process for redering an unmanufactured product fit for marketing or manufacture;

(d) “excisable goods” means goods specified in the First Schedule as being subject to a duty of excise and includes salt;

(e) “factory” means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;

(f) “manufacture” includes any process incidental or ancillary to the completion of a manufactured product; and

(i) in relation to tobacco includes the preparation of cigarettes, cigars, cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff; and

(ii) in relation to salt, includes collection, removal, preparation, steeping, evaporation, boiling, or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre, the separation of salt from earth or other substance so as to produce alimentary salt, and the excavation or removal of natural saline deposits or efflorescence; and the word “manufacturer” shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture in his own account if those goods are intended for sale;

(g) “prescribed” means prescribed by rules made under this Act;

(h) “sale” and “purchase”, with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

(i) “saltpetre” includes *rasi*, *sajji*, and all other substances manufactured from saline earth, and *kharinun* and every form of sulphate or carbonate of soda;

(j) “salt factory” includes—

(i) a place used or intended to be used in the manufacture of salt and all embankments, reservoirs, condensing and evaporating pans, buildings and waste places situated within the limits of such place, as defined from time to time by the Collector of Central Excise;

(ii) all drying grounds and storage platforms and storehouses appertaining to any such place;

(iii) land on which salt is spontaneously produced;

and a "private salt factory" is one not solely owned or not solely worked by the Central Government;

(k) "wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks, such goods belonging to others as an agent for the purpose of sale.

## CHAPTER II.

### LEVY AND COLLECTION OF DUTY.

3. (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in British India, and a duty on salt manufactured in, or imported by land into any part of British India as, and at the rates, set forth in the First Schedule.

(2) The Central Government may, by notification in the official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force;

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

4. Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement or deduction whatever except trade discount and the amount of duty then payable.

5. The Central Government may, by notification in the official Gazette, impose on any excisable goods other than salt brought into British India from the territory of any Indian State, not being territory which has been declared under section 5 of the Indian Tariff Act, 1934 (XXXII of 1934), to be foreign territory for the purposes of that section, a duty of customs equivalent to the duty imposed by this Act on the like goods produced or manufactured in British India.

6. The Central Government may, by notification in the official Gazette, provide that, from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under this Act, engage in—

(a) the production or manufacture or any process of the production or manufacture of any specified excisable goods or of saltpetre or of any specified component part or ingredients of such goods or of specified containers of such goods, or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any excisable goods specified in this behalf in Part A of the Second Schedule.

7. Every licence under section 6 shall be granted for such area, if any, for such period, subject to such restrictions and conditions and in such form and containing such particulars, as may be prescribed.

8. From such date as may be specified in this behalf by the Central Government by notification in the official Gazette, no person shall, except as provided by rules made under this Act, have in his possession any excisable goods specified in this behalf in Part B of the Second Schedule in excess of such quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.

Offences and Penalties.

9. Whoever commits any of the following offences, namely:—

(a) contravenes any of the provisions of a notification issued under section 6 or of section 8, or of a rule made under clause (iii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true), supplies false information;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section; shall, for every such offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

10. Any Court trying an offence under this Chapter may order the forfeiture to His Majesty of any goods in respect of which the Court is satisfied that an offence under this Chapter has been committed, and may also order the forfeiture of any receptacles, packages or coverings in which such goods are contained and the animals, vehicles, vessels or other conveyances used in carrying the goods, and any implements or machinery used in the manufacture of the goods.

11. In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central Board of Revenue to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such persons resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land-revenue.

12. The Central Government may, by notification in the official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3.

### CHAPTER III.

#### POWERS AND DUTIES OF OFFICERS AND LANDHOLDERS.

13. (1) Any Central Excise officer duly empowered by the Central Government in this behalf may arrest any person whom he has reason to believe to be liable to punishment under this Act.

(2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false may be arrested by such officer in order that his name and residence may be ascertained.

14. (1) Any Central Excise officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure shall be applicable to requisitions for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code.

15. All officers of Police and Customs and all officers of Government engaged in the collection of land-revenue, and all Central Excise Officers, village officers are hereby empowered and required to assist the Central Excise officers in the execution of this Act.

16. Every owner or occupier of land, and the agent of any such owner or occupier, in charge of the management of that land, if contraband excisable goods are manufactured thereon, shall in the absence of reasonable excuse be bound to give notice of such manufacture to a Magistrate, or to an officer of the Central Excise, Customs, Police, or Land Revenue Department, immediately the fact comes to his knowledge.

17. Any owner or occupier of land, or any agent of such owner or occupier in charge of the management of that land, who wilfully connives at any offence against the provisions of this Act or of any rules made thereunder shall for every such offence be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

18. All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898), relating respectively to searches and arrest made under that Code.

19. Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise officer within a reasonable distance, to the officer-in-charge of the nearest police station.

20. The officer-in-charge of a police-station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate.

21. (1) When any person is forwarded under section 19 to a Central Excise officer empowered to send persons so arrested to a Magistrate, the Central Excise officer shall proceed to enquire into the charges against him.

(2) For this purpose the Central Excise officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police-station may exercise and is subject to under the Code of Criminal Procedure, 1898 (V of 1898), when investigating a cognizable case:

Provided that—

(a) if the Central Excise officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise officer may direct to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

22. Any Central Excise or other officer exercising powers under this Act or under the rules made thereunder who—

(a) without reasonable ground of suspicion searches or causes to be searched any house, boat or place;

(b) vexatiously and unnecessarily detains, searches or arrests any person;

(c) vexatiously and unnecessarily seizes the movable property of any person, on pretence of seizing or searching for any article liable to confiscation under this Act;

(d) commits, as such officer, any other act to the injury of any person, without having reason to believe that such act is required for the execution of his duty;

shall, for every such offence, be punishable with fine which may extend to two thousand rupees.

Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall be punishable with fine which may extend to two thousand rupees or with imprisonment for a term which may extend to two years or with both.

23. Any Central Excise officer who ceases or refuses to perform or withdraws himself from the duties of his office, unless he has obtained the express written permission of the Collector of Central Excise, or has given to his superior officer two months' notice in writing of his intention or has other lawful excuse, shall on conviction before a Magistrate be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to three months' pay, or with both.

#### CHAPTER IV.

##### TRANSPORT BY SEA.

24. When any excisable goods are carried by sea in any vessel other than a vessel of the burden of three hundred tons and upwards, the owner and master of such vessel shall each be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Exceptions.

25. Nothing in section 24, applies to—

(a) any excisable goods covered by a permit granted under rules made under this Act;

(b) any excisable goods covered by a pass granted by any officer whom the Central Board of Revenue may appoint in this behalf;

(c) such amount of excisable goods carried on board any vessel for consumption by her crew or by the passengers or animals (if any) on board as the Central Board of Revenue may from time to time exempt from the operation of section 24.

26. When any officer empowered by the Central Board of Revenue, to act under this section has reason to believe, from personal knowledge or from information taken down in writing, that any excisable goods are being carried, or have within the previous twenty-four hours been carried, in any vessel so as to render the owner or master of such vessel liable to the penalties imposed by section 24, he may require such vessel to be brought to and thereupon may—

(a) enter and search the vessel;

(b) require the master of the vessel to produce any documents in his possession relating to the vessel or the cargo thereof;

(c) seize the vessel if the officer has reason to believe it liable to confiscation under this Act, and cause it to be brought with its crew and cargo into any port in British India; and

(d) where any excisable goods are found on board the vessel, search and arrest without a warrant any person on board the vessel whom he has reason to believe to be punishable under section 24.

27. Any master of a vessel refusing or neglecting to bring to the vessel or to produce his papers when required to do so by an officer acting under section 26, and any person obstructing any such officer in the performance of his duty, may be arrested by such officer without a warrant, and shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.



**28.** (1) Every vessel (including all appurtenances) in which any excisable goods are carried so as to render the owner or master of such vessel liable to penalties imposed by section 24, the cargo on board such vessel and the excisable goods in respect of which an offence under this Act has been committed shall be liable to confiscation on the orders of the officer empowered in this behalf by the Central Government.

(2) Whenever any Customs-officer is satisfied that any article is liable to confiscation under this section he may seize such article, and shall at once report the seizure to his superior officer for the information of the officer empowered to order confiscation under sub-section (1) and such officer may, if satisfied on such report or after making such inquiry as he thinks fit, that the article so seized is liable to confiscation, either declare it to be confiscated, or impose a fine in lieu thereof not exceeding the value of the article.

**29.** Any offence punishable under section 24 or section 27 may be deemed to have been committed within the limits of the jurisdiction of the Magistrate of any place where the offender is found, or to which, if arrested under section 26 or section 27, he may be brought.

**30.** The Central Government may, by notification in the official Gazette, exempt the carriage of excisable goods within any local limits or in any class of vessels from the operation of this Chapter, and, by like notification, again subject such carriage to the operation of this Chapter.

## CHAPTER V.

### SPECIAL PROVISIONS RELATING TO SALT.

**31.** The proprietor of a private salt factory who has by virtue of a sanad granted by the British or any former Government, a special and permanent right to manufacture salt, or to excavate or collect natural salt, shall on application made in accordance with the rules made under this Act be entitled to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act, his licence has been cancelled by an officer duly empowered by the Central Government in this behalf.

**32.** Every proprietor of a private salt-work, other than a private salt factory, to which section 31 applies, of which, under the provisions of section 17 of the Bombay Salt Act, 1890 (Bom. II of 1890), the proprietor was entitled on application to a licence to manufacture or to excavate or collect natural salt at such factory, shall continue to be entitled, on application made in accordance with the rules made under this Act, to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act his licence has been cancelled by an officer duly empowered by the Central Government in this behalf:

Provided that the Collector of Central Excise may at any time withdraw or withhold a licence from the proprietor of any such salt factory, if no salt has been manufactured, excavated or collected in such salt factory for the three years ending on the thirtieth day of June last preceding the date of his order, or, with the previous sanction of the Central Board of Revenue, if such salt factory has not produced, on an average, during the said three years, at least five thousand maunds of salt per annum.

## CHAPTER VI.

### ADJUDICATION OF CONFISCATIONS AND PENALTIES.

**33.** Where by the rules made under this Act any thing is liable to confis-

Power of adjudication. cation or any person is liable to a penalty, such confiscation or penalty may be adjudged—

(a) without limit, by a Collector of Central Excise;

(b) up to confiscation of goods not exceeding five hundred rupees in value and imposition of penalty not exceeding two hundred and fifty rupees, by an Assistant Collector of Central Excise:

Provided that the Central Board of Revenue may, in the case of any officer performing the duties of an Assistant Collector of Central Excise, reduce the limits indicated in clause (b) of this section, and may confer on any officer the powers indicated in clause (a) or (b) of this section.

34. Wherever confiscation is adjudged under this Act or the rules made thereunder, the officer adjudging it shall give

Option to pay fine in lieu of confiscation. the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

35. (1) Any person deeming himself aggrieved by any decision or order

Appeals.

passed by a Central Excise officer under this Act or the rules made thereunder, may, within three months from the date of such decision or order, appeal therefrom the Central Board of Revenue, or, in such cases as the Central Government directs, to any Central Excise officer not inferior in rank to an Assistant Collector of Central Excise officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against:

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation or penalty than has been adjudged against him in the original decision or order.

(2) Every order passed in appeal under this section shall, subject to the power of revision conferred by section 36, be final.

36. The Central Government may on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any Central Excise officer or by the Central Board of Revenue, and from which no appeal lies, reverse or modify such decision or order.

#### CHAPTER VII.

Power of Central Government to make rules.

37. (1) The Central Government may make rules to carry into effect the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(i) to provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;

(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;

(iii) prohibit absolutely, or with such exceptions, or subject to such conditions, as the Central Government thinks fit, the bringing of excisable goods into British India from the territory of any specified Prince or Chief-in-India, or the transit of excisable goods from any part of British India to any other part thereof;

(iv) regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or

manufacture and their transport to or from the premises of a licensed person, or a bonded warehouse, or to a market;

(v) regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt, and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, or of any component parts or ingredients or containers thereof;

(vi) provide for the employment of officers of the Crown to supervise the carrying out of any rules made under this Act;

(vii) require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation;

(viii) provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses;

(ix) provide for the distinguishing of goods which have been manufactured under licence, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act;

(x) impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified;

(xi) require that excisable goods shall not be sold or offered or kept for sale in British India except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed;

(xii) provide for the issue of licences and transport permits and the fees, if any, to be charged therefor:

Provided that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely:—

	Rs.
Licence to manufacture and refine saltpetre and to separate and purify salt in the process of such manufacture and refining	.. 2
Licence to manufacture saltpetre	.. 2
Licence to manufacture sulphate of soda ( <i>Kharinun</i> ) by solar heat in evaporating pans	.. 10
Licence to manufacture sulphate of soda ( <i>Kharinun</i> ) by artificial heat	.. 2
Licence to manufacture other saline substances	.. 2

(xiii) provide for the detention of goods, plant, machinery or material, for the purpose of exciting the duty, the procedure in connection with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed, and the disposal of goods so detained or confiscated;

(xiv) authorise and regulate the inspection of factories and provide for the taking of stamps, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods;

(xv) authorise and regulate the composition of offences against, or liabilities incurred under, this Act or the rules made thereunder;

(xvi) provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India:

Provided that rules made under this clause shall provide that when steel ingots on which the duty of excise imposed by this Act has been paid, or articles of iron or steel manufactured in British India from such ingots, are exported out of India, there shall be payable to the exporter of such ingots or articles, subject to such conditions as may be prescribed, a refund at the following rates, namely:—

on ingots, blooms and billets—

a refund at the rate of four rupees per ton,

on other manufactures of iron or steel—

(a) not fabricated—a refund at the rate of five and one-third rupees per ton;

(b) fabricated—a refund at the rate of six rupees per ton;

(xvii) exempt any goods from the whole or any part of the duty imposed by this Act;

(xviii) define an area no point in which shall be more than one hundred years from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area;

(xix) define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area;

(xx) authorise the Central Board of Revenue or Collectors of Central Excise appointed for the purposes of this Act to provide, by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section.

(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding two thousand rupees and that any article in respect of which any such breach is committed shall be confiscated.

38. All rules made and notifications issued under this Act shall be made

and issued by publication in the official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act:

Provided that every such rule shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period, for which the rule is so laid before one Chamber does not coincide with that for which it is now laid before the other, before the expiry of the later of these periods both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.

39. The enactment specified in the [Third Schedule]<sup>1</sup> are hereby repealed

Repeal of enactments.

to the extent mentioned in the fourth column thereof. But all rules made, notifications published, licences, passes or permits granted, powers conferred and other things done under any such enactment and now in force shall, so far as they are not inconsistent with this Act, be deemed to have been respectively made, published, granted, conferred or done under this Act.

40. (1) No suit shall lie against the Central Government or against any officer of the Crown in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution, or other legal proceedings shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

### THE FIRST SCHEDULE.

(See section 3.)

(See now First Schedule in the Finance Act, 1944.)

N.B.—For this latest rates of duties, see Finance Act, 1944 cited, *infra*.

Item No.	Description of goods.	Rate of duty.
I	<b>KEROSENE—</b> “Kerosene” means any inflammable hydrocarbon (including any mixture of hydrocarbons or any liquid containing hydrocarbons but excluding motor-spirit) which— (i) is made from petroleum as defined in section 2 of the [Petroleum Act, 1934 (XXX of 1934) <sup>1</sup> ] and (ii) is intended to be or is ordinarily used in liquid form for purposes of illumination.	The rate at which Customs duty is for the time being leviable under the Indian Tariff Act, 1934 (XXXII of 1934), read with any other enactment for the time being in force.
	<b>MATCHES—</b> “Match” includes a firework in the form of a match; and, where a match-stick has more heads than one capable of being ignited by striking, each such head shall be deemed to be a match. (1) Matches, manufactured in a factory whose daily output exceeds one hundred gross of boxes, in boxes or booklets containing on an average— (i) not more than forty matches .. (ii) more than forty but not more than fifty, matches. (iii) more than fifty, but not more than sixty matches. (iv) more than sixty, but not more than eighty matches. (2) Matches, manufactured in a factory whose daily output does not exceed one hundred gross of boxes, in boxes or booklets containing on an average— (i) not more than forty matches  (ii) more than forty, but not more than fifty matches. (iii) more than fifty, but not more than sixty matches.  (iv) more than sixty, but not more than eighty matches. (3) Matches in boxes containing on an average not more than twelve matches of the type known as “Bengal Lights.” (4) All other matches.	<div> Two rupees. Two rupees and eight annas. Three rupees Four rupees </div> <div> } Per gross of boxes or booklets. </div> <div> One rupee, fifteen annas and two pies. Two rupees and seven annas. Two rupees, fourteen annas and nine pies. Three rupees, four - teen annas and four pies. Ten annas per gross of boxes. </div> <div> } Per gross of boxes or booklets. </div> <div> Eight annas for every 1,440 matches or fraction thereof. </div>

LEG. REF.

<sup>1</sup>Substituted by Act VI of 1945.



Item No.	Description of goods.	Rate of duty.
II.—Country Tobacco—		
(1)	if intended for manufacture into—	
(a)	cigarettes ..	Six annas ..
(b)	biris ..	Six annas ..
(c)	cigars or cheroots ..	Two annas ..
(d)	hookah tobacco ..	One anna ..
(e)	snuff ..	Six annas ..
(2)	if intended for sale as chewing tobacco, whether manufactured or merely cured ..	One anna ..
(3)	if intended for any other purpose ..	Six annas ..
III.—Stalks, stems and other refuse of tobacco—		
(1)	if intended for use in the preparation of any form of manufactured tobacco.	One anna ..
(2)	if intended to be used for agricultural purposes.	Nil ..
IV.—Tobacco manufactured into cigars and cheroots of which the value—		
(i)	exceeds Rs. 30 a hundred ..	Six rupees ..
(ii)	exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred.	Five rupees ..
(iii)	exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred.	Four rupees ..
(iv)	exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred.	Three rupees ..
(v)	exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred.	Two rupees ..
(vi)	exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred.	One rupee ..
(vii)	exceeds Rs. 2-8-0 a hundred but does not exceed Rs. 5 a hundred.	Eight annas ..
(viii)	exceeds Rs. 1-4-0 a hundred but does not exceed Rs. 2-8-0 a hundred.	Four annas ..
(ix)	exceeds Rs. 10 but does not exceed Rs. 1-4-0 a hundred.	Two annas ..
10.	TYRES— “Tyre” means a pneumatic tyre in the manufacture of which rubber is used and includes the inner tube and the outer cover of such a tyre.	Ten per cent. <i>ad valorem</i> .
11.	VEGETABLE PRODUCT— “Vegetable product” means any vegetable oil or fat which, whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption.	Five rupees per cwt.

## THE SECOND SCHEDULE.

(See sections 6 and 8).

## PART A.

Excisable goods specified for the purposes of section 6—

## 1. Tobacco.

## PART B.

Excisable goods specified for the purposes of section 8—

## 1. Tobacco.

## THE THIRD SCHEDULE.

(See section 39).

Year.	No.	Short title.	Extent of repeal.
1879	XVI	.. The Transport of Salt Act, 1879	.. The whole.
1882	XII	.. The Indian Salt Act, 1882	.. The whole.
1889	IV	.. The Madras Salt Act, 1882	.. The whole.
	(Madras)		
1890	II	.. The Bombay Salt Act, 1890	.. The whole.
	(Bombay)		
1908	X	.. The Indian Salt-Duties Act, 1908	.. The whole.
1917	II	.. The Motor Spirit (Duties) Act, 1917	.. The whole.



Year.	No.	Short title.	Extent of repeals.
1922	XII	.. The Indian Finance Act, 1922	.. The whole.
1930	XVIII	.. The Silver (Excise Duty) Act, 1930	.. The whole.
1931	..	.. The Indian Finance (Supplementary and Extending) Act, 1931.	The whole.
1934	XIV	.. The Sugar (Excise Duty) Act, 1934	.. The whole.
1934	XVI	.. The Matches (Excise Duty) Act, 1934	.. The whole.
1934	XXIII	.. The Mechanical Lighters (Excise Duty) Act, 1934	.. The whole.
1934	XXXI	.. The Iron and Steel Duties Act, 1934	.. The whole.
1938	XIII	.. The Sind Salt Law Amendment Act, 1938	.. The whole.
1941	X	.. The Tyres (Excise Duty) Act, 1941	.. The whole.
1943	X	.. The Tobacco (Excise Duty) Act, 1943	.. The whole.
1943	XI	.. The Vegetable Product (Excise Duty) Act, 1943	.. The whole.

## THE FACTORIES ACT (XXV OF 1934).

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## THE SCHEDULE.

## THE FACTORIES ACT (XXV OF 1934).

[Am. Acts XI of 1935; VIII of 1936; XVII of 1940; Madras Act VI of 1941; Acts XVI of 1941, XIV of 1944; III of 1945; and X of 1946; and Rep. in part by Act XX of 1937].

[20th August, 1934.

*An Act to consolidate and amend the Law regulating labour in factories.*

WHEREAS it is expedient to consolidate and amend the Law regulating labour in factories; It is hereby enacted as follows:—

## CHAPTER I.

## PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE FACTORIES ACT, 1934.

SEC. 1: OBJECT OF THE ACT.—The object of the Act is to protect human beings from being subjected to unduly long hours of bodily strain or manual labour. It also provides that employees should work in healthy and sanitary conditions so far as the manufacturing process will allow and that precautions should be taken for their safety and for the prevention of accidents. In order to obtain the information necessary to ensure that its objects are carried out, the Local Government are empowered to appoint, inspectors, to call for returns, and to see that the prescribed registers are duly kept. This is part of the machinery which enables the authorities to maintain effective supervision,

and it is undoubtedly important that there should be substantial compliance with these provisions of the Act. 38 C.W.N. 1008=152 I.C. 556=1934 C. 730 (*Per McNair, J.*). At the same time, it should not be forgotten that the Act is sanctioning interference with the ordinary rights of the citizen and that the inquisitorial powers which are given should be used with tact and circumspection. 38 C.W.N. 1008=152 I.C. 556=1934 C. 730.

CONSTRUCTION OF THE ACT.—The provisions of the Act have to be construed in favour of the employee and strictly in favour of the employer. 152 I.C. 556=38 C.W.N. 1008=1934 C. 730. "A law which is enacted for the benefit of the employee should not

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of January, 1935.

#### Definitions.

2. [Cf. Old Act, section 2 and section 156, English Act.] In this Act, unless there is anything repugnant in the subject or context,—

(a) “adolescent” means a person who has completed his fifteenth but has not completed his seventeenth year;

(b) “adult” means a person who has completed his seventeenth year;

(c) “child” means a person who has not completed his fifteenth year;

(d) “day” means a period of twenty-four hours beginning at midnight;

(e) “week” means a period of seven days beginning at midnight on Saturday night;

be used merely for the purpose of harassing the employer. The launching of a test case in respect of an infringement of provisions which are not generally available, the meaning of which is doubtful to the authorities themselves and which the factory management honestly complied with as they understood them, asking for further enlightenment from the authorities without getting any, is to be strongly deprecated.” (*Ibid.*) “I am fully alive to the great importance of Factory Acts being properly enforced for the protection of workmen, and I have no doubt that in India it is particularly necessary that their beneficial provisions should be carried out. On the other hand one must also bear in mind that the employers’ position has to be considered too. It may be that without any negligence on their part defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence then it would seem only fair that the matter should be clearly brought home to them. That I have no doubt is the reason why the Legislature has distinctly specified what the inspector has to do. Whether a particular accused in any case was negligent or not does not concern this question of general principle on the construction of the Act”. 85 I.C. 226=26 Bom. L.R. 1245=1925 B. 143=26 Cr.L.J. 492.

CRITICISM ON THE DRAFTING OF THE ACT (XII OF 1911).—“We desire to point out to the authorities concerned that it will be difficult to uphold prosecutions under many of the sections of this Act, unless they are amended, especially in cases of factories to which exemptions have been granted”. 35 C.W.N. 1108. “The Act is carelessly and loosely drawn. It seems to consist mainly of parts of the English Act taken from their context and patched together. It is a penal statute, and as such it is essential that its terms should be clear, definite and unambiguous. On the contrary, it is difficult—if not impossible for a lawyer still less a layman, to understand many of its provisions.” 35 C. W. N. 1108. “There are many provisions in the Act which are confused and ambiguous, and the rules and forms provided do not tally with the requirements of the section.

The truth seems to be that the application of the Act to special factories has never been properly thought out. Drastic redrafting amendment of this important Act seem to be required urgently”. 35 C.W.N. 1108.

APPLICATION OF THE ACT TO CROWN FACTORIES.—Crown factories had from the beginning been brought under the operation of the Act, which followed in this respect the British law on the subject. This had been another subject of discussion when the Bill was introduced, and the conclusion to which the Committee had come on full consideration was, that Crown factories should be brought within the scope of the Act, but that the power to exempt them temporarily, in cases of emergency, should be reserved to the Government. It was quite necessary that such power should be reserved in order to avoid great inconvenience and mischief. It would be sufficient to instance the case of the Mint, and of the powder and gun manufacturies in time of war, to show the necessity for such a provision. (Proceedings in Council. *Fort St. George Gazette*, 4th May, 1881).

SEC. 2, CL. (a): “ADOLESCENT”.—The expression used in the English Act is “young person” which expression is defined to mean a person who has ceased to be a child and is under the age of eighteen years. (English Act, sec. 156). The Indian Law fixes the age at seventeen.

CL. (b): “ADULT”.—Under the English Act, a person would be an adult only after completing his eighteenth year.

CL. (c): “CHILD”—ENGLISH ACT.—The expression “child” has been defined by the English Act as follows:—“The expression “child” means a person who is under the age of fourteen years and who has not, being of the age of thirteen years obtained the certificate of proficiency or attendance at school mentioned in Part III of this (English Act) Act” (Sec. 156).

CL. (d): “DAY”—ENGLISH LAW.—Under the English Act, the expression “night” has been defined to mean the period between nine o’clock in the evening and six o’clock in the succeeding morning (Sec. 156).

(f) "power" means electrical energy, and any other form of energy which is mechanically transmitted and is not generated by human or animal agency;

(g) "manufacturing process" means any process—

(i) for making, altering, repairing, ornamenting, finishing or packing, or otherwise treating any article or substance with a view to its use, sale, transport delivery or disposal, or

(ii) for pumping oil, water or sewage, or

(iii) for generating, transforming or transmitting power;

(h) "worker" means a person employed, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or connected with the subject of the manufacturing process, but does not include any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on;

(j) "factory" means any premises including the precincts hereof whereon twenty or more workers are working, or where working on any day of the

CL. (f): "ANY OTHER FORM OF ENERGY WHICH IS MECHANICALLY TRANSMITTED".—These words must be construed *ejusdem generis* with electric, steam or water power and do not include hand power. [*Wilmott v. Paton*, (1902) 1 K.B. 237].

CL. (g): "PROCESS".—"Process" has been defined by the English Act as including the use of any locomotive (Sec. 156).

"MANUFACTURING PROCESS".—These words merely refer to the particular business carried on and do not necessarily refer to the production of some article. So that laundries, carpet beating or bottle washing works, etc., are factories within the Act if mechanical power is used [*Owner v. Cottingham Sanitary Steam Laundry Co., Ltd.*, (1910) 74 J.P. 219; *Johnstone v. Lalonde Bros. and Parhal*, (1912) 2 K.B. 218. See also *Royal Masonic Institution for Boys v. Parkes*, (1912) 3 K.B. 212 and *Patterson v. Hunt*, (1909) 73 J.P. 496]. Putting ginned cotton into bales and having it pressed must be considered work connected with the manufacturing process and the men engaged in the work must be deemed to be employed in the factory. 143 I.C. 772=1933 N. 283.

CL. (h): "WORKER".—Cf. the definition of "Workmen" in the Indian Workmen's Compensation Act, Sec. 2, cl. (n).

CL. (j): "FACTORY".—The definition in this cl. (j) applies to the term "factory" used in sec. 9 (3) of Cotton Ginning and Pressing Factories Act, 1925. 1937 M.W.N. 1335. See also I.L.R. (1937) Nag. 88=1937 Nag. 311. By a factory is meant premises where anything is done towards the making or finishing of an article up to the stage when it is ready to be sold or is in a suitable condition to be put on the market. 109 I.C. 599=8 L. 666=29 P.L.R. 234=29 Cr.L.J. 583=A.I.R. 1928 L. 78. See also 1 N.L.R. 115. A factory includes everything, machine rooms, sheds, godowns, yards. If within these premises or precincts mechanical power is used in aid of any process for

altering for transport or sale of any article, then these premises or precincts are a factory. 50 M. 834=1927 M. 345=52 M.L.J. 207. The drying yard used for drying groundnuts, where machinery for decorticating the groundnuts was working is a part of factory, although there is no connection with machinery or any work incidental to the manufacturing process. (*Ibid.*)

RAILWAY WORKSHOPS are 'factories'. 119 I.C. 722=1929 Lah. 573. A *Gurhal Ghar* is a 'factory', even though the engine shed is a separate building and less than twenty persons are employed therein, but over twenty persons are employed in the *Gurhal Ghar* inclusive of those employed on the crushers and those employed in the boiling shed, and these latter must be said to be employed both "on the premises, and within the precincts of the *Gurhal Ghar*". 32 Bom.L.R. 329=1930 Bom. 162=31 Cr.L.J. 1094.

TWO OR MORE BUILDINGS entirely separate from each other may in certain circumstances form part of one and the same factory. See *L.C.C. and Tuffs*, In re, (1903) 86 J.P. 29; *Hoyle v. Gram*, (1862) 12 C.B. 124.

"USE OF POWER IN PART OF BUILDING".—Every part of the premises unless specially exempted forms part of a factory, although power may only be used in one part [*Taylor v. Hickes*; *Hardcastle v. Jones*, (1862) 3 B. and S. 153; *Palmer's Shipbuilding Co. v. Chaytor*, (1869) 4 Q.B. 209; But see *Vines v. Inglis*, (1915) S.C. 18]. The definition of "factory" is intended not to cover merely individual business in any premises but is intended to denote any premises as a composite whole with a central source of power, i.e., either steam, water, or other electrical or mechanical power. 57 B. 150=35 Bom. L.R. 83=1933 Bom. 109.

"WORKPLACE" is not defined either in this Act or in the English Act, but in *Bennett v. Hardinge*, (1900) 2 Q.B. 397, Channel, J., said:—"I think that a workplace must be a place where some work is being perpetually

preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on,

but does not include a mine subject to the operation of the Indian Mines Act, 1923;

(k) "machinery" includes all plant whereby power is generated, transformed, transmitted or applied;

(l) "occupier" of a factory means the person who has ultimate control over the affairs of the factory:

or permanently done, I do not say that the mere presence of workmen in repairing a private house would make it a workplace . . .

N.B.—"The Act mainly deals with labour employed in what may be described as perennial factories (i.e.) excluding those which deal mainly with agricultural products in the raw state, and work for part of the year only; and all those establishments which either use no mechanical power or, using power, employ less than 20 persons. These also are excluded from the definition of "factories". See Whitely Commission Rep., p. 6.

PERSONS EMPLOYED IN THE FACTORY.—A person who works in a factory, whether for wages or not, may be deemed to be employed in that factory. Where it is shown that certain persons were engaged in the factory in one of the ways specified in sec. 2 (2) [of the old Act of 1911] it must be presumed they were 'employed' in the factory. 61 Cal. 332=35 Cr.L.J. 1401=38 C.W.N. 801=1934 Cal. 546. See sec. 2, cl. (2) of the old Act, XII of 1911. Persons employed merely for selling the manufactured articles do not come within the definition of "employed" in that factory even though they happen to occupy a room at the factory for the sake of convenience. 109 I.C. 599=8 L. 666=29 P.L.R. 234=29 Cr.L.J. 583=1928 Lah. 78. It is not correct to say that the Factories Act affects only manual labourers. 152 I.C. 556=38 C.W.N. 1008=A.I.R. 1934 Cal. 730.

POWER.—See sec. 2, cl. (f), *supra*.

SECS. 2 (j) AND 5.—The notification of the Central Provinces Government No. 202-2644 VII, dated 17th January 1939, which declares that all places in Central Provinces, wherein manufacturing process is carried on with the aid of power and wherein on any one day of the twelve months preceding the date of the notification ten or more workers were employed, to be factories under the Factories Act is *intra vires* of the power given to the Provincial Government by sec. 5 (1) of the Factories Act. The notification is not universal but selective and it does not render sec. (5) (j) of the Act nugatory inasmuch as the Act applies to the whole of British India while the notification applies only to Central Provinces. 1941 N.L.J. 471=I.L.R. (1942) N. 402=A.I.R. 1941 Nag. 337.

SEC. 2 (k): ENGLISH ACT.—Under the English Act the expression "machinery" includes any driving strap or band (sec. 156).

The expression "mill-gearing" comprehends every shaft, whether upright, oblique or horizontal, and every wheel, drum or pulley or other appliance by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process. (*Ibid.*)

CL. (l): [See also Notes under sec. 70, *infra*.] "OCCUPIER".—The word "occupier" in general means a person who occupies the factory either by himself or his agent. He may be an owner, he may be a lessee or even a mere licensee, but he must have the right to occupy the property and dictate how it is to be managed. 55 B. 366=32 Cr.L.J. 1063 (1)=33 Bom.L.R. 309=1931 B. 308. See also Rat. 902. The definition of "occupier" in the Act is not an exhaustive definition and there is nothing in it which in any way limits the normal meaning of the word "occupier" as indicating a person who is in actual possession and control of a factory. 50 B. 34=27 Bom.L.R. 1405=27 Cr.L.J. 165=1926 B. 57. The word "*Munim*" as commonly used does connote agency, and persons dealing with the chief authority in charge of the factory where it is situated would look upon him as the agent of the owner or occupier. If there is a special contract of service or agency between him and his master, he must prove it. 19 N.L.J. 247. The word "occupier" bears the same meaning in this Act as it bears in similar enactments in England, that is a person who regulates a factory and controls the work that is done there. 20 I.C. 144=14 Cr.L.J. 384=15 Bom.L.R. 328. The question who is the occupier of a factory must depend among others, upon these considerations, namely:—Who alone has the right of using the factory for the purposes for which it is constructed and worked; who has the right of regulating and controlling it; whose is the predominant possession of and general superintendence over it. 10 Bom.L.R. 38=7 Cr.L.J. 44. The manager of a factory who resides in a part of the premises in which the factory is, is not an occupier of the factory within the meaning of the Act. 29 B. 423=7 Bom.L.R. 454; 2 Cr.L.J. 428.

OWNER'S LIABILITY.—Even if the accused, who is the owner of a factory, shows that he knows nothing about the management of the factory and that he has left the whole conduct of its affairs to a manager appointed by him for the purpose, he is not free

Provided that where the affairs of a factory are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

(m) where work of the same kind is carried out by two or more sets of workers working during different periods of the day, each of such sets is called a "relay," and the period or periods for which it works is called a "shift"; and

(n) "prescribed" means prescribed by rules made by the Provincial Government under this Act.

References to time of day. 3. [Cf. S. 51, Old Act.] References to time of day in this Act or references—

(a) in British India, <sup>1</sup>[\* \*] to Indian Standard time, which is five and a half hours ahead of Greenwich Mean Time, and

(b) <sup>2</sup>[\* \* \* \* \*]

4. (1) For the purposes of this Act, a factory which is exclusively engaged in one or more of the following manufacturing

Seasonal factories. processes, namely, cotton ginning, cotton or jute pressing, the decortication of groundnuts, the manufacture of coffee indigo, lac, rubber, sugar (including *gur*) or tea, or any manufacturing process which is incidental to or connected with any of the aforesaid processes, is a seasonal factory:

Provided that the Provincial Government may, by notification in the Official Gazette, declare any such factory in which manufacturing processes are ordinarily carried on for more than one hundred and eighty working days in the year, not to be a seasonal factory for the purposes of this Act.

(2) The Provincial Government may, by notification in the Official Gazette, declare any specified factory in which manufacturing processes are ordinarily carried on for not more than one hundred and eighty working days in the year and cannot be carried on except during particular seasons or at times dependent on the irregular action of natural forces, to be a seasonal factory for the purposes of this Act.

<sup>3</sup>[5. (1) The Provincial Government may, by notification in the Official

Power to apply provisions applicable to factories to certain other places. this Act applicable to factories shall apply to any place wherein a manufacturing process is being carried on or is ordinarily carried on whether with or without the use of power whenever ten or more workers are working therein or have worked therein on any one day of the twelve months immediately preceding.

(2) A notification under sub-section (1) may be made in respect of any one such place or in respect of any class of such places or generally in respect of all such places.

(3) Notwithstanding anything contained in clause (j) of section 2, a place, to which all or any of the provisions of this Act applicable to factories are for the time being applicable in pursuance of a declaration under sub-section

#### LEG. REF.

<sup>1</sup> Words 'excluding Burma' omitted by A. O., 1937.

<sup>2</sup> Cl. (b) of sec. 3 omitted by *ibid*.

<sup>3</sup> Substituted by Act XVI of 1941.

from the liability imposed on him by sec. 41 (a) of the Factories Act. 55 B. 366=32 Cr.L.J. 1063 (1)=33 Bom.L.R. 309=1931 B. 308. In order to fix liability on any person other than the occupier of a factory, it is incumbent upon the latter to give the strictest proof of circumstances exonerating himself, and it is plain on the face of the section that the burden of proving absence

of knowledge or consent on his part lies entirely upon him. 25 C. 454.

SEC. 3.—"The general acceptance of standard time has rendered a modification of sec. 51 (1) desirable." (Statement of Objects and Reasons).

SEC. 4: THIS SECTION IS NEW.—"The Labour Commission recommended differential treatment for seasonal and non-seasonal factories in the matter of adult hours and in other respects. This clause is based on their recommendation." (Statement of Objects and Reasons).

SEC. 5.—See 1941 N.L.J. 471=1941 Nag. 337, cited under sec. 2, *supra*.

(1), shall, to the extent to which such provisions are so made applicable but not otherwise, be deemed to be a factory.]

6. [Cf. S. 53, Old Act.] The Provincial Government may, by order in writing, direct that the different departments or branches of a specified factory shall be treated as separate factories for all or any of the purposes of this Act.

Powers to declare departments to be separate factories.

7. Where the Provincial Government is satisfied that, following upon a change of occupier of a factory or in the manufacturing processes carried on therein, the number of workers for the time being working in the factory is less than twenty and is not likely to be twenty or more on any day during the ensuing twelve months, it may, by order in writing, exempt such factory from the operation of this Act:

Power to exempt on a change in the factory.

Provided that any exemption so granted shall cease to have effect on and after any day on which twenty or more workers work in the factory.

8. [Cf. Ss. 56 and 57, Old Act.] In any case of public emergency the <sup>1</sup>[Provincial Government] may, by notification in the Official Gazette, exempt any factory from any or all of the provisions of this Act for such period as he may think fit.

Power to exempt during public emergency.

#### LEG. REF.

<sup>1</sup> Substituted for "Governor-General in Council" by A.O., 1937.

SEC. 6: EXTENT OF A FACTORY.—Subject to certain specified exceptions the area of the factory or workshop is the whole space contained within its walls. "In the case of factories.....etc., the walls or fences built around the factory.....fix the boundaries and determine the area." *Back v. Dick*, (1906) A.C. 325, *per* Lord Atkinson, at p. 334.

MORE THAN ONE FACTORY IN A SINGLE BUILDING.—More than one factory or workshop may be contained in a single building or group of buildings; and different parts of the same building may constitute separate factories or workshops. (See 14 Hals. Laws of England, pp. 559-570.) "I cannot help thinking that we should be in great difficulties if we were to hold that the mere fact of one factory overlapping another caused them to be within the same curtilage." *Per* Kennedy, J., in *Brass v. London County Council*, (1924) 2 K.B. 336. In *Vines v. Inglis*, (1915) S.C. (J.) 18; 24 Digest 902 (b), a building consisted of a retail shop on the ground floor a millinery room in which no mechanical power was used on the next floor, and a non-textile factory for dress-making on the top floor, in which mechanical power was used, but not in respect of the millinery work. It was held that the millinery room was not a factory. A part of a factory may, under circumstances, be declared for the purposes of the Act to be a separate factory or workshop. [English Fac-

ories Act, 1901, sec. 149, cl. (2).] Different branches or departments of work carried on in the same factory or workshop shall, for all or any of the purposes of the Act, be treated as if they were different factories or workshops. (English Factories Act, 1901, sec. 150).

SEPARATE BUILDINGS CONSTITUTING SAME FACTORY.—Separate buildings, even though, a considerable distance apart, may, if used for one continuous manufacturing process, constitute a single factory or workshop. [English Factories Act, 1901, sec. 149, cl. (4).] The place where the product of a factory is delivered, even if directly connected with the place of production, is not necessarily a part of the factory. *Spacey v. Dowlais*, (1905) 2 K.B. 879 (C.A.).

ROOMS USED SOLELY FOR SLEEPING PURPOSES.—Rooms used solely for sleeping purposes and places within the precincts of a factory solely used for some purpose other than the manufacturing process are excluded from the operation of the Factories Act, [English Factories Act, 1901, sec. 149, cl. (4). *Lewis v. Gilbertson*, (1904) 91 L.T. 377.]

SEC. 7: STATEMENT OF OBJECTS AND REASONS.—"This is a new clause designed to enable the Local Government to exempt from the Act premises which by reason of a change in their use should no longer be treated as factories."

SEC. 8: STATEMENT OF OBJECTS AND REASONS.—Exceptional power given under this section is intended only for a serious general emergency such as might be caused by a war.



9. [Cf. S. 33, Old Act.] (1) Before work is begun in any factory after the commencement of this Act, or before work is begun in any seasonal factory each season, the occupier shall send to the Inspector a written notice containing—

(a) the name of the factory and its situation,  
 (b) the address to which communications relating to the factory should be sent,  
 (c) the nature of the manufacturing processes to be carried on in the factory,

(d) the nature and the amount of the power to be used, [\* \*]<sup>1</sup>

(e) the name of the person who shall be the manager of the factory for the purposes of this Act,

<sup>1</sup>[; and

(f) such other particulars as may be prescribed for the purposes of this Act.]

(2) Whenever another person is appointed as manager, the occupier shall send to the Inspector a written notice of the change, within seven days from the date on which the new manager assumes charge.

(3) During any period for which no person has been designated as manager of a factory under this section, or during which the person designated does not manage the factory, any person found acting as manager, or, if no such person is found, the occupier himself, shall be deemed to be the manager of the factory for the purposes of this Act.

## CHAPTER II.

### THE INSPECTING STAFF.

10. [Cf. S. 4, Old Act.] (1) The Provincial Government may, by notification in the Official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act within such local limits as it may assign to them respectively.

(2) The Provincial Government may, by notification as aforesaid, appoint any person to be a Chief Inspector, who shall, in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector throughout the province.

(3) No person shall be appointed to be an inspector under sub-section (1) or a Chief Inspector, under sub-section (2) or, having been so appointed, shall continue to hold office, who is or becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected therewith.

(4) Every District Magistrate shall be an Inspector for his district.

(5) The Provincial Government may also, by notification as aforesaid, appoint such public officers as it thinks fit to be additional Inspectors for all or any of the purposes of this Act, within such local limits as it may assign to them respectively.

(6) In any area where there are more Inspectors than one, the Provincial Government may, by notification as aforesaid, declare the powers which such Inspectors shall respectively exercise, and the Inspector to whom the prescribed notices are to be sent.

(7) Every Chief Inspector and Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code and shall be officially subordinate to such authority as the Provincial Government may specify in this behalf.

LEG. REF.

<sup>1</sup> The word "and" omitted and cl. (f)

added by Act XIV of 1944.

11. [Cf. S. 5, Old Act.] Subject to any rules made by the Provincial Government in this behalf, an Inspector may, within the local limits for which he is appointed,—

(a) enter, with such assistants (if any), being persons in the <sup>1</sup>[service of the Crown] or of any municipal or other public authority, as he thinks fit, any place which is, or which he has reason to believe to be, used as a factory or capable of being declared to be a factory under the provisions of section 5;

(b) make such examination of the premises and plant and of any prescribed registers, and take on the spot or otherwise such evidence of any persons, as he may deem necessary for carrying out the purposes of this Act; and

(c) exercise such other powers as may be necessary for carrying out the purposes of this Act:

Provided that no one shall be required under this section to answer any question or give any evidence tending to criminate himself.

12. [Cf. Ss. 6 to 8, Old Act.] (1) The Provincial Government may appoint such registered medical practitioners as it thinks fit to be certifying surgeons for the purposes of this Act within such local limits as it may assign to them respectively.

(2) A certifying surgeon may authorise any registered medical practitioner to exercise any of his powers under this Act:

Provided that a certificate of fitness for employment granted by such authorized practitioner shall be valid for a period of three months only, unless it is confirmed by the certifying surgeon himself after examination of the person concerned.

*Explanation.*—In this section a “registered medical practitioner” means any person registered under the Medical Act, 1858, or any subsequent enactment amending it, or under any Act of any legislature in British India providing for the maintenance of a register of medical practitioners, and includes, in any area where no such register is maintained, any person declared by the Provincial Government, by notification in the Official Gazette, to be a registered medical practitioner for the purposes of this section.

### CHAPTER III.

#### HEALTH AND SAFETY.

13. [Cf. Ss. 9 (a) and 37 (2) (e), Old Act and S. 1, English Act.] Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and shall be cleansed at such times and by such methods as may be prescribed, and these methods may include lime-washing, or colour-washing, painting, varnishing, disinfecting and deodorising.

14. [Cf. Ss. 9 (c), 10 and 37 (2) (e), Old Act and Ss. 1, 7 and 74, English Act.] (1) Every factory shall be ventilated in accordance with such standards and by such methods as may be prescribed.

(2) Where gas, dust or other impurity is generated in the course of work, adequate measures shall be taken to prevent injury to the health of workers.

(3) If it appears to the Inspector that in any factory gas, dust or other impurity generated in the course of work is being inhaled by the workers to an injurious extent, and that such generation or inhalation could be prevented by the use of mechanical or other devices, he may serve on the manager of the factory an order in writing, directing that mechanical or other devices for prevent-

#### LEG. REF.

<sup>1</sup> Substituted for “employment of Government” by A.O., 1937.

SEC. 12: REPORT OF SELECT COMMITTEE.  
—Only registered medical practitioners may

be appointed as certifying surgeons.

SEC. 13: REPORT OF SELECT COMMITTEE.  
—Local Government is given discretion to make or not to make detailed provision by rules for the time and methods of cleansing a factory.

ing such generation or inhalation shall be provided before a specified date, and shall thereafter be maintained in good order and used throughout working hours.

(4) The Provincial Government may make rules for any class of factories requiring mechanical or other devices to be provided and maintained for preventing the generation or inhalation of gas, dust or other impurities, which may be injurious to workers and specifying the nature of such devices.

15. [Cf. Ss. 9 (d), 12 and 37 (2) (g), Old Act and Ss. 90-96, English Act.] (1) The Provincial Government may make rules—

(a) prescribing standards for the cooling properties of the air in factories in which the humidity of the air is artificially increased;

(b) regulating the methods used for artificially increasing the humidity of the air; and

(c) directing prescribed tests for determining the humidity and cooling properties of the air to be carried out and recorded.

(2) In any factory in which the humidity of the air is artificially increased, the water used for the purpose shall be taken from a public supply or other source of drinking water, or shall be effectively purified before it is so used.

(3) If it appears to the Inspector that the water used in a factory for increasing humidity which is required to be effectively purified under subsection (2) is not effectively purified, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

16. [Cf. S. 6, English Act] If it appears to the Chief Inspector or to an

Cooling.

Inspector specially authorized in this behalf by the Provincial Government that the cooling properties of the air in any factory are at times insufficient to secure workers against injury to health or against serious discomfort, and that they can be to a great extent unreasonable in the circumstances, the Chief Inspector may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

17. [Cf. Ss. 1 and 3, English Act and Ss. 9 (b) and 37 (2) (f), Old Act.]

Overcrowding.

In order that no room in a factory shall be crowded during working hours to a dangerous extent or to an extent which may be injurious to the health of the workers, the proportion which the number of cubic feet of space in a room and the number of superficial feet of its floor area bears to the number of workers working at any time therein shall not be less than such standards as may be prescribed either generally or for the particular class of work carried on in the room.

Lighting.

18. [Cf. S. 11, Old Act.] (1) A factory shall be sufficiently lighted during all working hours.

(2) If it appears to the Inspector that any factory is not sufficiently lighted, he may serve on the manager of the factory an order in writing, speci-

SEC. 16: STATEMENT OF OBJECTS AND REASONS.—“This is based on a recommendation of the Labour Commission who give in their report the previous history of the legislative proposals for protecting workers against the effects of excessive heat.”

ENGLISH LAW.—In textile factories other than cotton factories 600 cubic feet of fresh air per hour per individual are required to be supplied.—*St. R. & O. Rev.*, 1902, Vol. IV.

REASONABLE TEMPERATURE.—This is a question of fact and may vary with the circumstances of the particular case. See *Deane*

*v. Barnes*, (1901) 65 J.P. 235; *Peter v. Plowden*, (1903) 67 J.P. 152. In *Bennet v. Hardinge*, (1900) 2 Q.B. 397, Channell, J., said: “It seems to me that the phrase ‘workers in attendance’ means persons who are in fact on the premises for any substantial period, and I do not think that they are any the less in attendance on the premises because they are there as customers. It does not seem to me that the purpose or object for which they are there affects the matter one way or the other.”

SEC. 17: STATEMENT OF OBJECTS AND REASONS.—This combines the provisions of

fying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(3) The Provincial Government may make rules requiring that all factories of specified classes shall be lighted in accordance with prescribed standards.

19. [Cf. S. 75, English Act and Ss. 14 and 37 (2) (i), Old Act.] (1) In every factory a sufficient supply of water fit for drinking shall be provided for the workers at suitable places.

(2) The supply required by sub-section (1) shall comply with such standards as may be prescribed.

(3) In every factory <sup>1</sup>[\* \* \*] a sufficient supply of water suitable for washing shall be provided for the use of workers, at suitable places and with facilities for its use, according to such standards as may be prescribed.

20. [Cf. S. 9, English Act and Ss. 13 and 37 (2) (h), Old Act.] For every factory sufficient latrines and urinals, according to the prescribed standards, shall be provided, for male workers and for female workers separately, of suitable patterns and at convenient places as prescribed, and shall be kept in a clean and sanitary condition during all working hours.

21. [Cf. S. 16, English Act and S. 15, Old Act.] In every factory the doors of each room in which more than twenty persons are employed shall, except in the case of sliding doors, be constructed so as to open outwards, or, where the door is between two rooms, in the direction of the nearest exit from the building, and no such door shall be locked or obstructed while any work is being carried on in the room.

22. [Cf. Ss. 16, 17 and 37 (2), Old Act.] In every factory such precautions against fire shall be taken as may be prescribed.

#### LEG. REF.

<sup>1</sup> In sub-section (3) the words "in which any process involving contract by the workers with injurious or obnoxious substances is carried on" omitted by Act XIV of 1944.

old sec. 9 (b) and sec. 37 (2) (f) with an addition enabling the Local Government to prescribe standards of floor space.

SEC. 18: STATEMENT OF OBJECTS AND REASONS.—Sub-cl. (1) and (2) reproduce the substance of old sec. 11. In sub-cl. (3) it is proposed to enable the Local Governments to prescribe standards of lighting by rule for particular classes of factories.

SEC. 19: STATEMENT OF OBJECTS AND REASONS.—Sub-cl. (1) combines old secs. 14 and 37 (2) (i); sub-cl. (2) is new and is based on a recommendation of Labour Commission. The change made by the Select Committee is designed to ensure that drinking water is supplied whether standards are prescribed or not.

SECS. 22 AND 23.—The expression "precautions against fire" in sec. 22 of the Factories Act mean precautions against the occurrence or outbreak of fire and would not cover precautions against the consequences of fire. Sec. 23 deals expressly with precautions against the consequences of fire by

providing means of escape. Reading the two secs. 22 and 23 together, the intention of the legislature is that in the case of precautions against the occurrence of fire, the matter should be dealt with by rules which would govern all factories, but that in dealing with precautions against the consequences of fire, it was recognised that all factories could not be dealt with in like manner, and sec. 23 therefore contains a general provision that provision shall be made for such means of escape as can be reasonably required in the circumstances of each factory, and then leaves it to the Inspector to determine whether such precautions have been taken, and if he thinks that the necessary provisions have not been made, he is given power to serve on the manager of a factory a notice, breach of which would amount to an offence under sec. 60 (a) (iii) of the Factories Act. There is no power under sec. 22 to make general rules covering the subject of means of escape against fire which is dealt with by sec. 23; and sec. 22 is not to be enforced by means of rules. R. 37 of the rules under the Act is therefore *ultra vires*, as it deals with a matter which does not fall under sec. 22 or under sec. 32, which is the rule-making section, but deals with a matter falling under sec. 23 which does not enable rules to be made. Breach

23. [Cf. S. 16, Old Act and S. 14, English Act.] (1) Every factory shall be provided with such means of escape in the face of fire [as may be prescribed.]<sup>1</sup>

Means of escape.

(2) If it appears to the Inspector that any factory is not so provided, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(3) The means of escape shall not be obstructed while any work is being carried on in the factory.

24. [Cf. S. 10, English Act and S. 18, Old Act.]

Fencing.

(1) In every factory the following shall be kept adequately fenced, namely:—

(a) every exposed moving part of a prime mover and every flywheel directly connected to a prime mover;

(b) every hoist or lift, hoist-well, or lift-well, and every trap-door or similar opening near which any person may have to work or pass; and

(c) every part of the machinery which the Provincial Government may prescribe.

(2) If it appears to the Inspector that any other part of the machinery in a factory is dangerous if not adequately fenced, he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(3) All fencing required by or under this section or under sub-section (1) of section 26 shall be maintained in an efficient state at all times when the workers have access to the parts required to be fenced except where they are under repair or are under examination in connexion with repair or are necessarily exposed for the purpose of cleaning or lubricating or altering the gearing or arrangements of the machinery.

#### LEG. REF.

<sup>1</sup> Substituted by Act XIV of 1944.

of R. 37 is not therefore an offence for which there can be a conviction. *I.L.R.* (1943) Bom. 92=44 Bom.L.R. 810=A.I. R. 1943 Bom. 5.

SEC. 23: ENGLISH LAW—FIRE.—Factories and workshops are to be furnished with a certificate that they are provided with such means of escape in case of fire as can reasonably be required. It is the duty of the district council to ascertain whether factories and workshops are provided with such means of escape from fire and where necessary to require its provision. The County Court has jurisdiction, on application, to apportion the cost of complying with the requirement between the owner and the occupier of the factory or workshop in a just and equitable manner (sec. 14). See *Monk v. Arnold*, (1902) 1 K.B. 761; *Horner v. Franklin*, (1904) 2 K.B. 877; (1905) 1 K.B. 479 [Sec. 14, *English Factory and Workshop Act* (1901)].

SEC. 24: REPORT OF SELECT COMMITTEE.—Sub-cl. (3) has been expanded so as to apply to any fencing which may be required in pursuance of an order under sec. 26 (1) and to make it clear that fencing may be removed for necessary attention to machinery.

SAFETY PROVISIONS IN ENGLISH LAW.—The

Act contains many provisions for securing the safety of the persons employed and also of the public. Thus, it is provided that in every factory every hoist or teagle and every fly-wheel directly connected with the steam, or water, or other mechanical power, whether in the engine house or not, and every part of any water-wheel or engine worked by such power, must be securely fenced. Every wheel-race not otherwise secured must be securely fenced close to the edge. All dangerous parts of the machinery must either be securely fenced or be in such position or of such construction as to be equally safe to every person as they would be if securely fenced. The fencing is to be maintained in an efficient state. [As to the extent of obligation to fence, see *Redgrave v. Lloyd*, (1895) 1 Q.B. 876 and *Hindle v. Birtwistle*, (1897) 1 Q.B. 192. See also sec. 10, *English Factory and Workshop Act* (1901) and Rules.]

The fact that the machinery is so situated that there is little or no danger of accidents happening is no justification for not carrying out the requirements of a statute as to fencing [see *Doel v. Shepherd*, (1856) 25 L.J.Q.B. 124]; but it is only necessary to keep up the fence when the parts required to be fenced are in motion for some manufacturing process. [*Coe v. Platt*, (1851) 6 Ex. 252]; but the obligation to fence machinery is absolute [*Watkins v. Naval*

(4) Such further provisions as may be prescribed shall be made for the protection from danger of persons employed in attending to the machinery in a factory.

25. [Cf. Ss. 17-19, English Act.] If it appears to the Inspector that any building or part of a building, or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety, he may serve on the manager of the factory, an order in writing requiring him before a specified date—

(a) to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or

(b) to carry out such tests as may be necessary to determine the strength or quality of any specified parts and to inform the Inspector of the results thereof.

26. [Cf. Ss. 17 to 19, English Act and 18-A, Old Act.] (1) If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it is dangerous to human life or safety, he may serve on the manager of the factory an order in writing specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(2) If it appears to the Inspector that the use of any building or part of a building or of any part of the ways, machinery or plant in a factory involves imminent danger to human life or safety, he may serve on the manager of the factory an order in writing prohibiting its use until it has been properly repaired or altered.

27. [Cf. S. 13, English Act.] (1) No woman or child shall be allowed to clean or oil any part of the machinery of a factory while that part is in motion under power or to work between moving parts or between fixed and moving parts of any machinery which is in motion under power.

*Colliery Co.*, (1921) A.C. 693; *Purcell v. Talbot (Clement), Ltd.*, (1914) 79 J.P. 1] and is unaffected by the fact that, with regard to some particular machine, it may be commercially impracticable or mechanically impossible to fence it securely [*Davies v. Owen (Thomas) & Co.*, (1919) 2 K.B. 39. See also *Jackson v. Milliner Motor Body & Co.*, (1911) 1 K.B. 546.]

Moreover, the defence of common employment is not applicable where the injury has been caused by the neglect of the employer to carry out his statutory obligations to fence his machinery (*Britton v. G.W.R.*, 7 Ex. 130) nor where the employer has failed to maintain or repair the fencing for his machinery [*Holmes v. Clarke*, (1862) 31 L. J. Ex. 356; *Groves v. Wimborne (Lord)*, (1898) 2 Q.B. 402], and in fact that the statute imposes a penalty for omission to fence does not bar an action for damages by the workman. (*Ibid.*) Sub-sec. (2) includes all machinery in a factory and it is for the Court to say if it is dangerous. [*Redgrave v. Lloyd*, (1895) 1 Q.B. 876.]

Machinery is dangerous if in the ordinary course of human affairs danger may reasonably be anticipated from the use of it with-

out protection. [*Hindle v. Birtwistle*, (1897) 1 Q.B. 192.] See Encyclopaedia of the Laws of England, 2nd Ed., Title "Factories."

The numerous provisions in the Procedure Code for service of notices or orders are intended to make it certain that a particular process or an order of the Court is brought to the specific notice of the individual affected. A mere knowledge that proceedings may be instituted or something of that sort is not sufficient to take the place of the imperative directions in the Code as to service on the actual individual. The words in sec. 18 (2) "serve on the Manager an order in writing" mean that such an order as is referred to in Form O should be served definitely on the manager of the factory and that it should specify exactly what measures the manager is to take in order to remove the danger. But a mere note of a visit is not such an order as is contemplated therein. 85 I.C. 226=26 Bom. L.R. 1245=26 Cr.L.J. 482=1925 Bom. 143. As to the necessity for order or notice by Inspector, see 12 Bom.L.R. 225.

SEC. 27: STATEMENT OF OBJECTS AND REASONS.—This is based on old sec. 19; but it

(2) The Provincial Government may, by notification in the Official Gazette, prohibit, in any specified factory or class of factories, the cleaning or oiling by any person of specified parts of machinery when these parts are in motion under power.

28. [Cf. Ss. 76 to 78, English Act and S. 19-A, Old Act.] (1) The Provincial Government may make rules prohibiting the admission to any specified class of factories, or to specified parts thereof, of children who cannot be lawfully employed therein.

(2) If it appears to the Inspector that the presence in any factory or part of a factory of children who cannot be lawfully employed therein may be dangerous to them or injurious to their health, he may serve on the manager of the factory an order in writing directing him to prevent the admission of such children to the factory or any part of it.

29. [Cf. S. 20, Old Act and S. 24, English Act.] No woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-opener is at work:

Provided that, if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof, or to such height as the Inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed-end is situated.

30. [Cf. S. 34, Old Act and Ss. 19-22, English Act.] Where in any factory an accident occurs which causes death, or which causes any bodily injury whereby any person injured is prevented from resuming his work in the factory during the forty-eight hours after the accident occurred, or which is of any

is proposed to extend to the oiling of machinery the prohibition which at present applies to the cleaning of machinery and to extend it to work done between moving parts as well as between fixed and moving parts. As to what is cleaning machinery, see *Taylor v. Mark*, (1911) 1 K.B. 145.

SEC. 28: STATEMENT OF OBJECTS AND REASONS.—Sub-cl. (2) reproduces the substance of old sec. 19-A. In sub-cl. (1) it is proposed to give the Local Governments general powers to exclude non-working children with a view to their protection.

ENGLISH LAW.—A child is not allowed to clean, in a factory, any part of any machinery, or any place under any machinery other than overhead mill-gearing, while it is in motion by the aid of steam, water or other mechanical power. A young person is not allowed to clean any dangerous part of machinery while it is so in motion. Neither a woman nor a young person is allowed to clean mill gearing machinery when in motion. [Sec. 13, English Factory and Workshop Act, 1901; *Pearson v. Belgian Mills Co.*, (1896) 1 Q.B. 244.] A young person employed in a mill oiled part of the machinery during meal times, contrary to orders and for his own amusement. The occupier of the mill was held to have committed an offence. [*Prior v. Slaitkwait Spinning Co.*, (1898) 1 Q.B. 881. But see *Robinson v. Melville*, (1890) 17 R. 62. See also *Graves v. Duncan*, (1899) 1 F. 72.]

SEC. 29.—The provisions of the section are not fulfilled if there is a door made in a partition between the two portions of the room and that door is shown to be open at a particular time, or even although it is shut, yet it is not locked or other effective means taken to prevent its being opened by a woman or child wishing to get into the press room or prohibited area. 94 I.C. 949=50 B. 34=27 Bom.L.R. 1405=27 Cr.L.J. 165=1926 Bom. 57.

SEC. 30: "PERSONS" INCLUDES PLURAL—SINGLE ACCIDENT—SEVERAL INJURED—FAILURE TO NOTIFY—SINGLE OFFENCE.—The word "person" includes the plural and consequently where as a result of a single accident more persons than one are injured the accident cannot be split up into as many persons injured and the notice contemplated is single notice of the accident which the manager is required to submit to the authorities and therefore contravention of this rule is one offence which cannot in its turn be split up into as many offences as the number of casualties. 31 Cr.L.J. 569=125 I.C. 380=1930 Lah. 658. The duty to inform the authority under the Factories Act under sec. 34 is laid on the manager. It is therefore primarily the manager who is to be supposed to have contravened this provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention. A.I.R. 1930 Lah. 658.



nature which may be prescribed in this behalf, the manager of the factory shall send notice thereof to such authorities, and in such form and within such time as may be prescribed.

31. [Cf. S. 50, Old Act.] (1) The manager of a factory on whom an order in writing by an Inspector has been served under the provisions of this Chapter, or the occupier of the factory, may, within thirty days of the service of the order, appeal against it to the Provincial Government, or to such authority as the Provincial Government may appoint in this behalf; and the Provincial Government or appointed authority may, subject to rules made in this behalf by the Provincial Government, confirm, modify or reverse the order.

(2) The appellate authority may, and if so required in the petition or appeal shall, hear the appeal with the aid of assessors one of whom shall be appointed by the appellate authority and the other by such body representing the industry concerned as the Provincial Government may prescribe in this behalf:

Provided that if no assessor is appointed by such body, or if the assessor so appointed fails to attend at the time and place fixed for hearing the appeal, the appellate authority may, unless satisfied that the failure to attend is due to sufficient cause, proceed to hear the appeal without the aid of such assessor, or if it thinks fit, without the aid of any assessor.

(3) In the case of an appeal against an order under section 16 the appellate authority shall, and in any other case except an appeal against an order under sub-section (2) of section 26 or sub-section (2) of section 28 the appellate authority may, suspend the order appealed against pending the decision of the appeal, subject however to such conditions as to partial compliance or the adoption of temporary measures as it may choose to impose in any case.

Power of Provincial Government to make rules to supplement this Chapter.

32. The Provincial Government may make rules—

(a) providing for any matter which, according to any of the provisions of this Chapter, is or may be prescribed;

(b) requiring the managers of factories to maintain stores of first-aid appliances and provide for their proper custody;

(c) providing against danger arising from the use of mechanical transport in factories, other than railways subject to the Indian Railways Act, 1890;

(d) prescribing the manner of the service of orders under this Chapter on managers of factories;

(e) regulating the procedure to be followed in presenting and hearing appeals under section 31, and the appointment and remuneration of assessors;

(f) regulating the exercise by Inspectors of their powers under this Chapter; and

(g) providing for any other matter which may be expedient in order to give effect to the provisions of this Chapter.

SEC. 32 (g).—R. 55 of the Bombay Factory Rules, 1935, is not *ultra vires*. 45 Cr. L.J. 761=46 Bom.L.R. 455=A.I.R. 1944 Bom. 250.

MANAGER'S ABSENCE FROM DUTY NOT NOTIFIED—LIABILITY FOR INFRINGEMENT.—Where the person, who is charged with offences under the Factories Act, was absent from his duties as manager at the time when the

alleged infringements of the Act took place, he cannot be prosecuted for infringements of the Act which took place during his absence although the absence was not notified to the authorities as required by law, for which non-compliance the occupier could be held liable. 152 I.C. 506=38 C.W.N. 1008 =A.I.R. 1934 Cal. 730.

33. [Cf. Ss. 73-79, English Act.] (1) The Provincial Government may make rules requiring that in any specified factory, wherein more than one hundred and fifty workers are ordinarily employed, an adequate shelter shall be provided for the use of workers during periods of rest, and such rules may prescribe the standards of such shelters.

Additional power to make health and safety rules relating to—

shelters during rest,—

rooms for children,—

(2) The Provincial Government may also make rules—

(a) requiring that in any specified factory, wherein more than fifty women workers are ordinarily employed, a suitable room shall be reserved for the use of children under the age of six years belonging to such women, and

(b) prescribing the standards for such rooms and the nature of the supervision to be exercised over the children therein.

(3) The Provincial Government may also make rules, for any class of certificates of stability,— factories and for the whole or any part of the province, requiring that work on a manufacturing process carried on with the aid of power shall not be begun in any building or part of a building erected or taken into use as a factory after the commencement of this Act, until a certificate of stability in the prescribed form, signed by a person possessing the prescribed qualifications, has been sent to the Inspector.

(4) Where the <sup>1</sup>[Provincial Government] is satisfied that any operation in a factory exposes any persons employed upon it to hazardous operations. a serious risk of bodily injury; poisoning or disease, he may make rules applicable to any factory or class of factories in which the operation is carried on—

(a) specifying the operation and declaring it to be hazardous,

(b) prohibiting or restricting the employment of women, adolescents or children upon the operation,

(c) providing for the medical examination of persons employed or seeking to be employed upon the operation and prohibiting the employment of persons not certified as fit for such employment, and

(d) providing for the protection of all persons employed upon the operation or in the vicinity of the places where it is carried on.

33. A (X)

#### CHAPTER IV.

##### RESTRICTIONS ON WORKING HOURS OF ADULTS.

34. [Cf. Old section 27.] No adult worker shall be allowed to work in a factory for more than <sup>2</sup>[forty-eight] hours in any week, or, where the factory is a seasonal one, for more than <sup>2</sup>[fifty] hours in any week:

Provided that an adult worker in a non-seasonal factory engaged in work which for technical reasons must be continuous throughout the day may work for fifty-six hours in any week.

#### LEG. REF.

<sup>1</sup> Substituted for "Governor-General in Council" by A. O., 1937.

<sup>2</sup> Substituted by Act VI of 1946.

SEC. 34: PERSONS EMPLOYED IN A FACTORY—MEANING OF.—Persons who are actually engaged in work in a factory in any of the ways enumerated in sec. 2 must be

(C.G.M.—317

presumed to be employed in the factory. 61 C. 332=35 Cr.L.J. 1401=38 C.W.N. 801=1934 C. 546.

"ALLOWED TO WORK IN A FACTORY".—The section is not confined to any act which the occupier himself has allowed, but it also includes an allowance by a servant or agent of the occupier. See *In re Crab Tree*, 85 L.T. 549.

⊗ Inserted by Act X of 1947. Correction carried out in 1945 Edn. (1945 Edn.)

Weekly holiday.

35. [Cf. Old section 22.] (1) No adult worker shall be allowed to work in a factory on a Sunday unless—

(a) he has had or will have a holiday for a whole day on one of the three days immediately before or after that Sunday, and

(b) the manager of the factory has, before that Sunday or the substituted day, whichever is earlier,—

(i) delivered a notice to the office of the Inspector of his intention to require the worker to work on the Sunday and of the day which is to be substituted, and

(ii) displayed a notice to that effect in the factory:

Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day.

(2) Notices given under sub-section (1) may be cancelled by a notice delivered to the office of the Inspector and a notice displayed in the factory not later than the day before the Sunday or the holiday to be cancelled, whichever is earlier.

(3) where, in accordance with the provisions of sub-section (1), any worker works on a Sunday and has had a holiday on one of the three days immediately, before it, that Sunday shall, for the purpose of calculating his weekly hours of work, be included in the preceding week.

[35-A. (1) Where, as a result of the passing of an order or the making of a rule under the provisions of this Act exempting a factory or the workers therein from the provisions of section 35, a worker is deprived of any of the weekly holidays for which provision is made by sub-section (1) of that section, he shall be allowed, as soon as circumstances permit, compensatory holidays of equal number to the holidays so lost.

(2) The Provincial Government may make rules prescribing the manner in which the holidays, for which provision is made in sub-section (1), shall be allowed.]<sup>1</sup>

Daily hours.

36. [Cf. Old section 28.] No adult worker shall be allowed to work in a factory for more than <sup>2</sup>[nine] hours in any day:

Provided that a male adult worker in a seasonal factory may work for <sup>2</sup>[ten] hours in any day.

37. [Cf. Old Act, section 21.] The periods of work of adult workers in a factory during each day shall be fixed either—

(a) so that no period shall exceed six hours, and so that no worker shall work for more than six hours before he has had an interval for rest of at least one hour;

or

(b) so that no period shall exceed five hours and so that no worker shall work for more than five hours before he has had an interval for rest of at least half an hour, or for more than eight and a half hours before he has had at least two such intervals.

#### LEG. REF.

<sup>1</sup> Sec. 35-A inserted by Act III of 1945.

<sup>2</sup> Substituted by Act X of 1946.

SECS. 36 AND 43.—Where an Inspector of Factories approves a system of working a particular factory, he has power under sec. 21 of General Clauses Act to cancel the approval. If an appeal is pending from the

order of cancellation it is not desirable to institute a criminal prosecution in respect of the factory having been worked in contravention during the pendency of the appeal. 59 I.C. 857=22 Cr.L.J. 153 (Lah.).

SEC. 37.—On this section, see 44 Bom.L.R. 810=1943 Bom. 5 cited under sec. 22 *supra*.

38. [New.] The periods of work of an adult worker in a factory shall be so arranged that, along with his intervals for rest under section 37, they shall not spread over more than <sup>1</sup>[ten and half hours, or where the factory is a seasonal one, eleven and a half] hours in any day, save with the permission of the Provincial Government and subject to such conditions as it may impose, either generally or in the case of any particular factory.

39. [Cf. Old Act, sections 26 and 36.] (1) There shall be displayed and correctly maintained in every factory in accordance with the provisions of sub-section (2) of section 76 a Notice of Periods for Work for Adults showing clearly the periods within which adult workers may be required to work.

(2) The periods shown in the Notice required by sub-section (1) shall be fixed beforehand in accordance with the following provisions of this section and shall be such that workers working for those periods would not be working in contravention of any of the provisions of sections 34, 35, 36, 37 and 38.

(3) Where all the adult workers in a factory are required to work within the same periods, the manager of the factory shall fix those periods for such workers generally.

(4) Where all the adult workers in a factory are not required to work within the same periods, the manager of the factory shall classify them into groups according to the nature of their work.

(5) For each group which is not required to work on a system of shifts, the manager of the factory shall fix the periods within which the group may be required to work.

(6) Where any group is required to work on a system of shifts and the relays are not to be subject to predetermined periodical changes of shift, the manager of the factory shall fix the periods within which each relay of the group may be required to work.

#### LEG. REF.

<sup>1</sup> Substituted by Act X of 1946.

SEC. 39.—Sec. 39 (1) of the Act and R. 70 require that a notice of periods of work for adults in English and in the language of the majority of the workers shall be affixed at the main entrance of the factory. Displaying an incorrect notice is tantamount to not displaying notice prescribed and would be punishable as a breach of sec. 39 (1) and r. 70. 1942 N.L.J. 518=I.L.R. (1943) Nag. 38=1943 Nag. 79.

OBJECT OF THE SECTION.—The main object of the section is not to ensure that the manager and no one else should fix the hours but that the hours should be fixed and regular hours of employment are to be fixed; they are not to be subject to sudden or casual alteration at any one's discretion or caprice. 58 Bom. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 Bom. 43.

SCOPE OF SECTION.—CHANGING SYSTEM OF "SPECIAL HOURS"—LEGALITY.—A continuously changing system of hours "specified" is something altogether different from what is contemplated by a fixation of special hours. The former course is not permitted by the section. 134 I.C. 881=35 C.W.N. 1108=1931 C. 639.

WORK OUTSIDE FIXED HOURS.—Where men work during a time which is admittedly outside

the time fixed for employment of each person employed in the factory, the owner of the factory is guilty under the section. 52 A. 444=31 Cr.L.J. 1220=1930 A.L.J. 459=1930 A. 214.

EXTRA WORK NOT DONE IN OR ABOUT FACTORY—PROHIBITION OF SECTION IF APPLIES.—Where the manager of an ice factory had fixed only 7½ hours a day for employees but it appeared that persons who had finished their work used to take ice to ships in the docks when required. *Held*, that the extra work was not work done in or about the factory and that it did not fall within the prohibitory provisions of the Act. 134 I.C. 881=35 C.W.N. 1108=1931 C. 639. *See also* I.L.R. (1943) Nag. 38=1943 Nag. 79 (Displaying incorrect notice—Breach of rules).

SECS. 39 AND 40.—This is based on old sec. 36. In order to prevent the evasion of the Act, it is proposed to provide that changes should be notified to the Inspector before they are made, and that his previous sanction should be required if a change has to be made within a week of the previous change.

REPORT OF SELECT COMMITTEE.—We have re-drafted and re-arranged the provisions contained in cls. 40 and 41 of the Bill (secs. 39 and 40 of this Act) as introduced with a view to expressing more clearly the intention of those clauses. The latter part of sub-cl. (4), cl. 39, formerly sub-cl. (3) of cl. 40,

(7) Where any group is to work on a system of shifts and the relays are to be subject to predetermined periodical changes of shifts, the manager of the factory shall draw up a scheme of shifts whereunder the periods within which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day.

(8) The Provincial Government may make rules prescribing forms of the Notice of Periods for Work for Adults and the manner in which it shall be maintained.

40. [Cf. Old Act, section 36.] (1) A copy of the Notice referred to in sub-section (1) of section 39 shall be sent in duplicate to the Inspector within fourteen days after the commencement of this Act, or, if the factory begins work after the commencement of this Act, before the day on which it begins work.

Copy of Notice of Periods for Work to be sent to Inspector.

(2) Any proposed change in the system of work in a factory which will necessitate a change in the Notice shall be notified to the Inspector in duplicate before the change is made, and except with the previous sanction of the Inspector, no such change shall be made until one week has elapsed since the last change.

41. [Cf. Old Act, sections 35 and 37 (2).] (1) Register of Adult Workers. The manager of every factory shall maintain a Register of Adult Workers showing—

- (a) the name of each adult worker in the factory;
- (b) the nature of his work;
- (c) the group, if any, in which he is included;
- (d) where his group works on shifts, the relay to which he is allotted; and
- (e) such other particulars as may be prescribed:

Provided that, if the Inspector is of opinion that any muster roll or register maintained as part of the routine of a factory gives in respect of any or all of the workers in the factory the particulars required under this section he may, by order in writing, direct that such muster roll or register shall to the corresponding extent be maintained in place of and be treated as the Register of Adult Workers in that factory:

Provided further that, where the Provincial Government is satisfied that the conditions of work in any factory or class of factories are such that there is

has been omitted as not relevant to the preparation of the notice, and as covered by the provisions of cl. 41.

SECS. 39, 42 AND 60.—Failure to comply with old sec. 36 would not in itself amount to a breach of the provisions of this section or justify the conviction under sec. 60. 58 B. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167 1934 B. 43. A factory which is exempt from the provisions of sec. 37 under the rules framed under sec. 43 (2) (d) cannot be held to be exempt also from the provisions of secs. 39 and 40. Therefore where there is a breach of the provisions of sec. 42 read with sec. 39, the fact that under the rules the factory is exempt from the provisions of sec. 37 does not afford any defence to a prosecution under sec. 60 (b) (i). I. L. R. (1937) Bom. 175=38 Bom.L.R. 1181=38 Cr.L.J. 304=A.I.R. 1937 Bom. 52.

POWER OF CHANGING WORKING HOURS CANNOT BE EXERCISED BY MANAGER AFTER MILL STARTS WORKING.—The manager and he alone can change the working hours on complying with the conditions stated in old sec. 36 (3) of the Act, but that power of change cannot be exercised by the manager after

the mill starts working on the period fixed by him. Any change subsequently made therein could not be covered by the change in the standing orders as contemplated by sec. 36 (3), but would be an unauthorised departure from the fixed period on a particular day. Although the hours fixed on the night in question were 12-30 A.M. to 5-30 A.M., the mills stopped working for about 15 minutes on account of a break-down and the manager extended the closing hour to 5-45 A.M., and issued an order to that effect and informed the workmen and the Inspector of Factories of that change and its reason, *held*, that the accused must be convicted under old sec. 41 (now sec. 60). 58 Bom. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 B. 43.

SEC. 41.—The section is mandatory, and it makes the position clear that in the absence of an order by the Inspector, one register in a prescribed form of all persons employed and of the hours and nature of their employments must be kept. It cannot be supplemented by a time-sheet. 152 I.C. 566=38 C.W.N. 1008=1934 C. 730. See also 1942 N.L.J. 518 cited under sec. 60.

no appreciable risk of contravention of the provisions of this Chapter in the case of that factory or factories of that class, as the case may be, the Provincial Government may, by written order, exempt, on such conditions as it may impose, that factory or all factories of that class, as the case may be, from the provisions of this section.

(2) The Provincial Government may make rules prescribing the form of the Register of Adult Workers, the manner in which it shall be maintained and the period for which it shall be preserved.

42. [Cf. section 26.] No adult worker shall be allowed to work otherwise than in accordance with the Notice of Periods for Work for Adults displayed under sub-section (1) of section 39 and the entries made beforehand against his name in the Register of Adult Workers maintained under section 41.

Hours of work to correspond with notice under section 39 and Register under section 41.

43. [Cf. Old Act, sections 29, 30, 32 and 32-A.] (1) The Provincial Government may make rules defining persons, who hold positions of supervision or management or are employed in a confidential position in a factory, and the provisions of this Chapter<sup>1</sup> [other than the provisions of clause (b) of sub-section (1) of section 45 and the provisos to that sub-section] shall not apply to any person so defined.

Power to make rules exempting from restrictions.

(2) The Provincial Government may make rules for adult workers providing for the exemption, to such extent and subject to such conditions as may be prescribed in such rules,—

(a) of workers engaged on urgent repairs—from the provisions of sections 34, 35, 36, 37 and 38;

(b) of workers engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of the factory—from the provisions of sections, 34, 36, 37 and 38;

(c) of workers engaged in work which is necessarily so intermittent that the intervals during which they do not work while on duty ordinarily amount to more than the intervals for rest required under section 37—from the provisions of sections 34, 36, 37 and 38;

(d) of workers engaged in any work which for technical reasons must be carried on continuously throughout the day—from the provisions of sections 34, 35, 36, 37 and 38;

#### LEG. REF.

<sup>1</sup> Inserted by Act XI of 1935.

SEC. 42: REPORT OF THE SELECT COMMITTEE.—“The prohibition contained in this clause was contained by implication in cl. 60 of the Bill as introduced. We have inserted it explicitly in this new clause, and in cl. 57, the analogous clause relating to children, with a view to the simplification of cl. 60 relating to penalties”. It is no defence to a breach of the provisions of this section, that the factory has been exempted from the provisions of sec. 37 under rules framed under sec. 43 (2) (d). I.L.R. (1937) Bom. 175 = 38 Cr.L.J. 304 = 38 Bom.L.R. 1181 = A.I.R. 1937 Bom. 52. See also 1938 N.L.J. 217 = 1938 Nag. 406 = I.L.R. (1940) Nag. 257.

SEC. 43 (2) (d).—Exemption of a factory from provisions of sec. 37, under rules made under this clause, does not operate as ex-

emption under secs. 39 and 40 also. Where, therefore, several hands are found working at a time shown as period of rest in the notice displayed under sec. 39 (1), there is clear breach of terms of sec. 42, and an offence under sec. 60 (b) (i) is committed. Exemption from provisions of sec. 37 is no valid defence. I.L.R. 1937 Bom. 175 = 38 Bom.L.R. 1181 = 38 Cr.L.J. 304 = 1937 Bom. 52. The provisions of r. 112 (c) (5) (1) and r. 112 (c) (5) (iii) are not alternative in the sense that if the provisions of sub-r. 5 (iii) are observed it is not necessary to observe the requirements of sub-r. 5 (1) of r. 112 (c) of Bihar and Orissa Factory Rules framed under sec. 43 of the Factories Act. The word “or” occurring between one sub-clause and another in r. 112 (c) cannot be interpreted in such a way as to make the sub-rules alternative. 1938 P.W.N. 903 = 40 Cr.L.J. 160 = A.I.R. 1939 Pat. 163.

(e) of workers engaged in making or supplying articles of prime necessity which must be made or supplied every day—from the provisions of section 35;

(f) of workers engaged in a manufacturing process which cannot be carried on except during fixed seasons—from the provisions of section 35;

(g) of workers engaged in a manufacturing process which cannot be carried on except at times dependent on the irregular action of natural forces—from the provisions of section 35 and section 37; and

(h) of workers engaged in engine-rooms or boiler-houses—from the provisions of section 35.

(3) Rules made under sub-section (2) providing for any exemption may also provide for any consequential exemption from the provisions of section 39 and 40 which the Provincial Government may deem to be expedient, subject to such conditions as it may impose.

(4) In making rules under this section the Provincial Government shall prescribe the maximum limits for the weekly hours of work for all classes of workers, and any exemption given, other than an exemption under clause (a) of sub-section (2), shall be subject to such limits.

(5) Rules made under this section shall remain in force for not more than three years.

44. [Cf. Old Act, section 30 (2).] (1) Where the Provincial Government is satisfied that, owing to the nature of the work carried on or to other circumstances, it is unreasonable to require that the periods of work of any adult workers in any factory or class of factories should be fixed beforehand, it may, by written order, relax or modify the provisions of sections 39 and 40 in respect of such workers to such extent and in such manner as it may think fit, and subject to such conditions as it may deem expedient to ensure control over periods of work.

(2) The Provincial Government, or subject to the control of the Provincial Government the Chief Inspector, may, by written order, exempt, on such conditions as it or he may deem expedient, any or all of the adult workers in any factory, or group or class of factories, from any or all of the provisions of sections 34, 35, 36, 37, 38, 39 and 40, on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work.

(3) Any exemption given under sub-section (2) in respect of weekly hours of work shall be subject to the maximum limits prescribed under sub-section (4) of section 43.

<sup>1</sup>[(4) An order under sub-section (2) shall remain in force for such period, not exceeding two months from the date on which notice thereof is given to the manager of the factory, as may be specified in the order:

Provided that if in the opinion of the Provincial Government the public interest so requires, the Provincial Government may from time to time, by notification in the official Gazette, extend the operation of any such order for such period, not exceeding six months at any one time, as may be specified in the notification.]

#### LEG. REF.

<sup>1</sup> Substituted by Act X of 1946.

SECS. 45 AND 54: TEMPORARY AMENDMENT OF SECS. 45 AND 54, ACT XXV OF 1934.—Until the termination of the hostilities in being at the commencement of this Act the first proviso to sub-sec. (1) of sec. 45 and the proviso to sub-sec. (3) of sec. 54 of the said Act shall have effect as if for the figures and letters "7-30 P.M.," the figures and letters

"8-30 P.M.," had been substituted. (Act XIV of 1944, sec. 5).

SEC. 45: GINNING FACTORIES.—All that the law authorises the Inspector to do in the case of a ginning factory is to express his opinion and not to issue orders. The Inspector has no right to issue a general prohibition against the employment of women at night without going into the question whether the staff is sufficient. 61 I.C. 225=19 A.L.J. 503=22 Cr.L.J. 369=1921 All. 229.



45. [Cf. Old Act, sections 24, 51 (2) and 32-A.]

Further restrictions on the employment of women.

(1) The provisions of this Chapter shall, in their application to women workers in factories, be supplemented by the following further restrictions, namely:—

(a) no exemption from the provisions of section 36 may be granted in respect of any women; and

(b) no women shall be allowed to work in a factory except between 6 A.M. and 7 P.M.:

Provided that the Provincial Government may, by notification in the Official Gazette, in respect of any class or classes of factories and for the whole year or any part of it, vary the limits laid down in clause (b) to any span of <sup>1</sup>[ten and half hours, or where the factory is a seasonal one, of eleven and half hours] between 5 A.M. and 7-30 P.M.:

Provided further that, in respect of any seasonal factory or class of seasonal factories in a specified area, the Provincial Government may make rules imposing a further restriction by defining the period or periods of the day within which women may be allowed to work, such that the period or periods so defined shall lie within the span fixed by clause (b) or under the above proviso and shall not be less than ten hours in the aggregate.

(2) The Provincial Government may make rules providing for the exemption from the above restrictions, to such extent and subject to such conditions as it may prescribe, of women working in fish-curing or fish-canning factories where the employment of women beyond the said hours is necessary to prevent damage to or deterioration in any raw material.

(3) Rules made under sub-section (2) shall remain in force for not more than three years.

46. [New.] Where a worker works on a shift which extends over mid-

Special provision for night-shifts. night, the ensuing day for him shall be deemed to be the period of twenty-four hours beginning when such shift ends, and the hours he has worked after midnight shall be counted towards the previous day:

Provided that the Provincial Government may, by order in writing, direct that in the case of any specified factory or any specified class of workers therein the ensuing day shall be deemed to be the period of twenty-four hours beginning when such shift begins and that the hours worked before midnight shall be counted towards the ensuing day.

Extra pay for overtime.

47. <sup>2</sup>[(1) Where a worker—

(a) in a non-seasonal factory works for more than nine hours in any day or for more than forty-eight hours in any week, or

(b) in a seasonal factory works for more than nine hours in any day or for more than fifty hours in any week,—

he shall be entitled in respect of the overtime worked to pay at the rate of twice his ordinary rate of pay.]

(2) Where any workers are paid on a piece rate basis, the Provincial Government in consultation with the industry concerned may, for the purposes of this section, fix time rates as nearly as possible equivalent to the average rate of earnings of those workers, and the rates so fixed shall be deemed to be the ordinary rates of pay of those workers for the purposes of this section.

(3) The Provincial Government may prescribe the registers that shall be

#### LEG. REF.

<sup>1</sup> Substituted by Act VI of 1946.

<sup>2</sup> Substituted for old sub-secs. (1) and (2) by Act VI of 1946.

maintained in a factory for the purpose of securing compliance with the provisions of this section.

48. No adult worker shall be allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed.

49. The Provincial Government may make rules providing that in any specified class or classes of factories work shall not be carried on by a system of shifts so arranged that more than one relay of workers is engaged in work of the same kind at the same time, save with the permission of the Provincial Government and subject to such conditions as it may impose, either generally or in the case of any particular factory.

#### <sup>1</sup>[CHAPTER IV-A.

##### HOLIDAYS WITH PAY.

49-A. (1) The provisions of this Chapter shall not apply to a seasonal factory.

(2) The provisions of this Chapter shall not operate to the prejudice of any rights to which a worker may be entitled under any other enactment, or under the terms of any award, agreement or contract of service.

49-B. (1) Every worker who has completed a period of twelve months continuous service in a factory shall be allowed, during the subsequent period of twelve months, holidays for a period of ten, or, if a child, fourteen consecutive days, inclusive of the day or days, if any, on which he is entitled to a holiday under sub-section (1) of section 35.

(2) If a worker fails in any one such period of twelve months to take the whole of the holidays allowed to him under sub-section (1), any holidays not taken by him shall be added to the holidays to be allowed to him under sub-section (1) in the succeeding period of twelve months, so however that the total number of days holidays which may be carried forward to a succeeding period shall not exceed ten or, in the case of a child, fourteen.

(3) If a worker entitled to holidays under sub-section (1) is discharged by his employer before he has been allowed the holidays, or if, having applied for and having been refused the holidays, he quits his employment before he has been allowed the holidays, the employer shall pay him the amount payable under section 49-C in respect of the holidays.

*Explanation.*—A worker shall be deemed to have completed a period of twelve months continuous service in a factory notwithstanding any interruption in service during those twelve months brought about by sickness, accident or authorised leave not exceeding ninety days in the aggregate for all three, or by a lock-out, or by a strike which is not an illegal strike, or by intermittent periods of involuntary unemployment not exceeding thirty days in the aggregate; and authorized leave shall be deemed not to include any weekly holiday allowed under section 35 which occurs at the beginning or end of an interruption brought about by the leave.

49-C. Without prejudice to the conditions governing the day or days, if any, on which the worker is entitled to a holiday under sub-section (1) of section 35, the worker shall, for the remaining days of the holidays allowed to him under section 49-B, be paid at a rate equivalent to the daily average of his wages as defined in the Payment of Wages Act, 1936 (IV of 1936), for the days on which he actually worked during the preceding three months, exclusive of any earnings in respect of overtime.

#### LEG. REF.

<sup>1</sup> Chapter VI-A inserted by Act III of 1946.

Payment when to be made.

49-D. A worker who has been allowed holidays under section 49-B shall, before his holidays begin, be paid half the total pay due for the period of holidays.

49-E. Any Inspector may institute proceedings on behalf of any worker to recover any sum required to be paid under this Chapter by an employer which the employer has not paid.

Power of Inspector to act for worker. 49-F. (1) The Provincial Government may make rules to carry into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power rules may be made under this section prescribing the keeping by employers of registers showing such particulars as may be prescribed and requiring such registers to be made available for examination by Inspectors.

(3) The Central Government may give directions to a Province as to the carrying into execution of the provisions of this section.

49-G. Where the Provincial Government is satisfied that the leave rules applicable to workers in a factory provide benefits substantially similar to those for which this Chapter makes provision, it may, by written order, exempt the factory from the provisions of this Chapter.]

Exemption of factories from provisions of this Chapter.

## CHAPTER V.

### SPECIAL PROVISIONS FOR ADOLESCENTS AND CHILDREN.

Prohibition of employment of young children.

50. [Cf. section 62, Eng. Act.] No child who has not completed his twelfth year shall be allowed to work in any factory.

Non-adult workers to carry tokens giving reference to certificates of fitness.

51. [Cf. sections 62 and 63, Eng. Act.] No child who has completed his twelfth year and no adolescent shall be allowed to work in any factory unless—

(a) a certificate of fitness granted to him under section 52 is in the custody of the manager of the factory, and

(b) he carries while he is at work a token giving a reference to such certificate.

52. [Cf. sections 63 to 67, Eng. Act.] (1) A certifying surgeon shall, on the application of any young person who wishes to work in a factory, or of the parent or guardian of such person, or of the manager of the factory in which such person wishes to work, examine such person and ascertain his fitness for such work.

(2) The certifying surgeon, after examination, may grant to such person, in the prescribed form,—

SEC. 52: MADRAS AMENDMENT.—For sub-sec. (1) of sec. 52 of the Factories Act, 1934, the following sub-section shall be substituted namely:—“(1) A certifying surgeon shall on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory”. (Madras Act VI of 1941).

REPORT OF SELECT COMMITTEE.—The G.C.M.—318

changes in sub-cl. (2) and (3) are designed to make it clear that the certificates relate to factory work generally and not to work in a particular factory. Even in the case of a child of fourteen there is need for certificate. 31 Bom.L.R. 544=30 Cr.L.J. 793=1929 Bom. 272. On this section see also 58 Bom. 137=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 Bom. 43. Where children were employed for purposes of sorting groundnuts in a yard close to a room where machinery for decortication of groundnuts was used. Held, that the children were employed in a factory. 50 Mad. 834=28 Cr.L.J. 267=1927 Mad. 345=52 M.L.J. 207.

(a) a certificate of fitness to work in a factory as a child, if he is satisfied that such person has completed his twelfth year, that he has attained the prescribed physical standards (if any), and that he is fit for such work; or

(b) a certificate of fitness to work in a factory as an adult, if he is satisfied that such person has completed his fifteenth year and is fit for a full day's work in a factory.

(3) A certifying surgeon may revoke any certificate granted under sub-section (2) if, in his opinion, the holder of it is no longer fit to work in the capacity stated therein in a factory.

(4) Where a certifying surgeon or a practitioner authorized under sub-section (2) of section 12 refuses to grant a certificate or a certificate of the kind requested, or revokes a certificate, he shall, if so requested by any person who could have applied for the certificate, state his reasons in writing for so doing.

53. [Cf. Ss. 63-67, Eng. Act.] (1) An adolescent who has been granted a certificate of fitness to work in a factory as an adult, under clause (b) of sub-section (2) of section 52, and who, while at work in a factory, carries a token giving reference to the certificate, shall be deemed to be an adult for all the purposes of Chapter IV.

(2) An adolescent who has not been granted a certificate of fitness to work in a factory as an adult, under sub-section (2) of section 52, shall, notwithstanding his age, be deemed to be a child for the purposes of this Act.

54. [Cf. Old S. 23 (b), S. 1 (2) and S. 25 also Ss. 23-30 of the Eng. Act.] (1) No child shall be allowed to work in a factory for more than five hours in any day.

(2) The hours of work of a child shall be so arranged that they shall not spread over more than seven-and-a-half hours in any day.

(3) No child shall be allowed to work in a factory except between 6 A.M. and 7 P.M.:

Provided that the Provincial Government may, by notification in the Official Gazette, in respect of any class or classes of factories and for the whole year or any part of it, vary these limits to any span of thirteen hours between 5 A.M. and 7-30 P.M.

(4) The provisions of section 35 shall apply also to child workers, but no exemption from the provisions of that section may be granted in respect of any child.

(5) No child shall be allowed to work in any factory on any day on which he has already been working in another factory.

55. [Cf. S. 32, Eng. Act.] (1) There shall be displayed and correctly maintained in every factory, in accordance with the provisions of sub-section (2) of section 76, a Notice of Periods for Work for Children, showing clearly the periods within which children may be required to work.

(2) The periods shown in the Notice required by sub-section (1) shall be fixed beforehand in accordance with the method laid down for adults in section 39 and shall be such that children working for those periods would not be working in contravention of section 54.

(3) The provisions of section 40 shall apply also to the Notice of Periods for Work for Children.

(4) The Provincial Government may make rules prescribing forms for the Notice of Periods for Work for Children and the manner in which it shall be maintained.

Register of Child Workers.

56. [Cf. Ss. 39-41 *supra*.] (1) The manager of every factory in which children are employed shall maintain a Register of Child Workers showing—

- (a) the name of each child worker in the factory,
- (b) the nature of his work,
- (c) the group, if any, in which he is included,
- (d) where his group works on shifts, the relay to which he is allotted,
- (e) the number of his certificate of fitness granted under section 52, and
- (f) such other particulars as may be prescribed.

(2) The Provincial Government may make rules prescribing the form of the Register of Child Workers, the manner in which it shall be maintained, and the period for which it shall be preserved.

57. [Cf. S. 32, Eng. Act.] No child shall be allowed to work otherwise than in accordance with the notice of Periods for

Hours of work to correspond with Notice and Register.

Work for Children displayed under sub-section (1) of section 55 and the entries made beforehand against his name in the Register of Child Workers

maintained under sub-section (1) of section 56.

Power to require medical examination.

58. [Cf. S. 8-A of the Old Act.] Where an Inspector is of opinion—

(a) that any person working in a factory without a certificate of fitness is a child or an adolescent, or

(b) that a child or adolescent working in a factory with a certificate is no longer fit to work in the capacity stated therein,

he may serve on the manager of the factory a notice requiring that such person, or that such child or adolescent, as the case may be, shall be examined by a certifying surgeon or by a practitioner authorised under sub-section (2) of section 12, and such person, child or adolescent shall not, if the Inspector so directs, be allowed to work in any factory until he has been so examined and has been granted a certificate of fitness or a fresh certificate of fitness, as the case may be.

Power to make rules.

59. [Cf. S. 126, Eng. Act.] The Provincial Government may make rules—

(a) prescribing the forms of certificates of fitness to be granted under section 52, providing for the grant of duplicates in the event of loss of the original certificates, and fixing the fees which may be charged for such certificates and such duplicates;

(b) prescribing the physical standards to be attained by children and adolescents;

(c) regulating the procedure of certifying surgeons under this Chapter, and specifying other duties which they may be required to perform in connexion with the employment of children and adolescents in factories; and

(d) providing for any other matter which may be expedient in order to give effect to the provisions of this Chapter.

#### <sup>1</sup>CHAPTER V-A.

##### SMALL FACTORIES.

59-A. (1) In this Act, unless there is anything repugnant in the subject or context, "small factory" means any premises includ-

Small factories.

ing the precincts thereof whereon ten or more but

less than twenty workers are working or were working on any day of the preceding six months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Indian Mines Act, 1923:

Provided that the Provincial Government may by notification in the Official Gazette, declare any premises to be a small factory, notwithstanding that less than ten workers are working thereon, if such premises would otherwise be a small factory.

(2) For the purposes of this Chapter an adolescent holding a certificate granted under this Act to work as an adult shall be deemed to be an adult.

59-B. (1) All the provisions of this Act, except clause (j) of section 2, sections 4, 5, 6 and 7, sub-sections (1) and (4) of section 14, sections 15, 21, 22 and 25, sub-sections (1), (2) and (3) of section 33 and Chapter IV shall apply to, and in relation to, all small factories wherein any worker who is not, or is not deemed to be, an adult is employed; and in the provisions hereby made so applicable every reference to a factory shall be deemed to include, so far as may be, a reference to a small factory.

(2) The aforesaid provisions shall cease to apply to a small factory on the expiry of six months from the receipt by the Inspector of a notice in writing from the occupier that he has ceased to employ therein any worker who is not, or is not deemed to be, an adult, unless any such worker is employed therein on any day of the said six months:

Provided that if any such worker is thereafter employed in the small factory, the said provisions of this Act shall again apply thereto.

Certain other provisions of law not barred.

59-C. The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of the Employment of Children Act, 1938.

## CHAPTER VI.

### PENALTIES AND PROCEDURE.

Penalty for contraventions of Act and rules.

60. [Cf. Ss. 135-138, Eng. Act and Ss. 41 to 44-A of the old Act.] If in any factory—

SECS. 60 TO 69.—These embody with the necessary consequential additions, secs. 41 to 44-A of the Old Act. Sec. 43-A which provided for the grant of compensation to injured workers out of fines has been omitted, as adequate provision has been made by Workmen's Compensation Act. (*Objects and Reasons*).

REPORT OF SELECT COMMITTEE.—“We have re-cast in a more succinct form the list of offences contained in the clause. We have also provided both here and in cl. 65 that where the manager and occupier were held jointly responsible for the breach of the law, the combined penalty shall not be in excess of the maximum penalty that might be inflicted on either of them”.

SEC. 60: CONSTRUCTION OF SECTION.—The section is a penal one, it ought to be construed strictly. The occupier and manager both or either of them can be required to pay a fine which may extend to Rs. 200 (now Rs. 500) but between the two they cannot be required to pay any sum exceeding that limit for each offence. (45 Bom. 220 =1921 Bom. 322). See now the change in the present Code explained in the Report of the Select Committee. See also sec. 65 *infra*. Factory Acts should be properly enforced for protection of workmen, but on the other hand one must also bear in mind that the employer's position has to be considered too.

It may be that without any negligence on their part defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence, then it would seem that the matter be clearly brought home to them. 26 Bom. L.R. 1245=26 Cr.L.J. 482=1925 Bom. 143. The Act is a special Act, and the absence of definite evidence to show that a boy of seven or eight years old, was employed or allowed to work in contravention of the provisions of the Act, a conviction under the Act is illegal. 49 I.C. 860=20 Cr.L.J. 236 =17 A.L.J. 223.

LIABILITY OF MANAGER AND OCCUPIER JOINT AND SEVERAL.—The Act provides that both the occupier and manager shall be jointly and severally liable to fine for any of the offences committed under the Act. This joint and several fine imposed on both the occupier and manager is irrespective of the fact as to which of the two had committed the offence. The duty to inform the authority under the Act is laid on the manager. It is therefore primarily the manager who is to be supposed to have contravened this provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention. 31 Cr.L.J. 869 (2)=125 I.C. 380 (2)=1930 Lah. 658. See also 55 Bom. 366=32 Cr.L.J. 1063=33 Bom.L.R. 309.

- (a) there is any contravention—
  - (i) of any of the provisions of sections 13 to 29 inclusive, or
  - (ii) of any order made under any of the said sections, or
  - (iii) of any of the said sections read with rules made in pursuance thereof under clause (a) of section 32, or
  - (iv) of any rule made under any of the said sections or under clause (b), clause (c), or clause (g) of section 32 or section 33, or
  - (v) of any condition imposed under sub-section (3) of section 31, or
- (b) any person is allowed to work in contravention—
  - (i) of any of the provisions of sections 34 to 38 inclusive, 42, 45 and 48,
  - (ii) of any rule made under any of the said sections, or under section 49, or
  - (iii) of any condition attached to any exemption granted under section 43 or section 44 or section 45 or to any permission granted under section 38 or section 49, or

See also Report of Select Committee. The word "occupier" denotes a person who is either a proprietor or otherwise entitled to be in possession of the factory and control its working. He may or may not actually occupy the building and even if he carries on the work through an agent he does not cease to be the occupier. He cannot therefore be any one who is a mere servant charged with specific duties either in regard to the control of the machinery, workmen or office. A *mukaddam* is really a foreman of the operatives and a servant of the factory. He is neither a managing agent nor a person authorised to represent the occupier. He cannot therefore be regarded as an occupier or manager. He cannot be tried jointly with the manager for an offence under sec. 41 (a) of the old Act but can be tried under sec. 42 (1) on the complaint of the manager. 34 Cr.L.J. 821=29 Nag.L.R. 72=1932 Nag. 100. If more than one person is unlawfully employed the manager and agent are liable for as many offences as there are persons so employed. 45 Bom. 220=1921 Bom. 322. The owners and occupiers of a factory cannot relieve themselves of their responsibilities regarding compliance with the requirements of the Factories Act by appointing a manager; they must see that the manager carries out his duties. It is only when the manager has acted in express disobedience of their order and they have done their best to see that the provisions of the Act are complied with, that they can themselves escape liability. Sec. 60 makes it clear that both the manager and occupier are liable. A manager is not a 'managing agent' within the meaning of that expression as used in the proviso to the definition of 'occupier' and hence cannot be deemed to be the occupier of the factory. The fact that the "occupiers" were ignorant persons who trusted to the knowledge and good sense of their manager may be a ground for awarding a smaller punishment but not for acquitting them. 55 L.W. 253=A.I.R. 1942 Mad. 347 (1)=(1942) 1 M.L.J. 104. See also 44 Bom.L.R. 810=1943 Bom. 5 (Breach of Rule 37—Offence).

OMITTING TO FENCE ENGINE WITHIN PREMISES.—The manager of the concern is liable

to be prosecuted for not properly fencing the engine found in the premises. 31 Cr.L.J. 1094=33 Bom.L.R. 329=1930 Bom. 162.

PRACTICE AND PROCEDURE.—Where the manager is prosecuted under sec. 60 (b) (i) read with sec. 42 for allowing work to be done beyond the prescribed period, it is no defence to plead that the accused acted in good faith honestly believing in the clock in the factory to be correct and that he is protected by sec. 81. It is enough in a prosecution under the Act to prove that the accused has infringed the Act or rules under the Act and it is not necessary to show that accused intended to infringe the Act or the rules. 1938 N.L.J. 217=A.I.R. 1938 Nag. 406. See also I.L.R. (1940) Nag. 257. It is not necessary that an order or notice from the Inspector of Factories should be issued to a person, who has not conformed to the rules made under the Act, before he can be charged for any offence under it. It is the duty of such person to obey the rules, and in case of his disobedience, he becomes liable to conviction whether there was any order or not from the Inspector, calling upon him to obey the rules. 12 Bom.L.R. 225. See also L.B.R. (1893-1900) 407. Management acting in good faith—Launching of prosecution as test case—Propriety of. Where the authorities themselves are doubtful about the applicability of certain provisions of the Act, but the management act reasonably and shows a genuine desire to meet any complaint and to rectify irregularities, and there is no absence of good faith, the launching of a test case in respect of trivial and technical infringements of the provisions of the Act is uncalled for. 152 I.C. 566=38 C.W.N. 1008=1934 Cal. 730. Penalties in cases against factory owners who are exploiting labour must be deterrent, especially in view of the fact that detection is frequently avoided. 19 N.L.J. 247.

SECS. 60 (b) AND 81.—Where acting on the assurance of the authorities concerned a factory doing urgent military orders works overtime fully believing that the necessary exemption would be given, the manager and occupier of the factory cannot be convicted of an offence under sec. 60 (b) (i) of the Fac-



(c) there is any contravention of any of the provisions of sections 39 to 41 inclusive or of any rule made under section 39, section 41 or section 47, or of any condition attached to any exemption granted under section 41 or to any modification or relaxation made under section 44, or

(d) any person is not paid any extra pay to which he is entitled under the provisions of section 47, or

(e) any adolescent or child is allowed to work in contravention of any of the provisions of sections 50, 51, 54, 57 and 58 or

(f) there is any contravention of section 55 or section 56 or of any rules made under either of these sections, or under clause (d) of section 59, the manager and occupier of the factory shall each be punishable with fine which may extend to five hundred rupees:

Provided that if both the manager and the occupier are convicted, the aggregate of the fines inflicted in respect of the same contravention shall not exceed this amount,<sup>1</sup>[or

(g) there is any contravention of section 49-B, 49-C or 49-D, or of any rule made under section 49-F.]

61. [Cf. S. 45 of the old Act and S. 143, Eng. Act.] If any person who has been convicted of any offence punishable under

Enhanced penalty in certain cases after previous conviction.

clauses (b) to [(g)]<sup>2</sup> inclusive of section 60 is again guilty of an offence involving a contravention of the same provision, he shall be punishable on the second conviction with fine which may extend to seven hundred and fifty rupees and shall not be less than one hundred rupees, and if he is again so guilty, shall be punishable on the third or any subsequent conviction with fine which may extend to one thousand rupees and shall not be less than two hundred and fifty rupees:

Provided that for the purposes of this section no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

#### LEG. REF.

<sup>1</sup> The word "or" at the end of cl. (f) and new cl. (g) added by Act III of 1945.

<sup>2</sup> Substituted by Act III of 1945.

tories Act. The case is covered by sec. 81, as there was no deliberate breach of the rules. 1943 Oudh 308=1943 O.W.N. 171.

SECS. 60 (c) AND 71.—Where in a factory there was a delay of a few minutes in posting the attendance register though the occupier had appointed a well-paid and efficient manager and there was no deliberate breach of the rule it was held there could be no conviction under sec. 60 (c) and that the occupier was entitled to the benefit of sec. 71. 10 Luck. 251; 1943 Oudh 311=1943 O.W.N. 174.

SECS. 60 (c), 63 AND 41 AND R. 71.—There is nothing in sec. 41 (2) as to the availability of the register of adult workers for inspection. Failure to produce the register on demand would be a breach of secs. 11 and 63 but it would not be a breach of any rule made under sec. 41 (2) since the availability of the register cannot possibly be brought within the words "the manner in which it shall be maintained" occurring in sec. 41 (2). The words in R. 71 "the register shall always be kept available during working hours for immediate inspection" are thus not *ultra vires*

of the Act but these words are *ultra vires* of any rule made under sec. 41. Consequently the owner and occupier of the factory who was not present himself and from whom no demand for the production of the register was made cannot be made liable under sec. 60 (c) of the Act which relates to secs. 39, 40, 41, 44 & 447 only. The breach in question is one punishable under sec. 63 of the Act which deals with wilful obstruction of an Inspector or failure to produce on demand any register in the custody of the person from whom the demand for inspection is made. The correct person to prosecute is not the owner but the person from whom the demand is made. 1942 N.L.J. 518=1943 Nag. 79=I.L.R. (1943) Nag. 38.

SEC. 61: STATEMENT OF OBJECTS AND REASONS.—This follows a recommendation of the Labour Commission and is designed to secure in suitable cases adequate penalties in the case of repeated offences.

REPORT OF SELECT COMMITTEE.—We have provided for a gradual increase of the penalty in the case of repeated offences, and we have limited the operation of the whole clause to offences relating to the provisions of Chapters IV and V, and it is only in respect of such offences that the need of such a provision has been felt.

Provided further that the Court, if it is satisfied that there are exceptional circumstances warranting such a course, may, after recording its reasons in writing, impose a smaller fine than is required by this section.

Penalty for failure to give notice of commencement of work or of change of manager. 62. An occupier of factory who fails to give any notice required by sub-section (1) or sub-section (2) of section 9 shall be punishable with fine which may extend to five hundred rupees.

63. [Cf. S. 43, Old Act.] Whoever wilfully obstructs an Inspector in the exercise of any power under section 11, or fails to produce on demand by an Inspector any registers or other documents in his custody kept in pursuance of

Penalty for obstructing Inspector. this Act or of any of the rules made thereunder, or conceals or prevents any worker in a factory from appearing before or being examined by an Inspector, shall be punishable with fine which may extend to five hundred rupees.

64. [Cf. S. 41 (j), Old Act.] A manager of a factory who fails to give notice of an accident as required under section 30 shall be punishable with fine which may extend to five hundred rupees.

Penalty for failure to give notice of accidents. 65. [Cf. S. 41, Old Act.] If in respect of any factory any return is not furnished as required under section 77, the manager and the occupier of the factory shall each be liable to fine which may extend to five hundred rupees:

Penalty for failure to make returns. Provided that if both the manager and the occupier are convicted, the aggregate of the fines inflicted shall not exceed this amount.

66. [Cf. S. 43, Old Act.] Whoever smokes, or uses a naked light or causes or permits any such light to be used in the vicinity of any inflammable material in a factory shall be punishable with fine which may extend to five hundred rupees.

Penalty for smoking or using naked light in vicinity of inflammable material.

*Exception.*—This provision does not extend to the use, in accordance with such precautions as may be prescribed, of a naked light in the course of a manufacturing process.

67. [Cf. S. 139, Eng. Act and S. 44, Old Act.] Whoever knowingly uses or attempts to use, as a certificate granted to himself under section 52, a certificate granted to another person under that section, or who, having procured such a certificate, knowingly allows it to be used, or an attempt to use it to be made

SEC. 63.—No sore of vicarious responsibility is recognized by this Act in respect of offences referred to in this section. Where the Assistant Manager failed to produce register on demand by the Inspector, alleging that the same was with the Manager who had left the office, the Manager cannot be convicted under this section even if he was really hiding himself in the factory in order to avoid meeting the Inspector. 41 C. W. N. 740.

SEC. 64.—See 1930 L. 658; L.B.R. (1893-1900) 407 cited under sec. 70 *infra*.

SEC. 65: LIABILITY OF OCCUPIER AND MANAGER.—Liability of the occupier and manager of a factory to be sentenced for an offence under sec. 41 is joint and several. Where, therefore, both are tried jointly for an offence under the section they cannot each be sentenced to the maximum penalty provided by the section but their joint liability to pay fine should not exceed the maximum. 21 Cr.L.J. 728=58 I.C. 152=45 B. 220=22

Bom.L.R. 904. See also 10 Bom.L.R. 38=7 Cr.L.J. 44. See also notes under sec. 60 *supra*.

CASE-LAW UNDER THE OLD ACT.—Separate sentences of fine on the occupier and manager in one trial under sec. 41 of the Act are illegal. An occupier is the controller for the time being of factory and may be either an owner of a lessee or a mortgagee with possession. The manager merely carries out the occupier's orders to work the factory. If there is no manager, the occupier himself is deemed to be the manager. 13 P.R. (Cr.) 1918=45 I.C. 159=19 Cr.L.J. 495. The manager of a mill who employs a number of workmen to work in his mill after 7 p.m., is liable to be convicted and sentenced separately in respect of each such workman under the provisions of sec. 41 (a) read with sec. 29 (i) of the Factories Act. 53 I.C. 935=20 Cr. L.J. 837=21 Bom.L.R. 1059. See also 44 B. 88. On this section, see also 45 B. 220=1921 B. 322 cited under sec. 60 *supra*.

by another person, shall be punishable with fine which may extend to twenty rupees.

68. [Cf. S. 148, Eng. Act.] If a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him, or obtaining any direct benefit from his wages, shall be punishable with fine which may extend to twenty rupees, unless it appears to the Court that the child so worked without the consent, connivance or wilful default of such parent, guardian or person.

69. [Cf. S. 41 (1), Old Act.] A manager of a factory who fails to display the notice required under sub-section (1) of section 76 or by any rule made under this Act, or to display or maintain any such notice as required by sub-section (2) of that section, shall be punishable with fine which may extend to five hundred rupees.

70. [Cf. Ss. 140 and 141, Eng. Act.] (1) Where the occupier of a factory is a firm or other association of individuals, any one of the individual partners or members thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory

is punishable:

Provided that the firm or association may give notice to the Inspector that it has nominated one of its number who is resident in British India to be the occupier of the factory for the purposes of this Chapter, and such individual shall so long as he is so resident be deemed to be the occupier for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a partner or member of the firm or association.

SEC. 70: WHO IS OCCUPIER—LIABILITY OF OCCUPIER—OLD CASES.—The term "occupier" generally means a person who controls the factory or workshop and the work that is done there, and includes the owner of the factory. 15 Bom.L.R. 328=20 I.C. 144=14 Cr.L.J. 384. The word "occupier" denotes a person who is either a proprietor or otherwise entitled to be in possession of the factory and control its working. He may or may not actually occupy the building and even if he carries on the work through an agent he does not cease to be the occupier. He cannot therefore be any one who is a mere servant charged with specific duties either in regard to the control of the machinery, workmen, or office. A *mukaddam* is really a foreman of the operatives and a servant of the factory. He is neither a managing agent nor a person authorised to represent the occupier. He cannot therefore be regarded as an occupier or manager. He cannot be tried jointly with the manager for an offence under sec. 41 (a) of the Old Act but cannot be tried under sec. 42 (i) on the complaint of the manager. 144 I.C. 693=34 Cr.L.J. 821=1933 N. 100. The word "occupier" in general means a person who occupies the factory either by himself or his agent. He may be an owner, he may be a lessee or even a mere licensee but he must have the right to occupy the property and dictate how it is to be managed. 55 B. 366=32 Cr.L.J. 1063 (i)=33 Bom.L.R. 309=1931 B. 308. Even if the accused, who is the owner of a factory shows that he knows

nothing about the management of the factory and that he has left the whole conduct of its affairs to a manager appointed by him for the purpose, he is not free from the liability imposed on him by sec. 41 (a) of the Old Act. (*Ibid.*) Several persons may at the same time be occupiers of premises within the meaning of the Act for different purposes. *Wearings v. Kirk*, (1904) 1 K.B. 213 (C. A.). *Per Mathew, L.J.*, at p. 217. The proprietor of a factory who lives for the greater part of the year in a house on the factory premises is an occupier for the purposes of the Act. Rat. 901. But see 29 B. 423; 7 Bom. L.R. 454 (*contra*). The provisions of Factories Act throw upon the occupier the responsibility of keeping the register. The responsibility is personal; and he cannot get rid of it by saying that he had delegated the duty to another person. 11 Bom.L.R. 12=9 Cr. L.J. 160=1 I.C. 102. The mere fact that a Municipality and the Factory were jointly responsible to keep a factory in a cleanly state will not discharge the occupier from his liability under Factories Act. The provisions of old sec. 17 is of a highly penal character and must be construed strictly in favour of the accused. 25 C. 454. Though the duty to inform the authority about accident is laid on the manager by sec. 34 (Old Act), the occupier and manager are made jointly and severally responsible for the contravention under this clause. 1930 L. 658. See also L.B.R. (1893-1900) 407.

(2) Where the occupier of a factory is a company, any one of the directors thereof, or, in the case of a private company, any one of the shareholders thereof, may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable:

Provided that the company may give notice to the Inspector that it has nominated a director, or, in the case of a private company, a shareholder, who is resident in either case in British India, to be the occupier of the factory for the purposes of this Chapter, and such director or shareholder shall so long as he is so resident be deemed to be the occupier of the factory for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director or shareholder.

71. [Cf. Ss. 140 and 141, Eng. Act and S. 42 Old Act.] (1) Where the occupier or manager of a factory is charged with an

Exemption of occupier or manager from liability in certain cases.

offence against this Act, he shall be entitled upon complaint duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory proves to the satisfaction of the Court—

SEC. 71: SCOPE.—See 19 Luck. 251. By this section “a *prima facie* liability is imposed upon the occupier or manager or dominus from which, however, he can extricate himself; otherwise he remains liable. The scheme of the Act is first to find the *de facto* employer: An information may be laid against the occupier. His way of escape is provided for by this section. He may set up a defence not unlike the defence of warranty which the seller of food may set up under the English sale of Food and Drugs Act. He may show that the offence was not committed by his fault. To do this he must bring the real offender before the Court.” *Ward v. Smith*, (1913) 3 K.B. 154. (Phillimore, J.). See also 45 I.C. 159=13 P.R. 1918 (Cr.)=19 Cr.L.J. 495. This section provides a remedy for an occupier or manager who is the victim of some other person's neglect; but he must take a certain step to assure the culprit's conviction and not merely attempt to exculpate himself.

PRACTICE AND PROCEDURE.—The structure of sec. 42 of the old Factories Act (1911) indicates that one proceeding is split up into two proceedings; and while the manager or occupier is accused of having committed an offence under the Act, he is also a complainant on his complaint against the other person or persons he has brought in. In the proceedings in which the manager or the occupier is the complainant he is liable to be cross-examined by the other person or persons who has or have been brought before the Court on his complaint. This must mean that the manager or occupier *qua* complainant must give evidence himself. There is no substance in the objection that the manager or occupier who initially is charged with an offence against the Act cannot go into the witness and give evidence himself, because he goes into the witness-box as an accused in the case originally started against him, but in his own right as a complainant on his complaint against the other person or persons whom he

has brought in. It is not a material irregularity to dispose of the two matters by one judgment or to record the evidence in the two matters together. 30 Cr.L.J. 818=56 C. 400=32 C.W.N. 922=1928 C. 557. When the manager or occupier of a factory is charged with an offence, he is entitled to make a complaint against those whom he considers the offenders and to have such persons brought before the Court at the time appointed to hear the charge brought against them. The effect is to split up one criminal proceeding into two; one carried on by the Inspector of Factories and another by the manager or the occupier. The manager or occupier in his capacity as the complainant is entitled to testify against the persons charged by him and is also liable to be cross-examined. But the carriage of proceedings remains with the original complainant, *vis.*, the Inspector of Factories, on whom lies the onus of proving that the offence has been committed. In this proceeding both parties complained against *vis.*, the manager or the occupier and the third party brought into Court at their instance, are entitled to cross-examine the prosecution witnesses and to lead evidence to disprove the charge. But in as much as they are the accused persons they would not be entitled to enter the witness-box. If the commission of the offence itself is not proved both parties complained against must be acquitted. The law holds the manager and the occupier primarily responsible for enforcing the execution of the Factories Act and they cannot escape their liability to prove due diligence or commission of the offence without their knowledge, consent or connivance and without adducing affirmative proof in that behalf. They cannot, therefore, be deemed to have exculpated themselves only because the actual offender admits that he has committed the offence. 1943 N.L.J. 399=1943 Nag. 243=I.L.R. (1943) Nag. 362. Where a complaint is lodged by an accused under sec. 71 of the Act, the Factory Inspector, as com-

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance, that other person shall be convicted of the offence and shall be liable to the like fine as if he were the occupier or manager, and the occupier or manager shall be discharged from any liability under this Act.

(2) When it is made to appear to the satisfaction of the Inspector at any time prior to the institution of the proceedings—

(a) that the occupier or manager of the factory has used all due diligence to enforce the execution of this Act, and

(b) by what person the offence has been committed, and

(c) that it has been committed without the knowledge, consent or connivance of the occupier or manager, and in contravention of his orders,

plainant in the original complaint, can cross-examine the accused when he goes into the witness-box to prove his own complaint. The effect of sec. 71 is that when an occupier or manager is charged and the Inspector proves that an offence has been committed, a special statutory defence open to the occupier or manager, which such statutory defence involves his lodging complaint against a third party which complaint has to be heard at the same time as the original complaint. The two complaints are both in connection with the same offence and must be dealt with together. In the interests of Justice the Factory Inspector should have the right to cross-examine a person whom he has charged if that person chooses to go into the witness-box to set up a statutory defence. I.L.R. (1940) Bom. 420 = 42 Bom.L.R. 482 = A.I.R. 1940 Bom. 265. But see also 43 C.W.N. 1223. Under sec. 71 the person who claims the exemption from liability on the ground that he used due diligence and that another person than himself was responsible for the offence, has the onus on him to show that he comes within the provisions of the section. 1938 P.W.N. 903 = 40 Cr.L.J. 160 = A.I.R. 1939 Pat. 163. When the occupier or manager who is charged, with an offence, makes a complaint under sec. 71, against those whom he considers the offenders his examination under sec. 200, Cr.P.Code, like any other complaint will not be illegal even though the Magistrate has already taken cognisance of the offence on the complaint of the Inspector of Factories. Such an examination would serve to prevent the occupier and the manager from abusing the right of cross-examination when the charge is heard. 1943 Nag. 243 = I.L.R. (1943) Nag. 362.

**PROCEDURE—DISCHARGE OF OWNER OR OCCUPIER AND CONVICTION OF ACTUAL OFFENDER ON LATTER PLEADING GUILTY—LEGALITY.**—If a complaint is made by the Inspector of Factories against the manager or occupier of a factory charging him with an offence under the Factories Act, the latter is entitled under sec. 71 of that Act to complain against the actual offender, and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against. The carriage of proceedings is with the original complainant on whom the onus lies of proving

that the offence has been committed. Both parties complained against are entitled to cross-examine the prosecution witnesses at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves. If the prosecution fails to prove the offence, both the accused must be acquitted. If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under the Act. Sec. 71, however, affords him an opportunity of escaping liability, provided he can give satisfactory proof of the matters set out in Cls. (a) and (b) of sec. 71 (1), *vis.*, that he had used due diligence and that the actual offender had committed the offence without his knowledge. The onus of proof, however, is now shifted to the manager or occupier and he is entitled to call evidence or to give evidence himself. The actual offender would be entitled to call evidence, but not give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the occupier or manager at this stage, besides being an accused, has to discharge the onus of positive proof required by sec. 71 (1) (a) and (b), and in all probability he alone is capable of proving certain facts of which proof is thereby required. The Crown which has initiated the proceedings, and has throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge and to call rebutting evidence. The Magistrate has no power to convict the actual offender or discharge the occupier or manager until the proof envisaged by sec. 71 (1) (a) and (b) is before him, although the former pleads guilty to the charge against him. I.L.R. (1940) 1 Cal. 120 = 43 C.W.N. 1223 = 1939 C. 724. Where in a factory there was a delay of a few minutes in posting the attendance register though the occupier had appointed a well paid and efficient manager and there was no deliberate breach of the rule it was held there could be no conviction under sec. 60 (e) and that the occupier was entitled to the benefit of sec. 71, 1943 O.W.N. 174 = A.I.R. 1943 Oudh 311.

the Inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the occupier or manager of the factory, and such person shall be liable to the like fine as if he were the occupier or manager.

72. [Cf. S. 46, Old Act.] If a child over the age of six years is found inside any part of a factory in which children are working, he shall, until the contrary is proved, be deemed to be working in the factory.

Presumption as to employment.

73. [Cf. S. 147, Eng. Act and S. 47, Old Act.] (1) When an act or omission would, if a person were under or over a certain age, be an offence punishable under this Act, and such person is in the opinion of the Court apparently under or over such age, the burden shall be on the accused to prove that such person is not under or over such age.

(2) A declaration in writing by a certifying surgeon relating to a worker that he has personally examined him and believes him to be under or over the age set forth in such declaration shall, for the purposes of this Act, be admissible as evidence of the age of that worker.

74. [Cf. S. 48, Old Act.] (1) No prosecution under this Act, except a prosecution under section 66, shall be instituted except by or with the previous sanction of the Inspector.

Cognizance of offences.

(2) No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class shall try any offence against this Act or any rule or order made thereunder other than an offence under section 66 or section 67.

75. [Cf. S. 146, Eng. Act and section 49, Old Act.] No Court shall take cognizance of any offence under this Act or any rule or order thereunder, other than an offence under section 62 or section 64, unless, complaint thereof is made within six months of the date on which the offence is alleged to have been committed:

Limitation of prosecutions.

Provided that when the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within twelve months of the date on which the offence is alleged to have been committed.

## CHAPTER VII.

### SUPPLEMENTAL.

76. [Cf. S. 128, Eng. Act and section 36, cl. (1), Old Act.] (1) In addition to the notices required to be displayed in any factory by this Act or the rules made thereunder, there shall be displayed in every factory a notice containing such abstracts of this Act and of the rules made thereunder in English and in the vernacular of the majority of the workers, as the Provincial Government may prescribe.

Display of factory notices.

(2) All notices required to be displayed in a factory shall be displayed at some conspicuous place at or near the main entrance to the factory, and shall be maintained in a clean and legible condition.

77. [Cf. S. 37, Old Act.] The <sup>1</sup>[Provincial Government] may make rules

#### LEG. REF.

<sup>1</sup> Substituted for 'Governor-General in Council' by A.O., 1937.

I.L.R. 1943 Nag. 362=1943 Nag. 243=1943 N.L.J. 399.

SEC. 76.—It is no offence, where an employer is being prosecuted for supplying incorrect particulars to show that the workmen could easily have ascertained their falsity. (*Nussey v. Britwistle*, (1894) 58 J.P. 735).

SEC. 75: RULE OF LIMITATION.—IF PEREMPTORY.—The rule of limitation laid down in sec. 75 is peremptory and cannot be circumvented by any considerations imported from the provisions of the Limitation Act.

SEC. 77.—The rules framed under the Factories Act do not require that a place,

Power of Provincial Government to make rules.

requiring occupiers or managers of factories to submit such returns, occasional or periodical, as may in his opinion be required for the purposes of this Act.

Control of rules made by Local Governments.

78. 1[\* \* \* \* \*]

79. [Cf. Ss. 39 and 40, Old Act.] (1) All rules made under this Act shall be subject to the condition of previous publication, and the date to be specified under clause (3) of section 23 of the General Clauses Act, 1897, shall not be less than three months from the date on which the draft of the proposed rules was published.

(2) All such rules shall be published in 2[\* \* \* \* \*] the Official Gazette 2[\* \* \* \* \*] and shall, unless some later date is appointed, come into force on the date of such publication.

Application to Crown factories.

80. [Cf. S. 150, Eng. Act.] This Act shall apply to factories belonging to the Crown.

Protection to persons acting under this Act.

81. [Cf. S. 58, Old Act.] No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Repeal and savings.

82. [Repealed by Act XX of 1937.]

SCHEDULE—(Repealed by Act XX of 1937.)

## THE FACTORIES (MADRAS AMENDMENT) ACT (VI OF 1941).

N.B.—See the same cited under Sec. 52, Factories Act (XXV of 1934), *supra*.

## THE FATAL ACCIDENTS ACT (XIII OF 1855).

Year.	No.	Short title.	Amendment.
1855	XIII	The Indian Fatal Accidents Act, 1855.	Repealed in part IX of 1871; X of 1914.

Short title given, Act XIV of 1897.

Rep. in pt., Act IX of 1871.

Ss. 1, 4 rep. in. pt., Act X of 1914.

Declared in force—

Throughout B. I., except as regards the Scheduled Districts, Act XV of 1874, S. 3; in the Santal Parganas, Reg. III of 1872, S. 3 as amended by Reg. III of 1899, S. 3; in the Angul District, Reg. III of 1913, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

### LEG. REF.

<sup>1</sup> Sec. 78 omitted by A.O., 1937.

<sup>2</sup> Words 'the Gazette of India' and 'as the case may be' omitted by A.O., 1937.

like a pit containing hot water, for silting wood in a rice factory, which is used for the purposes of the factory, should be fenced in such manner as to be completely unapproachable. It is sufficient if it is fenced in such a way that nobody would cross that way and fall into the pit by accident. Where the pit, which contained hot water and into which an employee in the factory fell and was fatally scalded was fenced on three sides but the fourth side was left open for approach and

did not ordinarily contain very hot or other injurious substance. *Held*, that the manager was not liable to be convicted for not observing Rule 72 (1) of the Rules framed under the Factories Act and for failing to fence the pit, because, firstly, the pit was fenced and secondly, it was not a pit which ordinarily contained any hot or injurious substance. A.I.R. 1939 Pat. 46=20 Pat.L.T. 95=1939 P.W.N. 133.

Sec. 81.—This section does not apply to a manager; it was inserted, primarily, if not entirely for the benefit of the inspecting staff. It cannot be said that the manager is acting under the Act. 1938 N.L.J. 217=1938 Nag. 406.



THE FATAL ACCIDENTS ACT (XIII OF 1855).<sup>1</sup>

[27th March, 1855.

*An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.*

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default may have caused the death of another person, and it is often times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; It is enacted as follows:—

1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such

Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong. as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

## LEG. REF.

<sup>1</sup>Short title, "The Indian Fatal Accidents Act, 1855. See the Indian Short Titles Act (XIV of 1897).

Based on the Fatal Accidents Act, 1846 (9 & 10 Vict., c. 93).

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

Sec. 1.—To establish civil liability under the Act against any person, it must be proved either that he actually committed the wrongful act himself, or at least, that he actively aided or abetted its commission and so took part directly in causing it. 16 I.C. 491=117 P.R. 1912. It is not enough that he knew that the Act was likely to be committed or that it was committed in the prosecution of a common object. (Ibid.) Under Act XIII of 1855, in order that damages may be claimed, it is sufficient if a person by his wrongful act, neglect or default shall have caused the death of another person. These words do not mean that death must be the direct result of the injury caused. Damages may be claimed where the death was due to the injury caused by the striking having become septic. 144 I.C. 820=34 P.L.R. 656=1933 L. 770. Where a death is caused by wrongful act, the right of heirs of deceased to sue for damages is governed by the principle of the Act even where the Act is not in force. 64 I.C. 311. If a person who has obtained a decree under the Fatal Accidents Act dies after decree, his legal representatives are entitled to the benefit of the decree. 103 I.C. 297. The word "representative" in the Act has not the same meaning as "legal representative" under the Civil Procedure Code. It does not mean only executor or administrator, but includes all or any of the persons for whose benefit a

suit can be brought under the Act. 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410.

Basis of Compensation.—No very definite rule has been laid down as to how many years' income should be allowed as compensation to the heirs of the deceased in a suit under the Act. Every thing is to be taken into account, possibility of the earner's death, his age and earning capacity for calculating the amount of damages. 101 I.C. 642=1927 L. 417. See also 59 M. 402=1936 M. 247=70 M.L.J. 115. In assessing the damages in respect of a fatal accident many factors have to be considered in arriving at the amount which the claimant or dependent of the deceased is entitled to in respect of his or her future maintenance (e.g.) the possibility of his or her early death, of the deceased dying from other causes and of the deceased losing the employment on which he was engaged and being unemployed. The defendant is not entitled to a sum calculated on a number of years from the moment of her loss. Allowance must also be made for the fact that the defendant is receiving a lump sum. 1938 Mad. 117=1937 M.W.N. 921=46 L. W. 452. Assessment of damages under the Fatal Accidents Act must necessarily be rough and approximate, but it should not be arbitrary or whimsical. It should not be made merely with reference to the plaintiff's requirements, but where the evidence establishes that the plaintiff's requirements were being fairly met by the deceased on whom they were dependent, the Court would be justified in assessing the damages on that basis. (1939) 1 M.L.J. 143=1938 M.W.N. 1241=48 L.W. 865=1939 Mad. 261. Where a person is killed on account of the negligent driving of the car, and the relatives of the deceased sue for damages under the Fatal Accidents Act, the damages must be fixed solely with reference to the pecuniary loss sustained by the relatives of the deceased in respect of

past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. The plaintiffs must adduce evidence affording a reasonable basis for the ascertainment of the pecuniary loss so inflicted. If no such evidence is adduced and there is no proof of pecuniary loss, no compensation can be awarded. 59 M. 402=42 L.W. 327=1936 M. 247=70 M.L.J. 155. In a suit by the heirs of a person dying as a result of motor accident, for damages under the Fatal Accidents Act, although the deceased is proved to have been guilty of negligence, the claim will succeed, if the effect of the deceased's negligence could have been avoided by the exercise of reasonable care on the part of the driver of the vehicle. 163 I.C. 957=1936 R. 295. In cases arising under Fatal Accidents Act, actuarial tables of Insurance Company afford a good basis for calculation of "normal expectation of life" of the deceased. 162 I.C. 336=1936 L. 362. Reasonable sum and not actual loss is to be awarded. Length of life and value to the plaintiffs determine the amount of compensation. 96 I.C. 403=1926 N. 271. See also 59 M. 402=43 L.W. 327=1936 M. 247=70 M.L.J. 155. Value of life depends on the earning capacity of the deceased. 96 I.C. 681=1926 A. 703 (1922 C. 317, Foll.). The principle on which compensation under the Act will be awarded is the same as that under Lord Campbell's Act in England. It is compensation for the loss of the actual pecuniary benefit which the beneficiaries might reasonably have expected to enjoy, had the man not been killed. [38 T.L.R. 899 and (1922) 1 K.B. 329, Rel. on] 29 Bom.L.R. 402=102 I.C. 400=1927 B. 357. Where the sole source of income of the deceased was cultivation by personal labour, the probable duration of the capacity of the deceased to supply labour for cultivation must be taken into consideration while assessing damages for his death. 1927 A. 684, following 42 L.J. Ex. 153. In a suit for damages, any fine realised from the defendant and paid to the plaintiff in the criminal case against the defendant should be taken into consideration. 1927 A. 684. In a suit for damages under the Act no sentimental considerations are relevant. The plaintiff cannot get higher damages because the deceased was brutally murdered by the defendant than if the death had been due merely to an error of judgment. 1927 A. 684. See also 4 M.L.T. 238. In assessing damages under the Act, one cannot take into consideration the mental suffering of the survivors. The fact therefore that the widow of the deceased, being a Brahmin, cannot re-marry; cannot have children and is thus left at the early age of 16 years a widow for the rest of her life is for this purpose an irrelevant consideration. 1937 Nag. 354=I.L.R. (1938) Nag. 54. Appellate Court should not set aside award of lower Court unless it is capricious or unreasonable. See 96 I.C. 273=1926 A. 702.

High Court would not interfere if the amount awarded is sufficient protection or reasonable compensation. 96 I.C. 681=1926 A. 703. Whilst the erection of a wall upon land is an ordinary user of the land, nevertheless it is an uncommon occurrence for a wall to fall, and when it does fall an explanation should be forthcoming from those who are responsible for its repair. Where the owner of the wall fails to carry out the necessary repairs which are required, allowing it to get into a serious defective condition, he fails to use ordinary care and skill, and is guilty of a breach of duty and neglect. If as a result the wall falls and causes death to persons using a public latrine built against the wall and adjoining it, the owner of the wall is liable in damages to the wife, husband or children of the persons killed. 1937 M.W.N. 921=46 L.W. 452=I.L.R. (1938) Mad. 233=1938 M. 117. Liability for damages under—Motor car—Accident causing death—Mortgagee without possession of car not liable he not being its "owner". 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410.

**Funeral Expenses.**—Funeral expenses and expenses alleged to have been incurred in the Police Court cannot be recovered in an action under the Act. 61 C. 480=38 C.W.N. 520=1934 C. 655.

**Who can Institute Suit.**—"Representative" meaning of. See 28 M. 479=15 M.L.J. 363. The word "representative" in the Act has a special meaning of its own. It has not the same meaning as "legal representative" in the C.P.Code. It means and includes all or any of the persons for whose benefit a suit under the Act could be maintained. It is not a surplusage in the case of Europeans and Eurasians and where there is no executor or administrator, the wife and children are entitled to maintain the action. 38 C.W.N. 520=61 C. 480=1934 C. 655. Court has power to divide damage claimed and award between some only of the parties for whose benefit the claim is made. 1922 C. 317. Compensation for death caused by railway accident—Discretionary with Court in apportioning among relatives—Circumstances to be taken into consideration—"Child"—Meaning. 22 I.C. 846=52 P.R. 1914. For purposes of awarding compensation under this section a son adopted after the death of the deceased is not a 'child' within the meaning of the section. (Ibid.) A co-parcener of the deceased man is not entitled to compensation under the Act. Compensation should be awarded looking to the members of the family of the deceased. 105 P. R. 1915=32 I.C. 18. See also 70 M.L.J. 155. In a claim for damages under the Act the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a jury and damages assessed as the probable pecuniary loss thereby occasioned. 69 I.C. 854. Landlord and tenant—Dwelling house in a bad state of repair—Licence to the privies

1[\* \* \*] Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased;

and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

2. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint 2[\* \* \* \* \*]:

Not more than one suit to be brought.

#### LEG. REF.

1The words "And it is enacted further that" were repealed by Act X of 1914, Sch. II.

2The words "and that every such action shall be brought within twelve calendar months after the death of such deceased person" were repealed by the Limitation Act (IX of 1871). For limitation, see now the Indian Limitation Act (IX of 1908).

—Privy portion collapsing—Tenant killed —Right of heirs to sue for damages. 29 Bom.L.R. 78. The fact that the deceased in some way provoked the quarrel as a result of which he died, is immaterial so far as regards the claim for damages under the Act is concerned. (Ibid.) The test of injury under this section, is not the legal liability alone, but the reasonable expectation of pecuniary advantage by the deceased's remaining alive. 112 P.R. 1913=20 I.C. 425. The reasonableness of the expectation is largely founded upon a record of pecuniary benefit received in the past and there must be something more than a mere speculation in the future. (Ibid.) (16 B. 254, Expl.). See also 1 A. 60. Nothing can be allowed to the survivors as compensation for mental suffering. See 4 M.L.T. 238 and cases referred to therein. 1927 A. 684. Effect of contributory negligence. See 85 P.R. 1894. In estimating the amount of damages to be awarded in an action under the Act, the Court must take into account all the circumstances which are material for considering the pecuniary loss sustained. The Court must view the matter broadly. 52 C. 602=89 I.C. 679=1925 C. 893. Death caused by negligence of Railway—Legal representatives—Suit for loss of currency notes in possession of deceased—Maintainability. 6 L. 451=90 I.C. 1026=1925 L. 636. Where an amount is paid to a Hindu widow under a private settlement as compensation to herself and her children for the death of her husband caused by a fatal accident, the amount must be apportioned between the widow and the children on the same principles which would have applied if the amount had been recovered by a suit

or action in which case the Court fixing the amount of compensation apportions the amount among the dependents in proportion to the loss caused to each by the death of the deceased. There is no hard and fast rule as to the proportion in which the amount has to be divided where there are a number of persons suffering injury by the death of a relation on whom they were all dependant. Roughly the son and widow may be given equal shares, and a daughter a half of what a son takes. 1945 M.W.N. 755=58 L.W. 647=(1945) 2 M.L.J. 550.

Plaint—Averments in.—A plaint in a suit under the Act has to be very carefully drawn and should give full particulars of the person or persons for whom or on whose behalf the action has been brought and of the nature of the claim in respect of which damages are sought to be recovered. 61 C. 480=38 C.W.N. 520=1934 C. 655. See also 38 C.W.N. 551=1934 C. 632=59 C.L.J. 391. If all the persons for whose benefit the suit should have been brought are the plaintiffs and no further action can be brought in respect of the same subject-matter of the complaint, the purpose of the Act is served. So a suit by the wife and children is in order even if it is expressed to be for the benefit of the wife alone, where the children have agreed to forego their claim to compensation. 61 C. 480=38 C.W.N. 520=1934 C. 655. Suit for damages against several wrong-doers—No joint tort —Joint decree against all is justified. See I.L.R. (1939) Mad. 306=(1939) 1 M.L.J. 143=1939 M. 261=1938 M.W.N. 1241.

Scale of Costs for Pleader, in case where damages are awarded under this Act: see 52 C. 602=89 I.C. 679=1925 C. 893.

Secs. 1 and 2.—The cause of action for a suit under the Act is the loss resulting to the plaintiffs from the death of the deceased; and "loss" means the loss of pecuniary benefit which the plaintiffs would have got from the deceased if he had not died. The action is purely compensatory, and plaintiffs are entitled to compensation in respect of their reasonable expectation of the value of the services of the deceased which have been lost to them ever. 1935 B. 333=37 Bom.L.R. 410=159 I.C. 363.

Sec. 2.—Act does not create fresh liability

Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

3. The plaint in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of such damages shall be sought to be recovered.

4. The following words and expressions are intended to have the meaning hereby assigned to them respectively, so far as such Interpretation clause. meanings are not excluded by the context or by the nature of the subject-matter; that is to say [\* \* \*] the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother<sup>2</sup> and grandfather and grandmother; and the word "child" shall include son and daughter and grandson and grand-daughter and step-son and step-daughter.

## THE FEDERAL COURT ACT (XXV OF 1937).

[7th October, 1937.]

*An Act to empower the Federal Court to make rules for regulating the service of processes issued by the Court.*

WHEREAS it is expedient to confer upon the Federal Court a supplemental power which is necessary for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under the Government of India Act, 1935; It is hereby enacted as follows:—

### LEG. REF.

<sup>1</sup>Certain words repealed by Act X of 1914.

<sup>2</sup>Step-father and Step-mother are designedly omitted.

but only provides procedure for enforcing the liability under the ordinary law. 6 L. 451=90 I.C. 1026=1925 L. 636. The section has no application to a suit instituted against the wrong-doer. 23 M.L.J. 255=17 I.C. 226 (13 B. 677; 28 M. 487, Foll.).

**Sec. 3: Plaint—Contents of—Particulars**  
—The plaint in a suit under the Act should not only give full particulars of the person or persons for whose benefit or on whose behalf the suit is brought, but also the particulars of the nature of the loss for which damages are claimed. 1935 B. 333=159 I.C. 363=37 Bom.L.R. 410. The failure to give particulars of all the beneficiaries in a suit for a claim under the Fatal Accidents Act is a defect in form. 38 C. W.N. 551=59 C.L.J. 391=1934 C. 632. See also 61 C. 480=1934 C. 655=151 I.C. 680.

**Pauper application for leave to sue under Fatal Accidents Act.**—An application for leave to file a suit, under the Fatal Acci-

dents Act, in forma pauperis, which does not state the full particulars of the beneficiaries as required by S. 3 of the Act, is liable to be rejected. 59 C.L.J. 304=1934 C. 712.

**Federal Court Rules (1942). O. 15, Rr. 6 and 7 and Limitation Act (IX of 1908). S. 5.**—When it was discovered that one of the respondents to an appeal was dead on the date of the filing of the appeal, an application was made to the Federal Court that the name of his legal representative may be entered as a respondent to the appeal in place of the deceased. On the objections by the legal representative that the application should be on terms of O. 15, R. 6 of the Federal Court Rules have been filed in the High Court and not in the Federal Court and that there was no sufficient cause for the delay in taking the proper steps.

Held, that the case did not fall within the first of the two categories contemplated by R. 6 of O. 15 because the deceased person was not in the eye of the law a party to the appeal as originally preferred as he had died before the filing of the appeal. The addition of parties referred to in the Rule cannot cover the representative of a party

Short title.

1.. This Act may be called THE FEDERAL COURT ACT, 1937.

2. The Federal Court may make rules for regulating the service of processes issued by the Court, including rules requiring a High Court from which an appeal has been preferred to the Federal Court to serve any process issued by the Federal Court in connection with that appeal.

Power of Federal Court to make rules.

### THE FEDERAL COURT ACT (XXI OF 1941).

[26th November, 1941.

*An Act to empower the Federal Court to make rules for regulating the presentation of appeals lying to that Court.*

WHEREAS it is expedient to empower the Federal Court to make rules for regulating the presentation of appeals lying to that Court, and for that purpose to repeal those provisions of the Code of Civil Procedure, 1908, which now regulate that matter;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE FEDERAL COURT ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Repeal of section 111-A and rule 17 of Order XLV of the First Schedule Act V of 1908.

2. Section 111-A of the Code of Civil Procedure, 1908, and rule 17 of Order XLV of the First Schedule to the said Code shall be omitted.

3. The Federal Court may, with the approval of the Governor-General in his discretion, make rules for regulating the presentation and prosecution of appeals lying to that Court, including rules relating to the furnishing of security for costs, the proceedings, if any, to be had in High Courts in connection with such appeals, and the preparation and transmission to the Federal Court of the records in such appeals.

Power of Federal Court to make rules.

### THE INDIAN (FEDERAL COURT JUDGES) ACT, 1942.

(5 and 6 Geo. 6, Ch. 7.)

[26th February, 1942.

*An Act to extend the power of the Governor-General of India to make acting appointments of Judges of the Federal Court.*

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendment of S. 202 of the Government of India Act, 1935, 26 Geo. V and I. Edw. Sec. 2.

1. (1) At the end of section two hundred and two of the Government of India Act, 1935, there shall be added the following sub-section:—

in whose favour a decree had been passed. R. 7 also shows that the addition spoken of in R. 6 refers to an addition necessitated by a party already on the record "undergoing a change of status". Where the appeal has to be preferred for the first time against the heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not

justify the application being treated merely as one to add a party. Even if it be so in form, it is in substance an appeal preferred against him for the first time, and it is only on that footing that the question of the application of S. 5 of the Limitation Act to such cases will arise. Held, further, that in the circumstances the delay must be held to have been satisfactorily explained. 1946 F. L.J. 25=50 O.W.N. (F.R.) 5=A.I.R. 1946 F.C. 13=(1946) 1 M.L.J. 327 (P.C.).

“(2) If the Governor-General in his discretion is satisfied, after considering a report from the Chief Justice of India—

(a) that in view of some personal interest which any Judge of the Federal Court has in the decision of any particular case, or of some part which any judge of the Federal Court has already taken, as judge or counsel or otherwise, in or in relation to any particular case (whether or not while it was before the Federal Court), that judge ought not to take part in the hearing and determination thereof, and

(b) that without Judge there are not sufficient Judges of the Federal Court available to sit for that purpose.

the Governor-General may in his discretion appoint a Judge of a High Court who is duly qualified for appointment as Judge of the Federal Court to act temporarily as a Judge of that Court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a Judge of the Federal Court until that case has been heard and determined by the Federal Court.”

(2) The amendment made by this Act in the Government of India Act, 1935, shall be deemed to have been made therein immediately before the passing thereof.

(3) A copy of the said Act giving effect to—

(a) the amendments mentioned in sub-section (2) of section seventeen of the India and Burma (Miscellaneous Amendments) Act, 1940; and

(b) the amendment made by this Act.

shall be prepared and certified by the Clerk of the Parliaments and deposited with the Rolls of Parliament, and His Majesty's printer shall print in accordance with the copy so certified all copies of the Government of India Act, 1935, which are printed after the said copy has been so prepared, certified and deposited.

Short title.

2. This Act may be cited as THE INDIA (FEDERAL COURT JUDGES) ACT, 1942.

### THE FEDERAL COURT (SUPPLEMENTAL POWERS) ACT (XXVI OF 1942).

[1st October, 1942.

*An Act to confer supplemental powers on the Federal Court.*

WHEREAS it is expedient to confer certain supplemental powers on the Federal Court;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FEDERAL COURT (SUPPLEMENTAL POWERS) ACT, 1942.

2. The Federal Court shall have power to delegate to the Registrar of the Court or any other official of the Court, by name or generally by designation, any judicial, quasi-judicial and non-judicial duties and the Registrar or such official in the discharge of any such delegated duties shall have power to administer oaths.

### THE INDIAN FINANCE ACT (XV OF 1930).

[Amended by Acts XXXII of 1934 and XX of 1937.]

[28th March, 1930.

*An Act <sup>1</sup>[\* \* \*] to fix rates of income-tax <sup>1</sup>[\* \* \*].*

Whereas it is expedient <sup>1</sup>[\* \*] <sup>1</sup>[\* \*] to fix rates of income-tax;

It is hereby enacted as follows:—

LEG. REF.

<sup>1</sup> Omitted by Act XX of 1937; sub-sec. 3 of sec. 1 and secs. 2, 3, 5, 7, 8, 9 and Sch. II omitted by Act XX of 1937.

Short title, extend and duration.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1930.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) [Omitted by Act XX of 1937.]

2. [Omitted by Act XX of 1937].

3. [Omitted by Act XX of 1937.]

4. Amendment of Schedules II and III to Act VIII of 1894. [Omitted by Act XXXII of 1934].

4-A. Amendment of Schedule II, Act VIII of 1894. [Omitted by Act XXXII of 1934].

5. [Omitted by Act XX of 1937].

6. (1) Income-tax for the year beginning on the 1st day of April, 1930, shall be charged at the rates specified in Part I of the third Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1930, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Third Schedule.

(3) For the purposes of the Third Schedule "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

7. [Omitted by Act XX of 1937.]

8. [Omitted by Act XX of 1937.]

9. [Omitted by Act XX of 1937.]

#### SCHEDULE I.

[Omitted by Act XXXII of 1934.]

#### SCHEDULE II.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1896

[Omitted by Act XX of 1937.]

[See section 5.]

#### SCHEDULE III.

[See section 6.]

#### PART I.

##### RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, un-registered firm and other association of individuals not being a registered firm or a company—	RATE.
(1) When the total income is less than Rs. 2,000 ..	Nil.
(2) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Five pies in the rupee.
(3) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Six pies in the rupee.
(4) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	Nine pies in the rupee.
(5) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	Ten pies in the rupee.
(6) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and one pie in the rupee.
(7) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and four pies in the rupee.
(8) When the total income is Rs. 40,000 or upwards ..	One anna and seven pies in the rupee.
B. In the case of every company and registered firm whatever its total income.	One anna and seven pies in the rupee.



**PART II.**  
**RATES OF SUPER-TAX.**

In respect of the excess over fifty thousand rupees of total income—

- (a) in the case of every company
  - (i) in respect of the first twenty-five thousand rupees of the excess.
  - (ii) for every rupee of the next twenty-five thousand rupees of such excess.
- (b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company, for every rupee of the first fifty thousand rupees of such excess.
- (c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—
  - (i) for every rupee of the second fifty thousand rupees of such excess.
  - (ii) for every rupee of the next fifty thousand rupees of such excess.
  - (iii) for every rupee of the next fifty thousand rupees of such excess.
  - (iv) for every rupee of the next fifty thousand rupees of such excess.
  - (v) for every rupee of the next fifty thousand rupees of such excess.
  - (vi) for every rupee of the next fifty thousand rupees of such excess.
  - (vii) for every rupee of the next fifty thousand rupees of such excess.
  - (viii) for every rupee of the next fifty thousand rupees of such excess.
  - (ix) for every rupee of the next fifty thousand rupees of such excess.
  - (x) for every rupee of the remainder of the excess ..

RATE:	
One anna in the rupee.	<i>Nil.</i>
One anna and one pie in the rupee.	
One anna and one pie in the rupee.	
One anna and seven pies in the rupee.	
Two annas and one pie in the rupee.	
Two annas and seven pies in the rupee.	
Three annas and one pie in the rupee.	
Three annas and seven pies in the rupee.	
Four annas and one pie in the rupee.	
Four annas and seven pies in the rupee.	
Five annas and one pie in the rupee.	
Five annas and seven pies in the rupee.	
Six annas and one pie in the rupee.	

**THE INDIAN FINANCE ACT (1931).**

[N.B.—Amended by the Indian Finance (Supplementary and Extending) Act, 1931; Act XXVIII of 1933; Act XXXII of 1934 and Act XX of 1937.]

An Act <sup>1</sup>[\* \* \*] to fix rates of income-tax and super-tax <sup>1</sup>[\* \* \* \*].

WHEREAS it is expedient <sup>1</sup>[\* \* \*] to fix rates of income-tax and super-tax <sup>1</sup>[\* \* \*]; It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN FINANCE ACT, 1931.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. [Omitted by Act XX of 1937.]

3. Amendment of Schedule II to Act VIII of 1894. [Repealed by Act XXXII of 1934, Sch. III.]

4. Additional customs duties. [Repealed by Act XXXII of 1934.]

5. [Omitted by Act XX of 1937.]

6. [Omitted by Act XX of 1937.]

7. (1) Income-tax for the year beginning on the 1st day of April, 1931, shall be charged at the rates specified in Part I of the Fourth Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1931, shall, for the purposes of S. 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Fourth Schedule.

(3) For the purposes of the Fourth Schedule, "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

LEG. REF.

<sup>1</sup> Omitted by Act XX of 1937,

8. [Omitted by Act XX of 1937.]  
 9. [Omitted by Act XX of 1937.]  
 10. [Omitted by Act XX of 1937.]

## SCHEDULE I.

[Repealed by Act XXXII of 1934.]

## SCHEDULE II.

[Repealed by Act XXXII of 1934, Sch. III.]

## SCHEDULE III.

[Omitted by Act XX of 1937.]

## SCHEDULE IV.

[See section 7.]

## PART I.

## RATES OF INCOME-TAX.

A.	In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	RATE.
(1)	When the total income is less than Rs. 2,000	<i>Nil.</i>
(2)	When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pias in the rupee.
(3)	When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pias in the rupee.
(4)	When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(5)	When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pias in the rupee.
(6)	When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pias in the rupee.
(7)	When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pias in the rupee.
(8)	When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(9)	When the total income is Rs. 1,00,000 or upwards.	Two annas and two pias in the rupee.
B.	In the case of every company and registered firm whatever its total income.	Two annas and two pias in the rupee.

## PART II.

## RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income—

(1)	in the case of every company—	RATE.
(a)	in respect of the first twenty thousand rupees of such excess.	<i>Nil.</i>
(b)	for every rupee of the remainder of such excess	One anna in the rupee.
(2)	(a) in the case of every Hindu undivided family—	
(i)	in respect of the first forty-five thousand rupees of such excess.	<i>Nil.</i>
(ii)	for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pias in the rupee.
(b)	in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(i)	for every rupee of the first twenty thousand rupees of such excess.	Nine pias in the rupee.
(ii)	for every rupee of the next fifty thousand rupees of such excess.	One anna and three pias in the rupee.
(c)	in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(i)	for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pias in the rupee.
(ii)	for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pias in the rupee.
(iii)	for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pias in the rupee.
(iv)	for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pias in the rupee.
(v)	for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pias in the rupee.

	RATE.
(vi) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(viii) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(ix) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(x) for every rupee of the remainder of such excess.	Six annas and three pies in the rupee.

### THE INDIAN FINANCE (SUPPLEMENTARY AND EXTENDING) AMENDMENT ACT (IV OF 1932).

[5th March, 1932.]

*An Act to amend the Indian Finance (Supplementary and Extending) Act 1931, for a certain purpose.*

[Omitted by Act XX of 1937.]

### THE INDIAN FINANCE ACT (VII OF 1933).

[N.B.—Amended by Acts XXXII of 1934 and XX of 1937.]

[31st March, 1933.]

*An Act* <sup>1</sup>[\* \* \*] *to fix rates of income-tax and super-tax* [\* \* \*]<sup>1</sup>

WHEREAS it is expedient [\* \* \* \* \*] to fix rates of income-tax and super-tax, <sup>1</sup>[\* \* \*]. It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN FINANCE ACT, 1933.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. [Omitted by Act XX of 1937.]

3. Amendment of Schedule II to Act VIII of 1894. [Omitted by Act XXXII of 1934, Sch. III.]

4. [Omitted by Act XX of 1937.]

5. (1) Income-tax for the year beginning on the 1st day of April, 1933, shall be charged at the rates specified in Part I of the Second Schedule, increased in each case, except in the case of total incomes of less than two thousand rupees, by one-fourth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1933, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-fourth of the amount of the rate.

(3) For the purposes of the Second Schedule "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

LEG. REF.

<sup>1</sup> Omitted by Act XX of 1937.

(4) For the purpose of assessing and collecting income-tax on total incomes of less than two thousand rupees the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part III of the Second Schedule.

6. [Omitted by Act XX of 1937.]

SCHEDULE I.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

[Omitted by Act XX of 1937.]

SCHEDULE II.

[See section 5.]

PART I.

RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, un-registered firm and other association of individuals not being a registered firm or a company—	RATE.
(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500.	Two pies in the rupee : (Provided that for the purpose of any assessment to be made for the year ending 31st March, 1934, the rate of income-tax applicable to such part of the total income of an assessee as is derived from salaries or from interest on securities paid in the financial year 1932-33 shall be four pies in the rupee, and for the purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1933, or of payments made in the said year of interest on securities or salaries the rate applicable to the total income of the person claiming refund shall be at the rate of four pies.)
(2) When the total income is Rs. 1,500 or upwards, but is less than Rs. 2,000.	Four pies in the rupee.
(3) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.
(4) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(5) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards	Two annas and two pies in the rupee.
B. In the case of every company and registered firm whatever its total income.	Two annas and two pies in the rupee.

## PART II.

## RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income—	RATE.
(1) in the case of every company—	
(a) in respect of the first twenty thousand rupees of such excess.	Nil.
(b) for every rupee of the remainder of such excess ..	One anna in the rupee.
(2) (a) in the case of every Hindu undivided family—	
(i) in respect of the first forty-five thousand rupees of such excess.	Nil.
(ii) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pies in the rupee.
(b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.
(c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pies in the rupee.
(iii) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(iv) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.
(v) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(vi) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(viii) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(ix) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(x) for every rupee of the remainder of such excess..	Six annas and three pies in the rupee.

## PART III.

*Adaptations of the Indian Income-tax Act, 1922, to provide for the summary assessments of income-tax on total incomes of less than Rs. 2,000.*

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under S. 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made may, within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the cancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee may produce, and such other evidence as the Income-tax Officer may require, determine, by order in writing, the amount of the tax, if any, payable by the assessee, and such determination shall be final:

Provided that, if any assessee making, such application files therewith a return of his income under sub-section (2) of S. 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under S. 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1933-34 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1932-33.

## THE INDIAN FINANCE ACT (IX OF 1934).

[N.B.—Amended by Acts, XXXII of 1934 and XX 1937.]

[29th March, 1934.]

An Act <sup>1</sup>[ \* \* \* \* \* ] to fix rates of income-tax and super-tax,  
 1[\* \* \* \* \*]

WHEREAS it is expedient, [\* \* \* \* \*]<sup>1</sup> to fix rates of income-tax and super-tax<sup>1</sup>[\* \* \* \* \*]. It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. *Omitted by Act XX of 1937.*

3. *[Repealed by Act XXXII of 1934, Sec. 13 and Sch III.]*

4. *[Omitted by Act XX of 1937.]*

5. (1) Income-tax for the year beginning on the 1st day of April, 1934, shall be charged at the rates specified in Part I of the Second Schedule increased in each case, except in the case of total incomes of less than two thousand rupees, by one fourth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1934, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-fourth of the amount of the rate.

(3) For the purposes of the Second Schedule "total income" means total income as determined for the purposes of income-tax or of super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of assessing and collecting income-tax on total incomes of less than two thousand rupees the Indian Income-tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part III of the Second schedule.

6. *[Omitted by Act XX of 1937.]*

7. *[Omitted by Act XX of 1937.]*

## SCHEDULE I.

Schedule to be inserted in the India Post Office Act, 1898.

*[Omitted by Act XX of 1937.]*

## SCHEDULE II.

*(See section 5.)*

## PART I.

## RATES OF INCOME-TAX.

- A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—

LEG. REF.

<sup>1</sup> Omitted by Act XX of 1937; also secs. 1937.

C.G.M.—321

2, 4, 6, 7, and Sch. I omitted by Act XX of

	RATE.
(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500.	Two pies in the rupee.
(2) When the total income is Rs. 1,500 or upwards, but is less than Rs. 2,000.	Four pies in the rupee.
(3) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.
(4) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(5) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pies in the rupee.
In the case of every company and registered firm whatever its total income.	Two annas and two pies in the rupee.

## PART II.

## RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income—

- (1) in the case of every company—
  - (a) in respect of the first twenty thousand rupees of such excess.
  - (b) for every rupee of the remainder of such excess ..
- (2) (a) in the case of every Hindu undivided family—
  - (i) in respect of the first forty-five thousand rupees of such excess.
  - (ii) for every rupee of the next twenty-five thousand rupees of such excess.
- (b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—
  - (i) for every rupee of the first twenty thousand rupees of such excess.
  - (ii) for every rupee of the next fifty thousand rupees of such excess.
- (c) in the case of every individual, Hindu undivided family unregistered firm and other association of individuals not being a registered firm or a company—
  - (i) for every rupee of the next fifty thousand rupees of such excess.
  - (ii) for every rupee of the next fifty thousand rupees of such excess.
  - (iii) for every rupee of the next fifty thousand rupees of such excess.
  - (iv) for every rupee of the next fifty thousand rupees of such excess.
  - (v) for every rupee of the next fifty thousand rupees of such excess.
  - (vi) for every rupee of the next fifty thousand rupees of such excess.
  - (vii) for every rupee of the next fifty thousand rupees of such excess.
  - (viii) for every rupee of the next fifty thousand rupees of such excess.
  - (ix) for every rupee of the next fifty thousand rupees of such excess.
  - (x) for every rupee of the remainder of such excess ..

## RATE.

- Nil.*
- One anna in the rupee.
- Nil.*
- One anna and three pies in the rupee.
- Nine pies in the rupee.
- One anna and three pies in the rupee.
- One anna and nine pies in the rupee.
- Two annas and three pies in the rupee.
- Two annas and nine pies in the rupee.
- Three annas and three pies in the rupee.
- Three annas and nine pies in the rupee.
- Four annas and three pies in the rupee.
- Four annas and nine pies in the rupee.
- Five annas and three pies in the rupee.
- Five annas and nine pies in the rupee.
- Six annas and three pies in the rupee.



## PART III.

ADAPTATIONS OF THE INDIAN INCOME-TAX ACT, 1922, TO PROVIDE FOR THE SUMMARY ASSESSMENTS OF INCOME-TAX ON TOTAL INCOMES OF LESS THAN Rs. 2,000.

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under S. 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made may, within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the cancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee may produce, and such other evidence as the Income-tax Officer may require, determine, by order in writing, the amount of the tax, if any, payable by the assessee, and such determination shall be final:

Provided that, if any assessee making such application files therewith a return of his income under sub-section (2) of S. 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under S. 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1934-35 of income of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1933-34.

## THE INDIAN FINANCE ACT, 1935.

[N.B.—Repealed in part by Act XX of 1937.]

The following Act, which has been assented to by the Central Government under the provisions of clause (b) of sub-section (1) of section 67-B of the Government of India Act, and has been expressed to be made by the Central Government under the provisions of sub-section (2) of the same section, is published in the Official Gazette, dated the 27th April, 1935.

An Act <sup>1</sup>[\* \* \* to fix rates of income-tax and super-tax <sup>1</sup>[\* \* \*]].

WHEREAS it is expedient <sup>1</sup>[\* \* \*] to fix rates of income-tax and super-tax <sup>1</sup>[\* \* \*]; It is hereby enacted as follows:

Short title and extent. 1. (1) This Act may be called THE INDIAN FINANCE ACT, 1935.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2, 3 and 4. [Omitted by Act XX of 1937.]

5. (1) Income-tax for the year beginning on the 1st day of April, 1935, shall be charged at the rates specified in Part I of the Second Schedule,<sup>1</sup> increased in each case, except in the case of total incomes of less than two thousand rupees falling under heading A in the said Part, by one-sixth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1935, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule, increased in each case by one-sixth of the amount of the rate.

(3) For the purposes of the Second Schedule "total income" means total income as determined for the purpose of income-tax, or super-tax; as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of assessing and collecting income-tax on total incomes of less than two thousand rupees the Indian Income-tax Act, 1922; shall

be deemed to be subject to the adaptations set out in Part III of the Second Schedule.

(5) For the purpose of any assessment to be made for the year ending 31st March, 1936, the rate of income-tax applicable to such part of the total income of any person as is derived from salaries or from interest on securities paid in the year ending 31st March, 1935; shall be the previous year's rate; and for the purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1935; or of payments made in the said year of salaries or of interest on securities the rate applicable to the total income of the person claiming refunds shall be the previous year's rate.

*Explanation.*—In this sub-section the term “previous year's rate” with reference to any person means the rate of income-tax which would have been applicable to his total income if he had been assessed for the year ending 31st March, 1935; on a total income equal to that on which he is assessable for the year ending 31st March, 1936.

6. [Omitted by Act XX of 1937.]

#### SCHEDULE I.

[Omitted by Act XX of 1937.]

#### SCHEDULE II.

[See section 5.]

#### PART I.

##### RATES OF INCOME-TAX.

A.	RATE.
In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500	One and one-third pies in the rupee.
(2) When the total income is Rs. 1,500 or upwards, but is less than Rs. 2,000.	Two and two-third pies in the rupee.
(3) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pies in the rupee.
(4) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pies in the rupee.
(5) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pies in the rupee.
(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pies in the rupee.
(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pies in the rupee.
B. In the case of every company and registered firm whatever its total income.	Two annas and two pies in the rupee.

#### PART II.

##### RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income—	RATE.
(1) in the case of every company—	
(a) in respect of the first twenty-five thousand rupees of such excess.	Nil.
(b) for every rupee of the remainder of such excess.	One anna in the rupee.
(2) (a) in the case of every Hindu undivided family—	
(i) in respect of the first forty-five thousand rupees of such excess.	Nil.
(ii) for every rupee of the next twenty-five thousand rupees of such excess.	One anna and three pies in the rupee.
(b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the first twenty thousand rupees of such excess.	Nine pies in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	One anna and three pies in the rupee.

(c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	RATE.
(i) for every rupee of the next fifty thousand rupees of such excess.	One anna and nine pies in rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	Two annas and three pies in the rupee.
(iii) for every rupee of the next fifty thousand rupees of such excess.	Two annas and nine pies in the rupee.
(iv) for every rupee of the next fifty thousand rupees of such excess.	Three annas and three pies in the rupee.
(v) for every rupee of the next fifty thousand rupees of such excess.	Three annas and nine pies in the rupee.
(vi) for every rupee of the next fifty thousand rupees of such excess.	Four annas and three pies in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess.	Four annas and nine pies in the rupee.
(viii) for every rupee of the next fifty thousand rupees of such excess.	Five annas and three pies in the rupee.
(ix) for every rupee of the next fifty thousand rupees of such excess.	Five annas and nine pies in the rupee.
(x) for every rupee of the remainder of such excess.	Six annas and three pies the rupee.

## PART III.

*Adaptations of the Indian Income-tax Act, 1922, to provide for the summary assessments of income-tax on total incomes of less than Rs. 2,000.*

1. The Income-tax Officer may, save where he has served a notice under sub-section (2) of section 22 of the Indian Income-tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue; and such notice shall be deemed to be a notice of demand under S. 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made may, within thirty days of receipt of the notice of demand, make an application to the Income-tax Officer for the cancellation or revision of the assessment, and the Income-tax Officer shall, after examining any accounts and documents and hearing any evidence which the assessee may produce, and such other evidence as the Income-tax Officer may require, determine, by order in writing; the amount of the tax, if any, payable by the assessee, and such determination shall be final.

Provided that, if any assessee making such application files therewith a return of his income under sub-section (2) of S. 22 of the Indian Income-tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under S. 29 of the Indian Income-tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1935-36 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1934-35.

## THE INDIAN FINANCE ACT, 1936.

[N.B.—Repealed in part by Act XXXII of 1940.]

*An Act* <sup>1</sup>[\* \* \* \*] *to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of Income-tax and super-tax; It is hereby enacted as follows:

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. *Fixation of salt duty.* [Repealed by Act XXXII of 1940.]

3. *Inland Postage Rates.* [Repealed by Act XXXII of 1940.]

LEG. REF.

<sup>1</sup> Repealed by Act XXXII of 1940, Sch. I.

4. (1) Income-tax for the year beginning on the 1st day of April, 1936; shall be charged at the rates specified in Part I of the Second Schedule, increased in each case by one-twelfth of the amount of the rate.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1936, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule; increased in each case by one-twelfth of the amount of the rate.

(3) For the purposes of the Second Schedule 'total income' means total income as determined for the purposes of income-tax or super-tax, as the case may be in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) For the purpose of any assessment to be made for the year ending 31st March, 1937, the rate of income-tax applicable to such part of the total income of any person as is derived from salaries or from interest on securities paid in the year ending 31st March, 1936, shall be the previous year's rate, and for the purposes of refunds under sub-section (1) or sub-section (3) of section 48 in respect of dividends declared in the year ending 31st March, 1936 or of payments made in the said year of salaries or of interest on securities, the rate applicable to the total income of the person claiming refunds shall be the previous year's rate.

*Explanation.*—In this sub-section the term 'previous year' with reference to any person means the rate of income-tax which would have been applicable to his total income if he had been assessed for the year ending 31st March, 1936, on a total income equal to that on which he is assessable for the year ending 31st March, 1937.

THE FIRST SCHEDULE.  
INLAND POSTAGE RATES.  
[Repealed by Act XXXII of 1940.]  
SCHEDULE II.  
[See section 4.]  
PART I.

RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, un-registered firm and other association of individuals not being a registered firm or a company—	RATE.
	<i>Nil.</i>
(1) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Six pias in the rupee.
(2) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Nine pias in the rupee.
(3) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000.	One anna in the rupee.
(4) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000.	One anna and four pias in the rupee.
(5) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna and seven pias in the rupee.
(6) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and eleven pias in the rupee.
(7) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000.	Two annas and one pie in the rupee.
(8) When the total income is Rs. 1,00,000 or upwards.	Two annas and two pias in the rupee.
B. In the case of every company and registered firm whatever its total income.	Two annas and two pias in the rupee.

PART II.

RATES OF SUPER-TAX.

In respect of the excess over thirty thousand rupees of total income— (1) in the case of every company— (a) in respect of the first twenty thousand rupees of such excess.	RATE.
(b) for every rupee of the remainder of such excess ..	<i>Nil.</i>
	One anna in the rupee.

- (2) (a) in the case of every Hindu undivided family—  
 (i) in respect of the first forty-five thousand rupees of such excess. Nil.  
 (ii) for every rupee of the next twenty-five thousand rupees of such excess. One anna and three pies in the rupee.
- (b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—  
 (i) for every rupee of the first twenty thousand rupees of such excess. Nine pies in the rupee.  
 (ii) for every rupee of the next fifty thousand rupees of such excess. One anna and three pies in the rupee.
- (c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—  
 (i) for every rupee of the next fifty thousand rupees of such excess. One anna and nine pies in the rupee.  
 (ii) for every rupee of the next fifty thousand rupees of such excess. Two annas and three pies in the rupee.  
 (iii) for every rupee of the next fifty thousand rupees of such excess. Two annas and nine pies in the rupee.  
 (iv) for every rupee of the next fifty thousand rupees of such excess. Three annas and three pies in the rupee.  
 (v) for every rupee of the next fifty thousand rupees of such excess. Three annas and nine pies in the rupee.  
 (vi) for every rupee of the next fifty thousand rupees of such excess. Four annas and three pies in the rupee.  
 (vii) for every rupee of the next fifty thousand rupees of such excess. Four annas and nine pies in the rupee.  
 (viii) for every rupee of the next fifty thousand rupees of such excess. Five annas and three pies in the rupee.  
 (ix) for every rupee of the next fifty thousand rupees of such excess. Five annas and nine pies in the rupee.  
 (x) for every rupee of the remainder of such excess. Six annas and three pies in the rupee.

This Bill has been consented to by the Council of State.

M. B. DADABHOY,  
*President, Council of State.*

*The 31st March, 1936.*

I assent to this Bill.

WILLINGDON,  
*Viceroy and Governor-General.*

*The 31st March, 1936.*

This Act has been made by me as Governor-General under the provisions of section 67-B of the Government of India Act.

WILLINGDON,  
*Viceroy and Governor-General.*

*The 31st March, 1936.*

Whereas I, Freeman, Earl of Willingdon; am of opinion that a state of emergency exists which justifies the direction by me that the Indian Finance Act, 1936, being an Act made by me under the provisions of section 67-B of the Government of India Act, shall come into operation forthwith.

Now, therefore, in exercise of the power conferred by the proviso to sub-section (2) of that Section, I do hereby direct, accordingly.

WILLINGDON,  
*Viceroy and Governor-General.*

**THE INDIAN FINANCE ACT, 1937.**

[*Repealed in part by Act XXV of 1942.*]

[31st March, 1937.]

*An Act* <sup>1</sup>[\* \* \* \*] *to fix rates of income-tax and super-tax.*

WHEREAS it is expedient <sup>1</sup>[\* \* \* \*] to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. Fixation of salt duty. [*Repealed by Act XXV of 1942.*]

3. Amendment of section 3, Act XIV of 1934 [*Repealed by Act XXV of 1942.*]

4. Amendment of the First Schedule to Act XXXII of 1934. [*Repealed by Act XXV of 1942.*]

5. Amendment of section 3, Act XVIII of 1930. [*Repealed by Act XXV of 1942.*]

6. Inland Postage rates. [*Repealed by Act XXV of 1942.*]

7. (1) Income-tax for the year beginning on the 1st day of April, 1937; shall be charged at rates applicable to the total income of each assessee the same, and increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1936.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1937; shall; for the purposes of section 55 of the Indian Income-tax Act, 1922, be the same rates; increased in each case by the same fraction of the amount of the rate, as for the year beginning on the first day of April, 1936.

(3) For the purposes of sub-section (1) "total income" means total income as determined in accordance with the provisions of the Indian Income-tax Act, 1922.

**THE SCHEDULE.**

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

[*Repealed by Act XXV of 1942.*]

**THE INDIAN FINANCE ACT, 1938.**

[*Rep. in part by Act XXV of 1942.*]

[26th March, 1938.]

*An Act* <sup>1</sup>[\* \* \* \*] *to fix rates of income-tax and super-tax.*

WHEREAS it is expedient <sup>1</sup>[\* \* \* \*] to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1938.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. Salt duty. [*Repealed by Act XXV of 1942.*]

3. Inland postage rates. [*Repealed by Act XXV of 1942.*]

4. (1) Income-tax for the year beginning on the 1st day of April, 1938; shall be charged at rates applicable to the total income of each assessee the same, and increased in each case

by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1937.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1938, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the same rates, increased in each case, by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1937.

(3) For the purposes of sub-section (1) "total income" means total income as determined in accordance with the provisions of the Indian Income-tax Act, 1922.

#### THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

[See section 3.]

[Repealed by Act XXV of 1942.]

#### THE INDIAN FINANCE ACT (1939).

[Rep. in part by Act XXV of 1942.]

An Act <sup>1</sup>[\* \* \* \*] to fix rates of income-tax and Super-tax.

WHEREAS it is expedient <sup>1</sup>[\* \* \* \*] to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1939.

(2) It extends to the whole of British India.

2. Fixation of salt duty [Repealed by Act XXV of 1942.]

3. Excise duty on *khandsari* sugar. [Repealed by Act XXV of 1942.]

4. Import duty on raw cotton. [Repealed by Act XXV of 1942.]

5. Inland postage rates. [Repealed by Act XXV of 1942.]

Income-tax and super-tax. 6. (1) Subject to the provisions of sub-section (2)—

(a) income-tax for the year beginning on the 1st day of April, 1939; shall be charged at the rates specified in Part I of Schedule II, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1939; shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of Schedule II.

(2) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined in accordance with the provisions of that section with reference to the rates specified in Schedule II.

(3) For the purpose of this section and of Schedule II, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), where more than half of the total income of any individual or Hindu undivided family consists of income from salaries, interest on securities or dividends in respect of which the individual or Hindu undivided family is deemed, under the provisions of section 49 B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, or consists of income falling under more than one of those heads—

(a) income-tax for year beginning on the 1st day of April, 1939, shall be charged in respect of such total incomes at the rates of income-tax which were imposed for the year beginning on the 1st day of April, 1938, in respect of incomes of individuals or Hindu undivided families, and

#### LEG. REF.

<sup>1</sup> Repealed by Act XXV of 1942.

assessee at the rates applicable for the year beginning April 1, 1939, 43 Bom. 257=45 Bom. L.R. 589=I.L.R. (1943) Bom. 614.

SEC. 6.—Super-tax ought to be charged to  
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(b) in cases in which super-tax has been deducted under the provisions of section 18 of the said Act or would have been so deductible had the Indian Income-tax (Amendment) Act, 1939, come into force on the 1st day of April, 1938; the rates of super-tax for the year beginning on the 1st day of April, 1939; shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates of super-tax which were imposed for the year beginning on the 1st day of April, 1938, in respect of incomes of individuals or Hindu undivided families, as the case may be.

(5) In respect of income to which sub-section (4) applies, the provisions of section 17 of the Indian Income-tax Act, 1922, shall apply to the assessment to be made for the year beginning on the 1st day of April, 1939, as though the Indian Income-tax (Amendment) Act, 1939, had not been passed.

### SCHEDULE I.

[Repealed by Act XXV of 1942.]

### SCHEDULE II.

[See section 6.]

#### PART I.

##### RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

	Rate.
1. On the first Rs. 1,500 of total income ..	<i>Nil</i>
2. On the next Rs. 3,500 of total income ..	Nine pias in the rupee.
3. On the next Rs. 5,000 of total income ..	One anna and three pias in the rupee.
4. On the next Rs. 5,000 of total income ..	Two annas in the rupee.
5. On the balance of total income ..	Two annas and six pias in the rupee.

Provided that—

(i) no income-tax shall be payable on a total income which does not exceed Rs. 2,000;

(ii) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs. 2,000.

B. In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.
On the whole of total income ..	Two annas and six pias in the rupee.

#### PART II.

##### RATES OF SUPER-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraph B of this Part applies—

	Rate.
1. On the first Rs. 25,000 of total income ..	<i>Nil</i> .
2. On the next Rs. 10,000 of total income ..	One anna in the rupee.
3. On the next Rs. 20,000 of total income ..	Two annas in the rupee.
4. On the next Rs. 70,000 of total income ..	Three annas in the rupee.
5. On the next Rs. 75,000 of total income ..	Four annas in the rupee.
6. On the next Rs. 1,50,000 of total income ..	Five annas in the rupee.
7. On the next Rs. 1,50,000 of total income ..	Six annas in the rupee.
8. On the balance of total income ..	Seven annas in the rupee.
B. In the case of every company and local authority	
On the whole of total income ..	One anna in the rupee.

## THE INDIAN FINANCE ACT (XVI OF 1940).

[6th April, 1940.

[Amended by Act XII of 1942 and repealed in part by Act VI of 1945.]

*An Act* <sup>1</sup>[\* \* \* \*] *to fix rates of income-tax and super-tax.*

WHEREAS it is expedient <sup>1</sup>[\* \* \* \*] to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1940.<sup>2</sup>

(2) It extends to the whole of British India.

2. Fixation of salt duty. [Repealed by Act XI of 1945.]

3. Excise duty on sugar. [Repealed by Act VI of 1945].

4. Excise duty on motor spirit. [Repealed by Act VI of 1945].

5. Import duty on motor spirit. [Repealed by Act VI of 1945].

6. Inland postage rates. [Repealed by Act VI of 1945].

Income-tax and super-tax.

7. (1) Subject to the provisions of sub-section (2)—

(a) income-tax for the year beginning on the 1st day of April, 1940, shall be charged at the rates specified, in Part I of Schedule II to the Indian Finance Act, 1939;

(b) rates of super-tax for the year beginning on the 1st day of April, 1940, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939:

Provided that in the case of an association of persons being a Co-operative Society, other than the Sanikatta Salt-owners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1940, shall be—

(1) On the first Rs. 25,000 of total income

.. Nil.

(2) On the balance of total income

.. One anna in the rupee.

(2) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined in accordance with the provisions of that section with reference to the rates imposed by sub-section (1).

(3) For the purpose of this section and of the rates of tax imposed by sub-section (1), the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

## SCHEDULE I.

[Repealed by Act VI of 1945.]

## THE INDIAN FINANCE ACT (VII OF 1941).

[Rep. in part by Act VI of 1945.]

[31st March, 1941.

*An Act* <sup>1</sup>[\* \* \* \*] *to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.*

WHEREAS it is expedient <sup>1</sup>[\* \* \* \*] to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1941.

(2) It extends to the whole of British India.

LEG. REF.

<sup>1</sup> Omitted by Act VI of 1945.

2. Fixation of Salt Duty. [*Repealed by Act VI of 1945*].
3. Excise duty on Matches. [*Repealed by Act VI of 1945*].
4. Excise duty on Mechanical Lighters. [*Repealed by Act VI of 1945*].
5. Import Duty on Artificial Silk Yarn and Thread. [*Repealed by Act VI of 1945*].

6. Inland Postage rates. [*Repealed by Act VI of 1945*].

Income-tax and super-tax. 7. (1) Subject to the provisions of sub-sections (2) and (3)—

(a) income-tax for the year beginning on the 1st day of April, 1941, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate;

(b) rates of super-tax for the year beginning on the 1st day of April, 1941, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939, increased—

(i) in the case of the rate applicable to a company, by a surcharge amounting to one-third of that rate, and

(ii) in the case of every other rate, by a surcharge for the purposes of the Central Government amounting to one-third of each such rate:

Provided that in the case of an association of persons being a co-operative society, other than the Sanikatta Salt Owners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1941, shall be the rates of super-tax specified in the proviso to clause (b) of sub-section (1) of section 7 of the Indian Finance Act, 1940, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate.

(2) In making any assessment for the year ending on the 31st day of March, 1942,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (1) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (1) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in

accordance with the provisions of sub-section (2) of this section where applicable.

(4) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

8. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940, for the words and figures "31st day of March, 1941," the words and figures "31st day of March, 1942," shall be substituted.

Continuance of and rate  
of Excise Profits Tax.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1941, be an amount equal to sixty-six and two thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

THE SCHEDULE. [*Repealed by Act XXV of 1942.*]

### THE INDIAN FINANCE ACT (XII OF 1942).

[See *Acts VIII of 1943, Ord. XVI of 1943, Finance Acts 1944 and 1945.*]

[*26th March, 1942.*]

*An Act to fix the duty on salt manufactured in, or imported by land into certain parts of British India, to vary the rate of the excise duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, to vary the rate of the excise duty on kerosene leviable under section 5 of the Indian Finance Act, 1922, to vary the rate of the excise duty on silver leviable under the Silver (Excise Duty) Act, 1930, to levy customs duties in addition to the duties of customs leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, to vary the rate of the excise duty on kerosene leviable under section 5 of the Indian Finance Act, 1922, to vary the rate of the excise only on silver leviable under the Silver (Excise Duty) Act, 1930, to levy customs duties in addition to the duties of customs leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1942.

(2) It extends to the whole of British India.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1942, they imposed such duty at the rate of one rupee and four anans per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into,

any such part, and such duty shall, for the purposes of the said Act, be deemed to have been imposed by rule made under that section.

3. In sub-section (1) of section 3 of the Motor Spirit (Duties) Act, 1917, Excise duty on Motor spirit. for the words "twelve annas" the words "fifteen annas" shall be substituted.

4. In the proviso to section 5 of the Indian Finance Act, 1922, for the words "of two annas and three pies" the words "at which customs duty is for the time being leviable under the Indian Tariff Act, 1934, read with any other enactment for the time being in force" shall be substituted.

Excise duty on kerosene. 5. In sub-section (1) of section 3 of the Silver (Excise Duty) Act, 1930, for the words "three annas" the words "three annas and seven and one-fifth pies" shall be substituted.

Additional customs duties. 6. Where an goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act, 1934, or under the said Schedule read with any notification of the Central Government for the time being in force, are assessed to duty, there shall up to the 31st day of March, 1943, be levied and collected as an addition to and in the same manner as the total amount so chargeable, a sum equal to one-fifth of such amount:

Provided that such addition of duty shall not be levied and collected on—

- (a) salt comprised in Item No. 25 (1) of the said Schedule;
- (b) motor spirit comprised in Item No. 27 (6) of the said Schedule;
- (c) raw cotton comprised in Item No. 46 (3) of the said Schedule, so long as the additional duty of customs imposed by the Cotton Fund Ordinance, 1942, continues to be leviable;
- (d) machinery comprised in Items Nos. 72, 72 (1), 72 (2) and 72 (3) of the said Schedule;
- (e) the following, when the Customs-collector is satisfied that they are produce or manufacture of Burma, namely:—
  - (i) potatoes and onions comprised in Item No. 7 of the said Schedule,
  - (ii) coffee comprised in Item No. 9 of the said Schedule,
  - (iii) spices comprised in Item No. 9 (3) of the said Schedule,
  - (iv) betelnuts comprised in Item No. 9 (5) of the said Schedule,
  - (v) cutch and gambier comprised in Item No. 13 (2) of the said Schedule,
  - (vi) sugar excluding confectionary comprised in Item No. 17 of the said Schedule,
  - (vii) cigars comprised in Item No. 24 (1) of the said Schedule,
  - (viii) matches comprised in Item No. 34 (4) (a) of the said Schedule.

7. For the year beginning on the 1st day of April, 1942, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Inland postage rates. 8. (1) Subject to the provisions of sub-sections Income-tax and super-tax. (2) and (3),—

(a) income-tax for the year beginning on the 1st day of April, 1942, shall be charged at the rates specified in Part I of Schedule II increased in the cases to which sub-paragraph (b) of paragraph A and paragraph B of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1942, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of Schedule II increased in the cases to which

paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) In making any assessment for the year ending on the 31st day of March, 1943,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1941, on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1941, on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-section (2) of this section where applicable.

(4) For the purposes of this section and of the rates if tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (2) no tax shall be payable in cases to which sub-paragraph (a) of paragraph A Part I of Schedule II applies where the assessee deposits with the Central Government in such manner and in accordance with such conditions as the Central Government may by rule prescribe for the purposes of this sub-section an amount representing not less than one rupee for every complete unit of twenty-five rupees by which his total income exceeds seven hundred and fifty rupees:

Provided that where the total income includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the amount to be deposited by the assessee in order to obtain the exemption conferred by this sub-section shall be an amount bearing to the minimum required to be deposited under the foregoing provisions of this sub-section the same proportion as the amount of his total income diminished by the amount of such inclusions bears to the amount of his total income.

(6) A deposit made in accordance with the provisions of sub-section (5) shall not in any way be capable of being charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the depositor and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to or have any claim on such deposit.

(7) Where the total income of an assessee referred to in sub-paragraph (b) of paragraph A of Part I of Schedule II does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the deductions, if any, allowed under the second proviso to sub-section (1) of section 7, section 15 and sub-section (1) of section 58-B of the Indian Income-tax Act, 1922, shall be funded for the assessee's benefit and shall be paid to him on such date, not more than twelve months after the termination of the present hostilities, as the Central Government may fix:

Provided that nothing in this sub-section shall apply to any part of total income to which clause (a) of sub-section (2) applies.

*Explanation.*—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

9. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940, for the words and figures "31st day of March, 1942", the words and figures "31st day of March, 1943" shall be substituted.

Continuance of and rate  
of Excess Profits Tax.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1942, be an amount equal to sixty-six and two thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

10. (1) If before the 1st day of July, 1942, or within thirty days of the date on which any excess profits tax, charged under the provisions of the Excess Profits Tax Act, 1940, at the rate of sixty-six and two-thirds per cent. becomes payable, whichever of these dates is later, a further sum not exceeding one-fifth of the amount of the said excess profits tax is deposited with the Central Government the Central Government shall repay, at such date and subject to such conditions as it may hereafter determine, so much of the said excess profits tax as shall be equal to one-tenth of the amount thereof or to one-half of such further sum deposited, whichever is the less:

Provided that, if the said excess profits tax is thereafter reduced, whether by relief given in respect of a deficiency of profits, or by relief given in respect of double excess profits taxation or otherwise, and whether by refund or otherwise, the portion of the tax to be repaid under this section shall be correspondingly reduced:

Provided further that if the said excess profits tax is so reduced, the maximum sum that may be deposited with the Central Government under this section shall also be correspondingly reduced:

Provided further that the provisions of this section shall apply in respect of excess profits tax to which the section applies which became payable before the commencement of this Act if the further sum referred to herein is deposited before the 1st day of July, 1942:

Provided further that in relation to excess profits tax payable under the Excess Profits Tax Act, 1940, in respect of any profits which are also liable to assessment to excess profits tax under the law in force in the United Kingdom it shall be unnecessary to deposit the further sum referred to in this section, and the amount repayable by the Central Government under this section shall, subject to the first proviso, be one-tenth of the amount of the excess profits tax payable at the rate of sixty-six and two-thirds per cent. under the Excess Profits Tax Act, 1940.

(2) Any sum deposited with the Central Government under sub-section (1) shall carry simple interest at the rate of two per cent. per annum and



shall be repaid within twelve months of the date of termination of the present hostilities.

(8) The Central Government may, by notification in the official Gazette, make rules for carrying out the purposes of this section and for prescribing the manner and conditions referred to in sub-section (5) of section 8.

# SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

(See section 7)

## "THE FIRST SCHEDULE.

### INLAND POSTAGE RATES.

(See section 7.)

#### Letters.

For a weight not exceeding one tola	..	One and half annas.
For every tola, or fraction thereof, exceeding one tola	..	Half an anna.
Single	..	Nine pies.
Reply	..	One and a half annas.

#### Book, Pattern and Sample Packets.

For the first five tolas or fraction thereof	..	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas	..	Three pies.

#### Registered Newspapers.

For a weight not exceeding ten tolas	..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas	..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	..	Half an anna.

In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—

For a weight not exceeding ten tolas	..	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas.	..	Quarter of an anna.

Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.

#### Parcels.

For a weight not exceeding forty tolas	..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas	..	Four annas.

## SCHEDULE II.

(See section 8.)

### PART I.

#### RATES OF INCOME-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies:—

(a) Where the total income does not exceed Rs. 2,000—

#### Rate.

1. On the first Rs. 750 of total income	..	Nil.
2. On the next Rs. 1,250 of total income	..	Six pies in the rupee.
Provided that no tax shall be payable on a total income which does not exceed Rs. 1,500.		

(b) Where the total income exceeds Rs. 2,000—

#### Rate.

#### Surcharge.

1. On the first Rs. 1,500 of total income	..	Nil.	..	Nil.
2. On the next Rs. 3,500 of total income	..	Nine pies in the rupee	..	Six pies in the rupee.
3. On the next Rs. 5,000 of total income	..	One anna and three pies in the rupee.	..	Nine pies in the rupee.
4. On the next Rs. 5,000 of total income	..	Two annas in the rupee.	..	One anna and two pies in the rupee.
5. On the balance of total income	..	Two annas and six pies in the rupee.	..	One anna and three pies in the rupee.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

#### Rate.

#### Surcharge.

On the whole of total income	..	Two annas and six pies in the rupee.	..	One anna and three pies in the rupee.
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### PART II.

#### RATES OF SUPER-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this part apply—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income.	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 10,000 of total income.	One anna in the rupee.	Six pies in the rupee.
3. On the next Rs. 20,000 of total income.	Two annas in the rupee.	One anna in the rupee.
4. On the next Rs. 70,000 of total income.	Three annas in the rupee.	One anna and six pies in the rupee.
5. On the next Rs. 75,000 of total income.	Four annas in the rupee.	Two annas in the rupee.
6. On the next Rs. 1,50,000 of total income.	Five annas in the rupee.	Two annas and six pies in the rupee.
7. On the next Rs. 1,50,000 of total income.	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of income	Seven annas in the rupee.	Three annas and six pies in the rupee.

**B.—In the case of every local authority—**

	Rate.	Surcharge.
On the whole of total income.	One anna in the rupee.	Six pies in the rupee.

**C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—**

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income.	<i>Nil.</i>	<i>Nil.</i>
2. On the balance of total income.	One anna in the rupee.	Six pies in the rupee.

**D.—In the case of every company—**

	Rate.
On the whole of total income.	One anna and six pies in the rupee.

## THE INDIAN FINANCE ACT (VIII OF 1943).

[29th March, 1943.]

*An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942, to fix rates of income-tax and super-tax, to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged, and to amend the Indian Finance (Supplementary—Extending) Act, 1931.*

**WHEREAS** it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942), to fix rates of income-tax and super-tax, to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged, and to amend the Indian Finance (Supplementary and Extending) Act, 1931; It is hereby enacted as follows:—

1. (1) This Act may be called **THE INDIAN**  
Short title and extent. **FINANCE ACT, 1943.**

(2) It extends to the whole of British India.

2. The provisions of section 7 of the Indian Salt Act, 1882 (XII of 1882), shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1943, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of said Act, be deemed to have been imposed by rule made under that section.

3. For the year beginning on the 1st day of April, 1943, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

4. The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934) or under the said Schedule read with any notification of the Central Government for the time being in force, imposed up to the 31st day of March, 1943, by section 6 of the Indian Finance Act, 1942 (XII of 1942), shall be levied and collected as provided in that section up to the 31st day of March, 1944.

Income-tax and super-tax. 5. (1) Subject to the provisions of sub-sections (2) and (3),—

(a) income-tax for the year beginning on the 1st day of April, 1943, shall be charged at the rates specified in Part I of Schedule II increased in the cases to which sub-paragraph (b) of paragraph A and paragraph B of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1943, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of Schedule II increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) In making any assessment for the year ending on the 31st day of March, 1944,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under sec. 49-B of the Indian Income-tax Act, 1922 (XI of 1922), to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1942, (XII of 1942), on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) Where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922 (XI of 1922), the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In cases to which section 17 of the Indian Income-tax Act, 1922 (XI of 1922), applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section,

and in accordance with the provisions of sub-section (1) of this section where applicable.

(4) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922 (XI of 1922).

(5) Notwithstanding anything contained in sub-section (1) or sub-section (2) no tax shall be payable in cases to which sub-paragraph (a) of paragraph A of Part I of Schedule II applies where the assessee deposits with the Central Government in such manner and in accordance with such conditions as the Central Government may by rule prescribe for the purposes of this sub-section an amount representing not less than one rupee for every complete unit of twenty-five rupees by which his total income exceeds seven hundred and fifty rupees.

(6) A deposit made in accordance with the provisions of sub-section (5) shall not in any way be capable of being charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the depositor and neither the official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920 (V of 1920), shall be entitled to or have any claim or any such deposit.

(7) Where the total income of an assessee referred to in sub-paragraph (b) of paragraph A of Part I of Schedule II does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date, not more than twelve months after the termination of the present hostilities, as the Central Government may fix:

*Explanation.*—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

(8) Notwithstanding anything contained in sub-section (7) of section 8 of the Indian Finance Act, 1942 (XII of 1942), the amount to be funded under that sub-section for the assessee's benefit in respect of any assessment for the year ending on the 31st day of March, 1943, shall be calculated on his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or any notification issued thereunder.

(9) The Central Government may, by notification in the official Gazette, make rules prescribing the manner and conditions referred to in sub-section (5).

6. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures "31st day of March, 1943" the words and figures "31st day of March, 1944" shall be substituted.

(2) The Excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940) shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1943, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

7. In section 5 of the Indian Finance (Supplementary and Extending) Act, 1931, the words "motor spirit or kerosene" and the words and figures "or under the Motor Spirit (Duties) Act, 1917, or under the Indian Finance Act, 1922" shall be omitted, and for the words "or under any of the said Acts" the words "or under the said Act" shall be substituted.

## SCHEDULE I.

Schedule to be inserted in the Indian Post office Act, 1898.

(See section 3.)

## "THE FIRST SCHEDULE.

## INLAND POSTAGE RATES.

(See section 7.)

*Letters.*

For a weight not exceeding one tola	..	One and a half annas.
For every tola, or fraction thereof, exceeding one tola	..	One anna.

*Post Cards.*

Single	..	Nine pies.
Reply	..	One and a half annas.

*Book, Pattern and Sample Packets.*

For the first five tolas or fraction thereof	..	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas	..	Three pies.

*Registered Newspapers.*

For a weight not exceeding ten tolas	..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas	..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	..	Half an anna.

In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—

For a weight not exceeding ten tolas	..	Half an anna.
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For every additional five tolas, or fraction thereof, in excess of ten tolas	..	Quarter of an anna.
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Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.

*Parcels.*

For a weight not exceeding forty tolas	..	Six annas.
For every forty tolas, or fraction thereof, exceeding forty tolas	..	Four annas.

## SCHEDULE II.

(See section 5.)

## PART I.

## RATES OF INCOME-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies:—

(a) Where the total income does not exceed Rs. 2,000—

Rate.

1. On the first Rs. 750 of total income	..	Nil.
2. On the next Rs. 1,250 of total income	..	Six pies in the rupee.

Provided that no tax shall be payable on a total income which does not exceed Rs. 1,500

(b) Where the total income exceeds Rs. 2,000—

Rate.

Surcharge.

1. On the first Rs. 1,500 of total income	..	Nil.	Nil.	
2. On the next Rs. 3,500 of total income	..	Nine pies in the rupee	..	Six pies in the rupee.
3. On the next Rs. 5,000 of total income	..	One anna and three pies in the rupee.	..	Ten pies in the rupee.
4. On the next Rs. 5,000 of total income	..	Two annas in the rupee.	..	One anna and four pies in the rupee.
5. On the balance of total income	..	Two annas and six pies in the rupee.	..	One anna and eight pies in the rupee.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

Rate.

Surcharge.

On the whole of total income	..	Two annas and six pies in the rupee.	..	One anna and eight pies in the rupee.
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## PART II.

## RATES OF SUPER-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this post apply—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income ..	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 10,000 of total income.	One anna in the rupee.	One anna in the rupee.
3. On the next Rs. 20,000 of total income.	Two annas in the rupee.	One anna and six pies in the rupee.
4. On the next Rs. 70,000 of total income.	Three annas in the rupee.	Two annas in the rupee.
5. On the next Rs. 75,000 of total income.	Four annas in the rupee.	Two annas and six pies in the rupee.
6. On the next Rs. 1,50,000 of total income.	Five annas in the rupee.	Three annas in the rupee.
7. On the next Rs. 1,50,000 of total income.	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of total income.	Seven annas in the rupee.	Three annas and six pies in the rupee.

B.—In the case of every local authority—

	Rate.	Surcharge.
On the whole of total income ..	One anna in the rupee.	One anna in the rupee.

C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income.	<i>Nil.</i>	<i>Nil.</i>
2. On the balance of total income.	One anna in the rupee.	One anna in the rupee.

D.—In the case of every company—

	Rate.
On the whole of total income. ..	Two annas in the rupee.

## THE INDIAN FINANCE ACT (1944).

[AMENDED BY ORDINANCE XXXIII OF 1944.]

[31st March, 1944.]

*An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April, 1944.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942), and to increase certain of those duties, to alter the duty of excise on tobacco and to impose duties of excise on betel-nuts, coffee and tea, to fix rates of income-tax and super-tax, and to continue the charge and levy of excess profits tax and make certain additional provisions relating thereto; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1944.

(2) It extends to the whole of British India.

2. The duty on salt manufactured in, or imported by land into, British India shall, for the year beginning on the 1st day of April, 1944, be at the rate of one rupee and nine annas per standard maund.

Fixation of salt duty.

3. For the year beginning on the 1st day of April, 1944, the Schedule contained in Schedule I to the Indian Finance Act, 1943 (VIII of 1943), shall again be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

Inland Postage rates.

4. (1) The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to

Continuation of, and enhancement of, additional duties of customs imposed by section 6, Act XII of 1942.

the Indian Tariff Act, 1934 (XXXII of 1934), or under the said Schedule read with any notification of the Central Government for the time being in force, imposed up to the 31st day of March, 1943, by sec. 6 of the Indian Finance Act, 1942 (XII of 1942), and continued up to the 31st day of March, 1944, by section 4 of the Indian Finance Act, 1943 (VIII of 1943), shall continue to be levied and collected as provided in section 6 of the Indian Finance Act, 1942, (XII of 1942), up to the 31st day of March, 1945, subject to the modification contained in sub-section (2).

(2) The additional duty to be levied and collected under the foregoing sub-section shall be one-half instead of one-fifth of the amount of the duty of customs specified in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in the case of the following goods, namely:—

(a) spirits, comprised in Item No. 22 (4) and in Item No. 22 (5) of the said Schedule;

(b) tobacco, comprised in Item No. 24 and in Item No. 24 (3) of the said Schedule;

(c) cigars, comprised in Item No. 24 (1) of the said Schedule;

(d) cigarettes, comprised in Item No. 24 (2) of the said Schedule.

Alteration of excise duties on tobacco and imposition of excise duties on betelnuts, coffee and tea.

5. The amendments set out in Part I and Part II of the First Schedule shall be made respectively in the First and Second Schedules to the Central Excises and Salt Act, 1944 (I of 1944).

Income-tax and super-tax. 6. (1) Subject to the provisions of sub-sections (2), (3) and (5),—

(a) income-tax for the year beginning on the 1st day of April, 1944, shall be charged at the rates specified in Part I of the Second Schedule increased in each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1944, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) In making any assessment for the year ending on the 31st day of March, 1945,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922 (XI of 1922), to have paid income-tax imposed in British India, the Income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943), on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922 (XI of 1922), the super-tax payable by the assessee on that portion of his total income which consists of such inclusions



shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943), on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In making any assessment for the year ending on the 31st day of March, 1944, or the year ending on the 31st day of March, 1945,—

(a) where the total income of a company includes any profits and gains from life insurance business the super-tax payable by the company on that part of its total income which consists of such inclusion shall be in the case of an assessment for the first mentioned year at the rate of one anna and one pie in the rupee and in the case of an assessment for the second mentioned year at the rate of nine pies in the rupee;

(b) where the total income of an assessee not being a company, includes any profits and gains from life insurance business the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusion bears to his total income, so, however, that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act, 1942 (XII of 1942), the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act.

(4) Where any assessment for the year ending on the 31st day of March, 1944, to which clause (a) or (b) of sub-section (3) is applicable has been completed at the rates of tax in operation under the Indian Finance Act, 1943 (VIII of 1943), it shall be revised by the Income-tax Officer in accordance with the provisions of clause (a) or (b), as the case may be, of sub-section (3) and the excess tax paid, if any, shall be refunded.

(5) In cases to which section 17 of the Indian Income-tax Act, 1922 (XI of 1922), applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-sections (2) and (3) of this section where applicable.

(6) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922 (XI of 1922).

(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date, not more than twelve months after the termination of the present hostilities, as the Central Government may fix.

*Explanation.*—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

(8) The provisions of section 23-A of the Indian Income-tax Act, 1922 (XI of 1922), shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1945.

7. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures "31st day of March, 1944," the words and figures "31st day of March, 1945", shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940), shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1944, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

Further provisions respecting excess profits tax. 8. (1) In sub-rule (1) of rule 2 of the Second Schedule to the Excess Profits Tax Act, 1940 (XV of 1940).—

(a) for the words "and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted" the following shall be substituted, namely:—

"and in particular there shall be deducted any debts incurred in respect of the business for income-tax or super-tax or excess profits tax, or for advance payments due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or for any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1942)";

(b) after clause (b) of the proviso the following clauses shall be inserted, namely:—

"(c) in the case of any advance payment due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), on the date on which, under the provisions of that section, the payment first became due;

(d) in the case of any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943), on the date on which, under the provisions of that section, the further sum became payable."

(2) To sub-section (1) of section 10 of the Indian Finance Act, 1942 (XII of 1942), the following proviso shall be added, namely:—

"Provided further that in respect of chargeable accounting periods ending after the 31st day of December, 1943, the amount repayable under this sub-section shall, subject to the provisions of the first of the foregoing provisos, be calculated by reference to the amount of the excess profits tax paid, and not by reference to the further amount deposited under this section".

(3) In section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943),—

(a) to sub-section (1) the following provisos shall be added, namely:—

"Provided that, in respect of any chargeable accounting period ending after the 31st day of December, 1943, the provisions of this sub-section shall have effect as if, in relation to any person who is a company, for the words 'one-fifth' the words 'nineteen-sixty-fourths' were substituted and as if, in relation to any other person, for the words 'one-fifth' the words 'seventeen-sixty-fourths' were substituted:

Provided further that if, in respect of any chargeable accounting period ending after the 31st day of December, 1943, a person who has deposited a further sum equal to seventeen-sixty-fourths of the excess profits tax payable shows that the amount of the income-tax and super-tax payable in respect of the excess profits arising in such period exceeds fifteen-sixty-fourths of the amount of the excess profits tax payable, so much of the deposit shall be refunded as will secure that the total of the deposit made and the income-tax and super-tax payable in respect of the excess profits arising in such period does not exceed one-half of the excess profits tax payable.";

(b) after sub-section (1) the following sub-section shall be inserted, namely:—

“(1-A) In respect of any chargeable accounting period ending after the 31st day of December, 1943, in respect of which a provisional assessment of excess profits tax is made under section 14-A of the Excess Profits Tax Act, 1940 (XV of 1940), the person liable to pay such excess profits tax shall deposit in the manner laid down in sub-section (1) a further sum equal to nineteen-sixty-fourths of the amount of the said excess profits tax if such person is a company and seventeen-sixty-fourths of the said amount if such person is not a company; and the provisions of sub-sections (6) and (7) of the said section 14-A shall apply to any payment made under this sub-section as they apply to a payment of excess profits tax.”;

(c) in sub-section (4) for the words, brackets and figure “sub-section (1) of the section”, where they occur for the first time, the words, brackets, figures and letter “sub-section (1) or (1-A) of this section” shall be substituted.

### THE FIRST SCHEDULE.

(See section 5.)

Amendments to be made in the Central Excises and Salt Act, 1944 (I of 1944).

#### PART I.

##### *Amendments of First Schedule.*

1. For Item No. 9, the following item shall be substituted, namely:—

##### ‘9. Tobacco—

“Tobacco” means any form of tobacco whether cured or uncured, and whether manufactured or not, and includes the leaf, stalk and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth.

##### I. Unmanufactured tobacco—

(i) If flue-cured and intended for—

(a) manufacture into cigarettes containing—

	Per lb.
(i) more than 20 per cent. weight of imported tobacco ..	Three rupees and eight annas.

(ii) 20 per cent. or less than 20 per cent. weight of imported tobacco.	Two rupees and eight annas.
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(iii) no imported tobacco ..

One rupee.

(b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b).

Three rupees and eight annas.

(2) if other than flue-cured and intended for—

(a) manufacture into cigarettes ..

Nine annas.

(b) any purpose other than the manufacture of cigarettes or a of the products enumerated in 3 (a) and (3) (b).

Nine annas.

(3) Whether flue-cured or not, if intended for—

(a) manufacture into—

(i) Biris .. .. .

Nine annas.

(ii) snuff .. .. .

Nine annas.

(iii) cigars and cheroots .. .. .

Three annas.

(iv) hookah tobacco .. .. .

Three annas.

(b) sale as chewing tobacco, whether manufactured or merely cured.

Three annas.

(c) agricultural purposes .. .. .

Nil.

(4) Stalks, stems and other refuse of tobacco intended for use in the preparation of any form of manufactured tobacco.

One anna.

##### II. Manufactured tobacco—

Cigars and cheroots of which the value—

(i) exceeds Rs. 30 a hundred. ..

Per hundred.

(ii) exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred.

Twelve rupees.  
Ten rupees.

(iii) exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred.

Eight rupees.

(iv) exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred.

Six rupees.

- (v) exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred. Four rupees.  
 (vi) exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred. Two rupees.  
 (vii) exceeds Rs. 2-8- a hundred but does not exceed Rs. 5 a hundred. One rupee.  
 (viii) exceeds Rs. 1-4 a hundred but does not exceed Rs. 2-8 a hundred. Eight annas.  
 (ix) exceeds Annas 12 a hundred but does not exceed Rs. 1-4 a hundred. Four annas.

2. After item No. 11, the following items shall be added, namely :—

“12. *Betel-nuts* cured—

“Betel-nut” means the fruit of the areca-palm (*areca catechu*), whether with or without husk, whether cured or uncured, but does not include the fruit while still attached to the tree. Two annas per lb.

13. *Coffee*, cured—

“Coffee” means the seed of the coffee tree (*coffee*), whether with or without husk, whether cured or uncured, but does not include the seed while still attached to the tree. Two annas per lb.

14. *Tea*—

“Tea” means the commodity known as tea made from the leaves of the plant *Camilla Thea* (Linn), and includes green tea. Two annas per lb.

## PART II.

### *Amendment of Second Schedule.*

In Part A after Item No. I (Tobacco) the following shall be added, namely:—

- “2. Betel-nuts } When supplied by a curer to a wholesale dealer, whether directly or  
 3. Coffee } through a broker or commission agent.”

## THE SECOND SCHEDULE.

(See section 5.)

## PART I.

### RATES OF INCOME-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies:—

	Rate.	Surcharge.
1. On the first Rs. 1,500 of total income. . .	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 3,500 of total income . .	Nine pies in the rupee	Six pies in the rupee.
3. On the next Rs. 5,000 of total income . .	One anna and three pies in the rupee.	Ten pies in the rupee.
4. On the next Rs. 5,000 of total income . .	Two annas in the rupee.	One anna and six pies in the rupee.
5. On the balance of total income . .	Two annas and six pies in the rupee.	Two annas in the rupee.

Provided that—

- (i) no income-tax shall be payable on a total income which does not exceed Rs. 2,000;  
 (ii) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs. 2,000.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.	Surcharge.
On the whole of total income . .	Two annas and six pies in the rupee.	Two annas in the rupee.

## PART II.

### RATES OF SUPER-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income. . .	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 10,000 of total income. . .	One anna in the rupee.	One anna in the rupee.
3. On the next Rs. 20,000 of total income. . .	Two annas in the rupee.	Two annas in the rupee.
4. On the next Rs. 70,000 of total income. . .	Three annas in the rupee.	Two annas and six pies in the rupee,

	Rate.	Surcharge.
5. On the next Rs. 75,000 of total income.	Four annas in the rupee.	Three annas in the rupee.
6. On the next Rs. 1,50,000 of total income.	Five annas of the rupee.	Three annas in the rupee.
7. On the next Rs. 1,50,000 of total income.	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of total income.	Seven annas in the rupee.	Three annas and six pies in the rupee.

B.—In the case of every local authority—  
On the whole of total income

One anna in the rupee. One anna in the rupee.

C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income.	Nil.	Nil.
2. On the balance of total income.	One anna in the rupee.	One anna in the rupee.

D.—In the case of every company—

	Rate.
On the whole of total income.	Three annas in the rupee.

Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of 1[the whole or part of the previous year] for the assessment for the year ending on the 31st day of March, 1945, not being a dividend payable at a fixed rate or a dividend declared on or before the 29th day of February, 1944, by a company to which but for sub-section (8) of section 6 of this Act, section 23-A of the Indian Income-tax Act, 1922 (XI of 1922), would be applicable.

2[Explanation.—For the purposes of this proviso, the expression 'dividend' shall be deemed to include any distribution included in the expression 'dividend' as defined in clause (6-A) of section 2 of the Indian Income-tax Act, 1922, and any such distribution made during the year ending on the 31st day of March, 1945, shall be deemed to have been made in respect of the whole or part of the previous year.]

## THE INDIAN FINANCE ACT, 1945.

[31st March, 1945.

*An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April, 1945.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942) and to modify certain of those duties, to alter the duty of customs and the duty of excise on tobacco, to fix rates of income-tax and super-tax, and to continue the charge and levy of excess profits tax;

It is hereby enacted as follows:—

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1945.

(2) It extends to the whole of British India.

2. The duty on salt manufactured in, or imported by land into, British India shall, for the year beginning on the 1st day of April, 1945, be at the rate of one rupee and nine annas per standard maund.

3. For the year beginning on the 1st day of April, 1945, the Schedule contained in the First Schedule to this Act shall be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

4. (1) The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to the

Continuation of, and enhancement of, additional duties of customs imposed by section 6, Act XII of 1942.

Indian Tariff Act, 1934, (XXXII of 1934), or under the said Schedule read with any notification of the Central Government for the time being in force, imposed up to the 31st day of March, 1943, by section 6 of the Indian Finance Act, 1942 (XII of 1942), and

continued, subject to certain modifications, up to the 31st day of March, 1945, by section 4 of the Indian Finance Act, 1944, shall continue to be levied and collected as provided in section 6 of the Indian Finance Act, 1942 (XII of 1942) up to the 31st day of March, 1946, subject to the modifications contained in sub-section (2).

(2) The additional duty to be levied and collected under the foregoing sub-section shall be one-half instead of one-fifth of the amount of the duty of customs specified in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in the case of spirits, comprised in Item No. 22 (4) and in sub-items (a), (c) and (d) of Item No. 22 (5) of the said Schedule; and no such additional duty shall be levied or collected on tobacco comprised in Items Nos. 24, 24 (1), 24 (2) and 24 (3) of the said Schedule.

Alteration of duty of customs on tobacco.

5. In the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934),—

(a) in Item No. 24, for the entry in the fourth column the entry “Rs. 8 per lb.” shall be substituted;

(b) in Item No. 24 (1), for the entry in the fourth column the following shall be substituted, namely:—

“The rate at which duty is for the time being leviable on articles included in Item No. 87 of this Schedule under this Act read with any other enactment in force, *plus* Rs. 7-8 per lb.”;

(c) in Item No. 24 (2), for the entry in the fourth column the following shall be substituted, namely:—

“The rate at which duty is for the time being leviable on articles included in Item No. 87 of this Schedule under this Act read with any other enactment in force *plus* Rs. 18-12 per thousand or Rs. 7-8 per lb. whichever is higher”;

(d) in Item No. 24 (3), for the entries in the fourth and sixth columns, respectively, the entries “Rs. 7-8 per lb.” and “Rs. 7 per lb.” shall be substituted.

Alteration of duty of excise on tobacco.

6. In the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944), in Item No. 9, under the heading “I. Unmanufactured tobacco”—

(a) for the entries (i), (ii) and (iii) contained in sub-item (1) beginning—

“(1) If flue-cured and intended for—

(a) manufacture into cigarettes containing—” the following shall be substituted, namely:—

	Per lb.
“(i) more than 60 per cent. weight of imported tobacco ..	Seven rupees and eight annas.
(ii) more than 40 per cent. but not more than 60 per cent. weight of imported tobacco. ..	Five rupees.
(iii) more than 20 per cent. but not more than 40 per cent. weight of imported tobacco ..	Three rupees and eight annas.
(iv) 20 per cent. or less than 20 per cent. weight of imported tobacco ..	Two rupees and eight annas.
(v) no imported tobacco ..	One rupee.”

and in the second column of clause (b) of that sub-item, for the words “Three rupees and eight annas” the words “Seven rupees and eight annas” shall be substituted;

(b) in sub-item (4), the word “stream” shall be omitted.

Income-tax and super-tax.

7. (1) Subject to the provisions of sub-sections (3), (4) and (5),—

(a) income-tax for the year beginning on the 1st day of April, 1945, shall be charged at the rates specified in Part I of the Second Schedule increased in each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and -

(b) rates of super-tax for the year beginning on the 1st day of April, 1945, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, (XI of 1922), be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) If any provision is made in the Indian Income-tax Act, 1922 (XI of 1922), for the exemption from income-tax of a portion of the earned income included in the total income of an assessee, then, in making any assessment for the year ending on the 31st day of March, 1946, there shall be deducted from the total income of an assessee in accordance with such provision an amount equal to one-tenth of such earned income exclusive of any income chargeable under the head "Salaries" but not exceeding in any case two thousand rupees.

(3) In making any assessment for the year ending on the 31st day March, 1946, where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922 (XI of 1922), to have paid income-tax imposed in British India, the Income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1944, on his total income the same proportion as the amount of such inclusions bears to his total income.

(4) In making any assessment for the year ending on the 31st day of March, 1946,—

(a) where the total income of a company includes any profits and gains from life insurance business, the super-tax payable by the company on that part of its total income which consists of such inclusion shall be at the rate of six pises in the rupee;

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business, the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusion bears to his total income, so, however, that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act, 1942 (XII of 1942), the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act.

(5) In cases to which section 17 of the Indian Income-tax Act, 1922 (XI of 1922), applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-sections (3) and (4) of this section where applicable.

(6) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922 (XI of 1922); and the expression "earned income" means earned income as defined for the purposes of the said Act.



(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date not more than twelve months after the termination of the present hostilities, as the Central Government may fix:

Provided that the amount to be funded for the assessee's benefit shall in no case exceed two-fifths of the tax payable by him.

*Explanation.*—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

(8) Notwithstanding anything contained in sub-section (7) of section 6 of the Indian Finance Act, 1944, the amount to be funded for the assessee's benefit under the provisions of that sub-section shall in no case exceed two-fifths of the amount of tax-payable by him in respect of his assessment for the year ending on the 31st day of March, 1945.

(9) The provisions of section 23-A of the Indian Income-tax Act, 1922 (XI of 1922), shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1946.

8. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures "31st day of March, 1945", the words and figures "31st day of March, 1946", shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940) shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1945, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profit of the business during that chargeable accounting period exceed the standard profits.

#### THE FIRST SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

(See section 3.)

#### THE FIRST SCHEDULE.

##### INLAND POSTAGE RATES.

(See section 7.)

##### Letters.

For a weight not exceeding one tola	..	One and a half annas.
For every tola, or fraction thereof, exceeding one tola	..	One anna.
<i>Post Cards.</i>		
Single	..	Nine pias.
Reply	..	One and a half annas.
<i>Book, Pattern and Sample Packets.</i>		
For the first five tolas or fraction thereof	..	Nine pias.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas	..	Three pias.
<i>Registered Newspapers.</i>		
For a weight not exceeding ten tolas	..	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas	..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	..	Half an anna.
<i>In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—</i>		
For a weight not exceeding ten tolas	..	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas	..	Quarter of an anna.

Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.

*Parcel.*

For a weight not exceeding forty tolas .. Six annas.  
For every forty tolas, or fraction thereof, exceeding forty tolas .. Six annas."

## THE SECOND SCHEDULE.

(See section 7.)

### PART I.

#### RATES OF INCOME-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies:—

	Rate.	Surcharge.
1. On the first Rs. 1,500 of total income ..	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 3,500 of total income ..	Nine pies in the rupee ..	Six pies in the rupee.
3. On the next Rs. 5,000 of total income ..	One anna and three pies in the rupee.	Ten pies in the rupee.
4. On the next Rs. 5,000 of total income ..	Two annas in the rupee.	One anna and four pies in the rupee.
5. On the balance of total income ..	Two annas and six pies in the rupee.	Two anna and three pies in the rupee.

Provided that—

(i) no income-tax shall be payable on a total income which, before deduction of the allowance, if any, for earned income, does not exceed Rs. 2,000;

(ii) the income-tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance, if any, for earned income) exceeds Rs. 2,000;

(iii) the income-tax payable on the total income as reduced by the allowance for earned income shall not exceed either—

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income) exceeds Rs. 2,000 the same proportion as such reduced total income bears to the unreduced total income, or

(b) the income-tax payable on the income so reduced at the rates specified in this Schedule,

whichever is less.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.	Surcharge.
On the whole of total income ..	Two annas and six pies in the rupee.	Two annas and three pies in the rupee.

### PART II.

#### RATES OF SUPER-TAX.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income. . .	<i>Nil.</i>	<i>Nil.</i>
2. On the next Rs. 10,000 of total income.	One anna in the rupee.	One anna in the rupee.
3. On the next Rs. 20,000 of total income.	Two annas in the rupee.	Two annas in the rupee.
4. On the next Rs. 70,000 of total income.	Three annas in the rupee.	Two annas and six pies in the rupee.
5. On the next Rs. 75,000 of total income.	Four annas in the rupee.	Three annas in the rupee.
6. On the next Rs. 1,50,000 of total income.	Five annas in the rupee.	Three annas in the rupee.
7. On the next Rs. 1,50,000 of total income.	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of total income.	Seven annas in the rupee.	Three annas and six pies in the rupee.

B.—In the case of every local authority—

On the whole of total income ..	One anna in the rupee.	One anna in the rupee.
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C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate.	SurchARGE.
1. On the first Rs. 25,000 of total income.	<i>Nil.</i>	<i>Nil.</i>
2. On the balance of total income.	One anna in the rupee.	Six pies in the rupee.

D.—In the case of every company—

	Rate.
On the whole of total income.	Three annas in the rupee.

Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1946, not being a dividend payable at a fixed rate.

*Explanation.*—For the purposes of this proviso, the expression 'dividend' shall be deemed to include any distribution included in the expression 'dividend' as defined in clause (6-A) of section 2 of the Indian Income-tax Act, 1922, and any such distribution made during the year ending on the 31st day of March, 1946, shall be deemed to have been made in respect of the whole or part of the previous year.

### THE INDIAN FINANCE ACT (VII OF 1946.)

(Recd. Governor-General's assent on 30th March, 1946.)

*An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April, 1946.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue, subject to certain modifications, for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942) to alter the duty of customs on cinematograph films, raw cotton and silver, to withdraw the duty of customs on raw cotton levied under the Cotton Fund Ordinance, 1942 (VIII of 1942), to impose a duty of customs on gold, to alter the duty of customs and the duty of excise on betelnuts, motor spirit, kerosene and minerals oils, to fix rates of income-tax and super-tax and to make certain provisions relating to income-tax, super-tax and excess profits tax.

It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN FINANCE ACT, 1946.

(2) It extends to the whole of British India.

Fixation of salt duty. 2. The duty on salt manufactured in, or imported by land into, British India, for the year beginning on the 1st day of April, 1946, be at the rate of one rupee and nine annas per standard maund.

Inland postage rates. 3. For the year beginning on the 1st day of April 1946, the Schedule contained in the First Schedule to the Indian Finance Act 1945, shall again be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

Amendment of section 4, Indian Finance Act, 1945. 4. (1) To sub-section (2) of section 4 of the Indian Finance Act, 1945, the following shall be added, namely:—

"or, after the 28th day of February 1946, on kerosene and mineral oils, comprised in Items Nos. 27 (4) and 27 (5) of the said Schedule".

(2) The provisions of this section shall be deemed to have come into force on the 28th day of February 1946.

5. (1) The additional duties of customs on certain goods chargeable with a duty of customs under the First Schedule to the

Continuation of, and enhancement of additional duties of customs imposed by section 6, Act XII of 1942.

Indian Tariff Act, 1934 (XXXII of 1934), or under the said Schedule read with any notification of the Central Government for the time being in force, imposed up to the 31st day of March 1943 by section 6 of the Indian Finance Act, 1942, and continued, subject to certain

modifications, up to the 31st day of March 1946, by section 4 of the Indian Finance Act, 1945, as amended by section 4 of this Act, shall continue to be levied and collected as provided in the said section 6 up to the 31st day of March 1947, subject to the aforesaid modifications and to the further modifications contained in sub-section (2).

(2) The additional duty to be levied and collected under sub-section (1) shall be one half instead of one-fifth of the amount of the duty of customs specified in the First Schedule to the Indian Tariff Act, 1934, in the case of wines, comprised in Item No. 22 (3) of the said Schedule; and no such additional duty shall be levied or collected on—

(a) betelnuts, comprised in Item No. 9 (5),

(b) cinematograph films, not exposed and exposed, comprised in Items Nos. 29 and 29 (1),

(c) raw cotton, comprised in Item No. 46 (3),

(d) silver bullion and silver sheets and plates which have undergone no process of manufacture subsequent to rolling, and silver coin, not otherwise specified, comprised in Items Nos. 61 (2) and 62 (1).

(e) gold bullion and gold sheets and plates which have undergone no process of manufacture subsequent to rolling, and gold coin, comprised in Items Nos. 61 (3) and 62 (2), of the said Schedule.

Imposition and alteration of certain duties of customs.

6. In the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934),—

(a) in Item No. 9 (5), for the entries in the fourth and sixth columns, the entires "Five annas per lb." and "Four annas and six pies per lb." shall be respectively substituted;

(b) in Item No. 29, for the entry in the fourth column, the entry "Three pies per linear foot" shall be substituted;

(c) in Item No. 29 (1), for the entry in the fourth column, the entry "Four annas per linear foot" shall be substituted;

(d) in Item No. 46 (3), for the entry in the fourth column, the entry "Two annas per lb." shall be substituted;

(e) in Items Nos. 61 (2) and 62 (1) in the fourth column, for the word "Three" the word "eight" shall be substituted;

(f) in Items Nos. 61 (3) and 62 (2),—

(i) in the third column the word "Revenue" shall be inserted, and

(ii) for the entry in the fourth column, the following entry shall be substituted, namely:—

"Rs. 25 per tola of 180 grains fine".

7. In the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in Items Nos. 27 (4) and 27 (5), in the fourth column, the words 'and nine pies' shall be omitted.

8. (1) In the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944), in Item No. 4 for the word "Fifteen" the word "Twelve" shall be substituted.

(2) The provisions of this section shall be deemed to have come into force on the 1st day of March 1946.

9. In the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944), in Item No. 12, for the words "Two annas" the words "One anna" shall be substituted.

Repeal of Ordinance VIII of 1942.

10. The Cotton Fund Ordinance, 1942, is hereby repealed:

Provided that the repeal of the said Ordinance shall not prejudice the power of Central Government to utilise the balance at the credit of the fund established thereunder for the purposes set out in section 3 of that Ordinance.

Income-tax and super-tax.

11. (1) Subject to the provisions of sub-sections (3), (4), (5), (6) and (7),—

(a) income-tax for the year beginning on the 1st day of April, 1946 shall be charged at the rates specified in Part I of the Schedule, and

(b) rates of super-tax for the year beginning on the first day of April, 1946, shall for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of the Schedule.

(2) In making any assessment for the year ending on the 31st day of March 1947, there shall be deducted from the total income of an assessee, in accordance with the provisions of section 15-A of the Indian Income-tax Act, 1922, an amount equal to—

(i) one-tenth of the earned income chargeable under the head "Salaries" which is included in his total income, subject to a maximum of two thousand rupees, *plus*

(ii) one-fifth of the earned income other than the income chargeable under the head "Salaries" which is included in his total income:

Provided that the aggregate amount to be deducted under this sub-section shall not in any case exceed four thousand rupees.

(3) In making any assessment for the year ending on the 31st day of March 1947,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" as reduced by the deduction for earned income appropriate thereto, or any income chargeable under the head "Interest on Securities", or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1945, on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusion shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1945, on his total income the same proportion as the amount of such inclusion bears to his total income.

(4) In making any assessment for the year ending on the 31st day of March 1947, where the total income of an assessee consists partly of earned income and partly of unearned income, the super-tax payable by him shall be—

(i) on that part of the earned income chargeable under the head "Salaries" to which clause (b) of sub-section (3) applies, the amount of super-tax computed in accordance with the provisions of that clause, *plus*

(ii) on the remainder of the earned income, the amount which bears to the total amount of super-tax which would have been payable on his total income

had it consisted wholly of earned income the same proportion as such remainder bears to his total income, *plus*

(iii) on the unearned income, the amount which bears to the amount of super-tax which would have been payable on his total income had it consisted wholly of unearned income the same proportion as the unearned bears to his total income.

(5) Where the total income of an assessee referred to in paragraph A of Part I of the Schedule does not exceed six thousand rupees and includes any income to which clause (a) of sub-section (3) applies, the income-tax payable by the assessee on such inclusion as computed in accordance with the provisions of that clause shall be reduced by an amount representing one rupee for every complete unit of two hundred rupees of such inclusion as reduced by the amount of income, if any, exempt under the second proviso to sub-section (1) of section 7, section 15, and sub-section (1) of section 58-F, of the Indian Income-tax Act, 1922.

Provided that the reduction to be made under this sub-section shall not in any case exceed two-fifths of the income-tax otherwise payable on such inclusion:

Provided further that if there is an incomplete unit of such inclusion amounting to one hundred rupees or more, it shall for the purposes of this sub-section be reckoned as a complete unit of two hundred rupees.

(6) In making any assessment for the year ending on the 31st day of March 1947,—

(a) where the total income of a company includes any profits and gains from life insurance business, the super-tax payable by the company shall be reduced by an amount computed at the rate of one anna in the rupee on that part of its total income which consists of such inclusion;

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business, the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusion bears to his total income, so however that the aggregate of the taxes so computed in respect of such inclusion shall not in any case exceed the amount of tax payable on such inclusion at the rate of five annas in the rupee.

(7) In cases to which section 17 of the Indian Income-tax Act, 1922 applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section and in accordance, where applicable with the provisions of sub-sections (3), (4), (5) and (6) of this section.

(8) For the purposes of making any deduction of income-tax in the year beginning on the first day of April 1946, under sub-section (2) or sub-section (2-B) of section 18 of the Indian Income-tax Act, 1922, from any earned income chargeable under the head "Salaries", the estimated total income of the assessee under this head shall, in computing the income-tax to be deducted, be reduced by an amount equal to one-fifth of such earned income but not exceeding in any case four thousand rupees.

(9) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922, and the expression "earned income" has the meaning assigned to it in clause (6-AA) of section 2 of that Act.

(10) If any provision is made in the Indian Income-tax Act, 1922, for the allowance of expenditure on scientific research related to the business carried on by an assessee, then any such expenditure incurred by him in the previous year for the assessment for the year ending on the 31st day of March 1946, shall for the purposes of that provision and in accordance therewith, be deemed to be expenditure incurred in the previous year for the assessment for the year ending on the 31st day of March 1947, and shall be added to the amount of such expenditure, if any, in that previous year.

(11) Any sum being excess profits tax repaid in respect of any chargeable accounting period under the provisions of section 10 of the Indian Finance Act, 1942, or of section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943), shall be deemed to be income for the purpose of the Indian Income-tax Act, 1922, and shall, notwithstanding the provisions of section 34 of that Act, be treated as income of the previous year which constitutes or includes the chargeable accounting period in respect of which the said sum is repayable:

Provided that any such sum repaid in respect of any profits which are also assessable to excess profits tax under the law in force in the United Kingdom shall be treated, for the purpose of assessment to income-tax and super-tax, as income of the previous year during which the repayment is made.

(12) The Income-tax Officer shall calculate the amount of income-tax and super-tax payable in respect of each sum referred to in sub-section (11), and such amount shall be deducted from the said sum at the time that it is repaid, and where the regular assessment proceeding for the appropriate assessment year are not complete; the tax so deducted shall be treated as a payment of income-tax or super-tax, as the case may be, for the purposes of sub-section (5) of section 18 of the Indian Income-tax Act, 1922.

(13) Any person objecting to the amount of a deduction made under sub-section (12) may appeal to the Appellate Assistant Commissioner within thirty days of the receipt of the repayment order, and the provisions of sections 30, 31 and 33 of the Indian Income-tax Act, 1922, shall apply as if such appeal were an appeal under the first mentioned section.

(14) Where under the provisions of sub-section (2) of section 12 of the Excess Profits Tax Act, 1940 (XV of 1940), excess profits tax payable under the law in force in the United Kingdom has been deducted in computing for the purposes of income-tax and super-tax the profits and gains of any business, the amount of any repayment under sub-section (1) of section 28 of the Finance Act, 1941 (4 & 5 Geo. VI, c. 30), as amended by section 37 of the Finance Act, 1942 (5 & 6 Geo. VI, c. 21), in respect of those profits, shall be deemed to be income for the purposes of the Indian Income-tax Act, 1922, and shall, for the purpose of assessment to income-tax and super-tax, be treated as income of the previous year during which the repayment is made.

12. If any provision is made in clause (vi) of sub-section (2) of section 10 of the Indian Income-tax Act, 1922 (XI of 1922),  
 Excess profits-tax. to allow in respect of depreciation a further sum which is not deductible in determining the written down value, then such sum shall not be included in the allowances made in computing profits for the purposes of the Excess Profits Tax Act, 1940 (XV of 1940).

Amendment of section 10, Act XII of 1942. 13. (1) To sub-section (1) of section 10 of the Indian Finance Act, 1942, the following further proviso shall be added, namely:—

“Provided further that no such further sum herein referred to shall be deposited with the Central Government after the 28th day of February, 1946”.

(2) The provisions of this section shall be deemed to have come into force on the 28th day of February, 1946.



## THE SCHEDULE.

(See Section 11).

## PART I.

*Rates of Income-tax.*

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies—

Rate.

Provided that—

(i) no additional super-tax shall be payable where such part is less than, or equal to, five per cent. on the capital of the company;

(ii) where such part is more than five per cent. on the capital of the company, the additional super-tax payable shall be reduced by the amount of additional super-tax which would, but for the provisions of clause (i) of this proviso, have been payable had such part been equal to five per cent. on the capital of the company;

(iii) where any dividends (not being dividends payable at a fixed rate) have been declared before the 1st day of March, 1946 in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1947, and the amount of super-tax computed at the rates set out in this paragraph exceeds the amount of super-tax which would be payable by the company at the rate specified in the Indian Finance Act, 1945, such proportion of the amount of super-tax computed under this paragraph as the amount of dividends declared before the 1st day of March, 1946 bears to the total amount of dividends declared in respect of the said previous year (not being dividends payable at a fixed rate) shall be so reduced as not to exceed the same proportion of the super-tax computed at the rate specified in the Indian Finance Act, 1945;

(iv) the additional super-tax shall be payable only by a company in which the public are substantially interested within the meaning of the *Explanation* to sub-section (1) of section 23-A of the Indian Income-tax Act, 1922, or a subsidiary company of such a company where the whole of the share capital of such subsidiary company is held by the parent company or by the nominee thereof.

*Explanation.*—For the purposes of this paragraph,—

(a) the expression "capital of the company" shall be deemed to mean the paid-up share capital at the beginning of the previous year for the assessment for the year ending on the 31st day of March, 1947 (other than capital entitled to a dividend at a fixed rate) plus any reserves other than depreciation reserves and reserves for bad or doubtful debts at the same date as diminished by the amount on deposit on the same date with the Central Government under section 10 of the Indian Finance Act, 1942, or section 2 of the Excess Profits Tax Ordinance, 1943;

(b) the expression "dividend" shall be deemed to include any distribution included in the expression "dividend" as defined in clause (6-A) of section 2 of the Indian Income-tax Act, 1922, and any such distribution made during the year ending on the 31st day of March, 1947, shall be deemed to have been made in respect of the whole or part of the previous year;

(c) where any portion of the profits and gains of a company is not included in its total income, by reason of such portion being exempt from tax under any provision of the Indian Income-tax Act, 1922, the capital of the company, the total amount of dividends and the amount of dividends payable at a fixed rate shall each be deemed to be the proportion thereof that the total income of the company bears to its total profits and gains.

## LEG. REF.

<sup>1</sup>For Statement of Objects and Reasons, see *Gazette of India*, 1893, Pt. V, p. 101; for Report of the Select Committee, see *ibid.*, 1897, Pt. V, p. 15, and for Proceedings in Council, see *ibid.*, 1893, Pt. VI, p. 207, *ibid.*

1896, p. 250 and *ibid.*, 1913, p. 101. This Act has been declared to be in force in British Baluchistan by sec. 3 of the British Baluchistan Laws Regulation, 1913 (II of 1913), Bal. Code.

[4th February, 1897.]

*An Act to provide for certain matters relating to Fisheries in British India.*

WHEREAS it is expedient to provide for certain matters relating to fisheries in British India; it is hereby enacted as follows:—

1. (1) This Act may be called THE INDIAN  
Title and extent. FISHERIES ACT, 1897.

(2) It extends to the whole of British India, <sup>1</sup>[\* \*] <sup>2</sup>[\* \* \* \*]

2. Subject to the provisions of sections 8 and 10 of the <sup>3</sup>General Clauses Act, 1887, this Act shall be read as supplemental to any other enactment<sup>4</sup> for the time being in force relating to fisheries in any part of British India <sup>4</sup>[\* \* \*].

Act to be read as supplemental to other Fisheries Laws.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(1) "fish" includes shell-fish;

(2) "fixed engine" means any net, cage, trap or other contrivance for taking fish, fixed in the soil or made stationary in any other way; and

(3) "private water" means water which is the exclusive property of any person or in which any person has for the time being an exclusive right of fishery whether as owner, lessee or in any other capacity.

*Explanation.*—Water shall not cease to be "private water" within the meaning of this definition by reason only that other persons may have by custom a right of fishery therein.

4. (1) If any person uses any dynamite or other explosive substance in any water with intent thereby to catch or destroy any of the fish that may be therein, he shall be punishable with imprisonment for a term which may extend to two months, or with fine which may extend to two hundred rupees.

(2) In sub-section (1) the word "water" includes the sea within a distance of one marine league of the sea-coast; and an offence committed under that sub-section in such sea may be tried, punished and in all respects dealt with as if it had been committed on the land abutting on such coast.

#### LEG. REF.

<sup>1</sup> The word 'except Burma' omitted by A. O., 1937.

<sup>2</sup> The word "and" at the end of sub-sec. (2), and sub-sec. (3) were repealed by the Repealing and Amending Act, 1914, (X of 1914).

<sup>3</sup> See now secs. 4 and 26 of the General Clauses Act, 1897 (X of 1897).

<sup>4</sup> For law relating to Fisheries in—

(1) Assam, see the Assam Land and Revenue Regulation, 1886, (I of 1886), secs. 16 and 155.

(2) Bengal and Assam (private fisheries), see the Private Fisheries Protection Act, 1889 (Ben. Act II of 1889).

(3) Central Provinces, see the Central Provinces Land Revenue Act, 1881 (XVIII of 1881), C. P. Code.

(4) Nilgiris District, as to acclimatised fish, see the Nilgiris Game and Fish Preservation Act, 1879 (Mad. Act II of 1879), Mad. Code, Vol. I.

(5) See Punjab Fisheries Act (II of 1914).

(6) Madras—see Madras Act (II of 1927).

The right of a subject to a several fishery in a navigable river depends not upon the ownership of the bed of the river but upon the navigability of the river, and is extinguished on the river losing its navigable character. The question whether the river has lost its navigable character is a question of fact. If the channel of a river is deep for about nine months of the year and boats of ordinary size employed in commerce can navigate it during that period, the river cannot be said to lose its navigable character so as to extinguish a right to a several fishery therein merely because no boats can pass for about three months in the year during the dry weather. The right to fish in the pools of water remaining in the permanent bed of the river during the dry weather subsists, although they are not connected throughout the year with the flowing waters of the stream. Such pools are a part and parcel of river itself. 48 C.W.N. 537=A.I.R. 1944 Cal. 315.

5. (1) If any person puts any poison, lime or noxious material into any water with intent thereby to catch or destroy any fish, he shall be punishable with imprisonment for a term which may extend to two months, or with fine which may extend to two hundred rupees.

(2) The Provincial Government may, by notification in the Official Gazette, suspend the operation of this section in any specified area; and may in like manner modify or cancel any such notification.

6. (1) The Provincial Government may make rules<sup>1</sup> for the purposes hereinafter in this section mentioned, and may by notification in the Official Gazette apply all or any of such rules to such waters, not being private waters, as the Provincial Government may specify in the said notification.

(2) The Provincial Government may also, by a like notification, apply such rules or any of them to any private water with the consent in writing of the owner thereof and of all persons having for the time being any exclusive right of fishery therein.

(3) Such rules may prohibit or regulate all or any of the following matters, that is to say:—

(a) the erection and use of fixed engines;

(b) the construction of weirs; and

(c) the dimension and kind of the nets to be used and the modes of using them.

(4) Such rules may all prohibit all fishing in any specified water for a period not exceeding two years.

(5) In making any rule under this section the Provincial Government may—

(a) direct that a breach of it shall be punishable with fine which may extend to one hundred rupees, and, when the breach is a continuing breach, with a further fine which may extend to ten rupees for every day after the date of the first conviction during which the breach is proved to have been persisted in; and

(b) provide for—

(i) the seizure, forfeiture and removal of fixed engines, erected, or used or nets used, in contravention of the rule, and

(ii) the forfeiture of any fish taken by means of any such fixed engine or net.

(6) The power to make rules under this section is subject to the condition that they shall be made after previous publication.

7. (1) Any police-officer, or other person<sup>2</sup> specially empowered by the Provincial Government] in this behalf, either by name or as holding any office, for the time being may, without an order from a Magistrate and without warrant arrest any person committing in his view any offence punishable under section 4 or 5 or under any rule under section 6—

(a) if the name and address of the person are unknown to him, and

(b) if the person declines to give his name and address, or if there is reason to doubt the accuracy of the name and address if given.

(2) A person arrested under this section may be detained until his name and address have been correctly ascertained:

#### LEG. REF.

<sup>1</sup>For rules under sec. 6, see different local Rules and Orders.

<sup>2</sup>For notification under this section in Madras, see Fort St. George Gazette, 1903, Pt. I, p. 19.

Provided that no person so arrested shall be detained longer than may be necessary for bringing him before a Magistrate, except under the order of a Magistrate for his detention.

## THE INDIAN FISHERIES (MADRAS AMENDMENT) ACT (II OF 1927).

[2nd December, 1928.]

*An Act to amend the Indian Fisheries Act, 1897, in its application to the Presidency of Madras.*

WHEREAS it is expedient to amend the Indian Fisheries Act, 1897, in its application to the Presidency of Madras for the purposes hereinafter appearing; and whereas the previous sanction of the Governor-General has been obtained to the passing of this Act; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FISHERIES (MADRAS AMENDMENT) ACT, 1927.

(2) It extends to the whole of the Presidency of Madras.

Amendment of S. 6, Act IV of 1897.

2. In sub-section (3) of section 6 of the Indian Fisheries Act, 1897 (hereinafter referred to as the said Act)—

(i) after the words "prohibit or regulate" the words "either permanently or for a time or for specified seasons only" shall be inserted, and

(ii) for clause (c) the following clause shall be substituted, namely:—

"(c) the dimension and kind of the contrivances to be used for taking fish generally or any specified kind of fish and the modes of using such contrivances."

Amendment of S. 6, Act IV of 1897.

3. For sub-section (4) of section 6 of the said Act, the following sub-section shall be substituted, namely:—

"(4) Such rules may also prohibit all fishing in any specified water except under a lease or license granted by Government and in accordance with such conditions as may be specified in such lease or licence:

Provided that no rule shall be made under this sub-section to prohibit sea fishery other than pearl fishery or chank fishery unless, after previous publication under sub-section (6) of this section, it has been laid in draft before the Legislative Council, and has been approved by a resolution of the Legislative Council either with or without modification or addition; but upon such approval being given the rule may be issued in the form in which it has been so approved."

Addition of new S. 8 to Act IV of 1897.

4. After section 7 of the said Act, the following section shall be added, namely:—

Recovery of rents, fees and other moneys payable to Government.

"8. All rents, fees and other moneys payable to Government on account of fishery leases and licences granted by them may be recovered in like manner as if they were arrears of land revenue."

THE FOREIGNERS ACT (III OF 1864).<sup>1</sup>

[See also Registration of Foreigners Act XVI of 1939].

[Rep. in part by Acts XII of 1876 and X of 1914; amended by Acts XII of 1891 and III of 1915. See also Act XVI of 1939.]

[12th February, 1864.

*An Act to give the Government certain powers with respect to Foreigners.*

WHEREAS it is expedient to make provision to enable the Government to prevent the subjects of Foreign States from residing or sojourning in British India, or from passing through or travelling therein, without the consent of the Government; it is enacted as follows:—

1. The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say:—

## LEG. REF.

<sup>1</sup> Short title, "the Foreigners Act, 1864". See the Indian Short Titles Act, 1897 (XIV of 1897).

For special direction from Parliament to pass this Act, see sec. 84 of the Government of India Act, 1833 (III and IV Will. IV, c. 85), Coll. Stats., Ind., Vol. I.

For the Statement of Objects and Reasons of the Bill which became Act III of 1864, see Calcutta Gazette, 1863, p. 2163: for Proceedings relating to the Bill, see *ibid.*, Supplement, p. 581, and *Gazette of India*, 1864, Supplement, p. 41.

The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), sec. 3.

It has been declared in force in—

Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), sec. 4 (1) and Sch. I, Bur. Code, Vol. I but its application to Chins in the Chin Hills has been barred by the Chin Hills Regulation, 1896 (V of 1896), Bur. Code, Vol. I, and to hill tribes in a hill-tract to which the Regulation applies by the Kachin Hill Tribes Regulation, 1895 (I of 1895), Bur. Code, Vol. I.

Sindh, see *Gazette of India*, 1878, Pt. I, p. 482.

Aden, see *Gazette of India*, 1879, Pt. I, p. 434.

West Jalpaiguri, the Western Dvars, the Western Hills of Darjiling, the Darjiling Tarai, and the Dahson Sub-Division of the Darjiling District, see *Gazette of India*, 1881, Pt. I, p. 74.

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44), and Manbhum,

and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see *Gazette of India*, 1881, Pt. I, p. 504.

The Santhal Parganas by the Santhal Parganas Settlement Regulation (III of 1872), sec. 3, as amended by the Santhal Parganas Justice and Laws Regulation (III of 1899), B. and O. Code, Vol. I.

The Arakan Hill Districts by the Arakan Hill District Laws Regulation, 1916 (I of 1916), sec. 2, Bur. Code, Vol. I.

British Baluchistan by the British Baluchistan Laws Regulation, 1913 (II of 1913), sec. 3, Bal. Code.

Angul District by the Angul Laws Regulation, 1913 (III of 1913), sec. 3, B. and O. Code, Vol. I.

It has been declared, by notification under sec. 3 (a) of the Scheduled District Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

The Purhat Estate in the Singhbhum District, see *Gazette of India*, 1897, Pt. I, p. 1059.

The Scheduled portion of the Mirzapur District, see *Gazette of India*, 1879, Pt. I, p. 383.

Jaunsar Barwar, see *Gazette of India*, 1879, Pt. I, p. 382.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. (Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province, see *Gazette of India*, 1901, Pt. I, p. 857, and *ibid.*, 1902, Pt. I, p. 575; but its application in that part of the Hazara District known as Upper Tanawal has been barred by the Hazara (Upper Tanawal) Re-

<sup>1</sup>[ \* \* \* ].  
 "Foreigner."

The word "foreigner" shall denote a person:—

<sup>2</sup>[(a) who is not a natural born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914, or

(b) who has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in British India:

Provided that any British subject who, under any law for the time being in force in British India, ceases to be a British subject, shall thereupon be deemed to be a foreigner];

the words "the Magistrate of the district" shall denote the chief officer charged with the executive administration of a district and exercising the powers of a Magistrate, by whatever designation the chief officer charged with the executive administration is styled, or, in the absence of such officer from the station at which his Court is usually held, the senior officer at the station exercising the powers of a Magistrate as defined in the Code of Criminal Procedure:

"Vessel." <sup>3</sup>the word "vessel" shall include anything made for the conveyance by water of human beings or property:<sup>3</sup>

[Number.] Rep. by Act X of 1914.

[Gender.] Rep. by Act X of 1914.

2. If a question shall arise whether any person alleged to be a foreigner and to be subject to the provisions of this Act is a

Proof of being a foreigner. foreigner or not, or is or is not subject to the provisions of this Act, the onus of proving that such person is not a foreigner, or is not subject to the provisions of this Act, shall lie upon such person.

#### LEG. REF.

gulation, 1900 (II of 1900). (Punjab and N. W. Code), see Gazette of India, 1886, Pt. I, p. 301.

The District of Lahaul, see Gazette of India, 1886, Pt. I, p. 48.

The Scheduled Districts of the Central Provinces, see Gazette of India, 1879, Pt. I, p. 771.

The Scheduled Districts in Ganjam and Vizagapatam, see Gazette of India, 1898, Pt. I, p. 870.

The District of Sylhet, see 1879, Pt. I, p. 631.

The rest of Assam (except the North Lushai Hills), see Gazette of India, 1897, Pt. I, p. 299.

It has been extended by notification under sec. 5 of the last-mentioned Act, to the following Scheduled Districts, namely:—

Kumaon and Garhwal, see Gazette of India, 1876, Pt. I, p. 606.

The Tarai of the Province of Agra, see Gazette of India, 1876, Pt. I, p. 505.

<sup>1</sup>Definitions of 'British India' and 'Local Government' omitted by A.O., 1937.

<sup>2</sup>These words were substituted for the words "not being either a natural-born subject of Her Majesty within the meaning of the Statute 3 and 4 William IV, Chap. 85, sec. 81. or a Native of British India" by sec. 2 of the Foreigners (Amendment) Act, 1915 (III of 1915).

<sup>3</sup>Cf. definition in sec. 3 (56) of the General Clauses Act, 1897.

SEC. 2: EFFECT OF TRANSFER OF TERRITORY.—CESSION OF TERRITORY BY BRITAIN TO ANOTHER STATE.—BRITISH SUBJECT CEASES TO BE SUCH ON CESSION.—A relinquishment by the Government of a territory is not only a relinquishment of the right to soil or territory, but also of the rights over the inhabitants of the country. The distinction between a right of election of which sovereign he will become the subject and the method by which a man can leave a newly ceded

3. The Central Government may, by writing, order any foreigner to remove himself from British India or to remove himself therefrom by a particular route to be specified in the order: <sup>1</sup>[ \* \* \* ].

Government may order any foreigner to remove himself.

<sup>2</sup> [3-A. (1) Whenever in a Presidency town the Commissioner of Police or elsewhere the Magistrate of the District considers that the <sup>3</sup>[Central Government] should be moved to issue an order under section 3 in respect of any foreigner who is within the limits of such Presidency town or of the jurisdiction of such Magistrate, he may report the case to the <sup>3</sup>[Central Government] and at the same time issue a warrant for the apprehension of such foreigner.

Foreigner may be apprehended and detained pending order of removal.

(2) Any officer issuing a warrant under sub-section (1) may, in his discretion, direct by endorsement on the warrant that if such foreigner executes a bond with or without sureties for his attendance at a specified place and time, the person to whom the warrant is directed shall take such security and release such foreigner from custody.

(3) Any person executing a warrant under sub-section (1) may search for and apprehend the foreigner named in such warrant; and, subject to any direction issued under sub-section (2), shall forthwith cause such foreigner when apprehended to be produced before the officer issuing the warrant.

(4) When a foreigner for whose apprehension a warrant has been issued under sub-section (1) is produced or appears before the officer issuing such warrant, such officer may direct him to be detained in custody pending the orders of the <sup>3</sup>[Central Government], or may release him on his executing a bond with or without sureties to appear at a specified place and time and thereafter if and when required until such orders are obtained.

(5) Any officer who has in accordance with the provisions of sub-section (4), ordered a foreigner to be detained or released on his executing a bond shall

#### LEG. REF.

<sup>1</sup> Words referring to Local Government were omitted by A.O., 1937.

<sup>2</sup> Sec. 3-A was inserted by sec. 3 of the Foreigners (Amendment) Act, 1915 (III of 1915).

<sup>3</sup> Substituted for 'Local Government' by A.O., 1937.

territory and remain within the allegiance of his former sovereign, seems somewhat fine; but the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former sovereign; there must be conduct on his part, such as leaving the ceded territory and going to reside permanently in his former sovereign's dominions to indicate his previous election. Any inhabitant of the ceded or separated territory has not the right to remain as an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation. The common law of England embodying the above rules is the law for the time being in

force in British India within the meaning of the proviso to sec. 1. 90 I.C. 310=1925 B. 489 [18 Cal. 620 (P.C.) and 42 Mad. 589 (P.C.), Foll.]. The applicant was born in Ramdupati which was in British territory. In that village he had some lands and owned a house in which his family resided permanently. He, however, came to Bombay for purposes of trade. Ramdupati was subsequently ceded to the Maharaja of Benares by the British Government. The applicant continued to live in Bombay for trade before as well as after the cession. *Held*, that the applicant as a "foreigner" by virtue of the proviso to sec. 2 of Act III of 1915, amending the Foreigners Act, 1864. 90 I.C. 310=49 B. 804=27 Bom.L.R. 1043=26 Cr. L. J. 1526=1925 B. 489.

SECS. 3 AND 3-A: PROCEDURE.—Government must issue orders about detention or release or removal without delay.—Commissioner of Police cannot do any such thing without such orders. 85 I.C. 138=49 B. 222=26 Bom.L.R. 1252=26 Cr.L.J. 458=1925 B. 139.

SECS. 3 AND 4.—Act III of 1864 is not *ultra vires* of the Governor-General of India



forthwith report the fact to the <sup>1</sup>[Central Government]. On the receipt of a report under this sub-section the <sup>1</sup>[Central Government] shall without delay either direct that the foreigner be discharged or make an order for the removal of such foreigner in accordance with the provisions of section 3.]

4. If any foreigner ordered to remove himself from British India, or ordered to remove himself therefrom by a particular route, shall neglect or refuse so to do, or if any foreigner, having removed himself from British India in consequence of an order issued under any of the provisions of this Act, or having been removed from British India under any of the said provisions, shall wilfully return thereto without a license in writing granted by the Central Government <sup>2</sup>[\* \* \*] such foreigner may be apprehended and detained in safe custody, until he shall be discharged therefrom by order of the Central Government <sup>2</sup>[\* \* \*] upon such terms and conditions as the said Central Government <sup>2</sup>[\* \* \*] shall deem sufficient for the peace and security of British India, and of the allies of Her Majesty, and of the neighbouring Princes and States.

5. Whenever the Central Government shall consider it necessary to take further precautions in respect of foreigners residing or travelling in British India or any part thereof, it shall be lawful for the Central Government, by a notification published in the Official Gazette, to order that the provisions of this and the subsequent sections of this Act shall be in force in British India, or in such part thereof as shall be specified in such notification, for such period as shall be therein declared; and thereupon, and for such period, the whole of this Act including this and the subsequent sections shall have full force and effect in British India or such part thereof as shall have been so specified. The Central Government may, from time to time, by a notification published as aforesaid cancel or alter any former notification which may still be in force; or may extend the period declared therein: Provided that none of the provisions of this or the subsequent sections of this Act shall extend to any foreign minister duly accredited by his Government; to any consul or vice-consul; to any person under the age of fourteen years; or to any person in the service of Her Majesty.

6. Every foreigner on arriving in any part of British India in which all the provisions of this Act are for the time being in force under an order issued as provided in the last preceding section, from any port or place not within British India, or from any port or place within British India

#### LEG. REF.

<sup>1</sup> Substituted for 'Local Government' by A. O., 1932.

<sup>2</sup> Words referring to Local Government omitted by *ibid.*

in Council. 18 B. 636. The Act applies to all foreigners, although their residence in Bombay may not be likely to affect or endanger the peace and security of British India. (*Ibid.*) The Government would be the sole Judges of what was necessary for the peace and security of British India, and if they acted in accordance with the letter of the Act, the High Court could not enquire into the sufficiency or otherwise of their reasons for so acting. (*Ibid.*) A warrant issued under secs. 3 and 4 of Act III of 1864 should not comprise two distinct orders, one to the foreigner to remove himself from British

India, the other to arrest him in case it is not duly obeyed. There should be a separate order directing him to remove himself from British India which should be duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there should be a further order by the Government authorizing his arrest and detention in jail. The persons named in the warrant should be described with sufficient certainty and particularity. The particular route to be specified in the order referred to in sec. 3 of Act III of 1864 is intended to be a route in British India and not a route beyond the High Seas. In the absence of statutory provision, the absence of a seal will render a warrant void. (*Ibid.*) See also 18 C.W.N. 705=15 Cr.L.J. 328=23 I.C. 678=1 L.W. 989 (P.C.).

where all the provisions of this Act are not in force, shall if he arrive at a presidency-town, forthwith report himself to the Commissioner of Police of such town, or, if he arrive at any other place, then he shall forthwith report himself to the Magistrate of the district, or to such other officer as shall be appointed to receive such reports, by the Central Government <sup>1</sup>[\* \* \*].

7. The report shall be in writing, and shall be signed by the person reporting himself, and shall specify his name or names, the nation to which he belongs, the place from which he shall have come, the place or places of his destination, the object of his pursuit, and the date of his arrival in such presidency-town or other place. The report shall be recorded by the officer to whom it is made.

8. The provisions of the last two preceding sections shall not extend to any person being the master or commander of a vessel or employed therein, but if any such person shall be in any part of British India in which all the provisions of this Act are for the time being in force, after he shall have ceased to be actually employed in a vessel, he shall forthwith report himself in manner aforesaid.

Foreigner neglecting to report themselves, may be dealt with in like manner as foreigners travelling without a license.

9. If any foreigner shall neglect to report himself as required by this Act, he may be dealt with in the manner hereinafter provided in respect of foreigners travelling without a license.

No foreigner to travel in India without a license.

10. No foreigner shall travel in or pass through any part of British India in which all the provisions of this Act are for the time being in force without a license.

Grant of licenses.

<sup>2</sup>[11. Licenses under this Act may be granted by the Central Government or by officers specially authorized by that Government.]

12. Every such license shall state the name of the person to whom the license is granted, the nation to which he belongs, the district or districts through which he is authorized to pass or the limits within which he is authorized to travel, and the period (if any) during which the license is intended to have effect.

13. The license may be granted subject to such conditions as the Central Government <sup>3</sup>[\* \* \*] may direct, or as the officer granting the license may deem necessary. Any license may be revoked at any time by the Central Government <sup>4</sup>[\* \* \*] or by the officer who granted the licence.

14. If any foreigner travel in or attempt to pass through any part of British India without such license as aforesaid, or beyond the districts or limits mentioned therein, or after such license shall have been revoked, or shall violate any of the conditions therein specified, he may be apprehended without warrant by any officer exercising any of the powers of a Magistrate, or by any European commissioned officer in the service of Her Majesty, or by any member of a volunteer corps enrolled by authority of <sup>4</sup>[the Central Government] whilst on duty, or by any police-officer.

#### LEG. REF.

<sup>1</sup>Reference to Local Government, omitted by A.O., 1937.

<sup>2</sup>Sec. 11, substituted by A.O., 1937.

<sup>3</sup>The words "or the Local Government" omitted by A.O., 1937.

<sup>4</sup>Substituted for "Government" by A.O., 1937.

15. If any person be apprehended by a person not exercising any of the powers of a Magistrate and not being a police-officer, he shall be delivered over as soon as possible to a police-officer, and forthwith carried before the Magistrate of the district. Whenever any person shall be apprehended by or taken before the Magistrate of the district, such Magistrate shall immediately report the case to the <sup>1</sup>[Central Government] and shall cause the person brought before him to be discharged, or to be conveyed to one of the presidency-towns, or pending the orders of such Government to be detained.

16. Any person apprehended or detained under the provisions of this Act may be admitted to bail by the Magistrate of the district, or by any officer authorized to grant licenses, and shall be put to as little inconvenience as possible during his detention in custody.

<sup>2</sup>[17. The Central Government may order any person apprehended or detained under the provisions of this Act to remove himself from any part of British India by sea or by such other route as the Central Government may direct; or the Central Government may cause him to be removed from that part of British India by such route and in such manner as to that Government may seem fit.]

18. The Central Government may by order prohibit any person or any class of persons not being natural-born subjects of Her Majesty within the meaning of the <sup>3</sup>Statute 3 and 4 William IV, Chap. 85, section 81, from travelling in or passing through any part of British India in which all the provisions of this Act may, for the time being, be in force, and from passing from any part thereof to another without a license to be granted by such officer or officers as shall be specified in the order; and, if any person so prohibited shall wilfully disobey such order, he may be apprehended without warrant by any of the officers specified in section 14 of this Act, and carried before the Magistrate of the district, and dealt with under the provisions of section 17 in the same manner as if he were a foreigner; and the Central Government may order such person to be detained in safe custody or under the surveillance of the police so long as it may be deemed necessary for the peace and security of British India or any part thereof.

19. \*[\* \* \* \* \*]

20. It shall be lawful for the Commissioner of Police, or for the Magistrate of the district, or for any officer appointed to receive reports as mentioned in the sixth section of this Act, or for any police-officer under the authority of such Commissioner or Magistrate, to enter any vessel in any port or place within British India in which all the provisions of this Act may, for the time being, be in force, in order to ascertain whether any foreigner bound to report his arrival under the said section 6 of this Act is on board of such vessel; and it shall be lawful for such Commissioner of Police, Magistrate or other officer as aforesaid to adopt such

#### LEG. REF.

<sup>1</sup> Substituted for 'Local Government to which he is subordinate' by A.O., 1937.

<sup>2</sup> Sec. 17 substituted for old sec. 17 by *ibid.*

<sup>3</sup> The Government of India Act, 1833 (3 & 4 Will. IV, c. 85) is now repealed except-

ing sec. 112 by the Government of India Act (9 & 10 Geo. 5, c. 101). For definition of "natural-born British Subject", see sec. 1 of British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V, c. 17), Coll. Stats., Ind., Vol. III.

<sup>4</sup> Sec. 19 omitted by A.O., 1937.

Masters of vessels to furnish list of passengers, and to give information respecting them.

means as may be reasonably necessary for that purpose; and the master or commander of such vessels shall also, before any of the passengers are allowed to disembark, if he shall be required so to do by such Commissioner of Police, Magistrate, or other officer as

aforsaid, deliver to him a list in writing of the passengers on board, specifying the ports or places at which they embarked, and the ports or places of their disembarkation, or intended disembarkation, and answer to the best of his knowledge all such questions touching the passengers on board the said vessel,

or touching those who may have disembarked in any part of British India, as shall be put to him by the Commissioner of Police, Magistrate, or other officer as aforsaid. If any foreigner on board such vessel in any part of British India shall refuse to give an account of his objects of pursuit in India, or if his account thereof shall not be satisfactory the officer may refuse to allow him to disembark, or he may be dealt with in the same manner as a foreigner travelling in British India without a license.

21. If the master or commander of a vessel shall wilfully give a false answer to any question which by section 20 of this Act he is bound to answer, or shall make any false report, he shall be held to have committed the offence specified in section 177 of the Indian Penal Code.

22. If the master or commander of any vessel shall wilfully neglect or refuse to comply with the requisitions of this Act, he shall, on conviction before the Magistrate of the district or a Justice of the Peace, be liable to a fine not exceeding two thousand rupees.

23. Whoever intentionally obstructs any officer in the exercise of any of the powers vested in him by this Act shall be held to have committed the offence specified in section 186 of the Indian Penal Code.

24. [*Fines imposed under this Act how to be recovered.*] Rep. by Act X of 1914.

25. The Central Government <sup>1</sup>[\* \* \*] may <sup>2</sup>exempt any person, or any class of persons, either wholly or partially, or temporarily or otherwise, from all or any of the provisions of this Act contained in any of the sections subsequent to section 5, and may at any time revoke any such exemption.

Penalty for false answer or report.

Penalty for neglect by master of vessel to comply with requisitions of Act.

Penalty for obstructing officers.

Persons may be exempted from provisions of this Act.

## THE FOREIGNERS ACT (II OF 1940).

[23rd February, 1940.]

*An Act to provide for the imposition of restrictions on foreigners.*

WHEREAS it is expedient to provide for the imposition of restrictions on the entry of foreigners into British India, their presence therein and their departure therefrom; It is hereby enacted as follows:—

Short title, extent and duration. 1. (1) This Act may be called THE FOREIGNERS ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall be in force during the continuance of the present war and for a period of six months thereafter.

### LEG. REF.

<sup>1</sup>Reference to Local Government omitted by A.O. 1937.

<sup>2</sup>For exemption, see Gazette of India, 1914, Pt. I, pp. 1329 and 1905.

## Definitions.

## 2. In this Act,—

(a) "foreigner" has the meaning assigned to it in the Foreigners Act, 1864, except that it does not include—

- (i) any ruler or subject of any Indian State; or
- (ii) any native of the tribal areas;

(b) "prescribed" means prescribed by orders made under this Act;

(c) "specified" means specified by direction of a prescribed authority.

## 3. (1) The Central Government may, by order, make provision, either

## Power to make orders.

generally with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into British India or their departure therefrom or their presence or continued presence therein.

(2) In particular, and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(a) shall not enter British India, or shall enter British India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from British India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in British India, or in any prescribed area therein;

(d) shall remove himself to, and remain in, such area in British India as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impression to be taken and to furnish specimens of his hand-writing and signature to such authority and at such time and place as may be prescribed or specified;

(v) prohibiting him from association with persons of a prescribed or specified description;

(vi) prohibiting him from engaging in activities of a prescribed or specified description;

(vii) prohibiting him from using or possessing prescribed or specified articles or

(viii) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions; or

(g) shall be arrested and detained or confined;

and may make provision for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

## 4. (1) Any foreigner (hereinafter referred to as an internee) in respect

## Internees.

of whom there is in force any order made under clause (g) of sub-section (2) of section 3, directing that he be detained or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time determine.

(2) No person shall—

(a) knowingly assist an internee to escape from custody or knowingly harbour an escaped internee; or

(b) give an escaped internee any assistance with intent thereby to prevent, hinder or interfere with the apprehension of the internee.

(3) The Central Government may, by order, provide for regulating access to, and the conduct of persons in, places in British India where internees are detained and for prohibiting or regulating the despatch or conveyance from outside such places to or for internees therein of such articles as may be prescribed.

(4) No proceedings shall be taken by virtue of sub-section (2) or sub-section (3) against any person in respect of any act done by him when he is himself an internee.

5. (1) No foreigner who was in British India on the date on which this Act came into force shall, while in British India after that date, assume or use or purport to assume or use for any purpose any name other than that by which he was ordinarily known immediately before the said date.

(2) Where, after the date on which this Act came into force, any foreigner carries on or purports to carry on (whether alone or in association with any other person) any trade or business under any name or style other than that under which that trade or business was being carried on immediately before the said date, he shall, for the purposes of sub-section (1), be deemed to be using a name other than that by which he was ordinarily known immediately before the said date.

(3) In relation to any foreigner who, not having been in British India on the date on which this Act came into force, thereafter enters British India, sub-sections (1) and (2) shall have effect as if for any reference, in those sub-sections to the date on which this Act came into force were substituted a reference to the date on which he first enters British India thereafter.

(4) For the purposes of this section—

(a) the expression “name” includes a surname, and

(b) a name shall be deemed to be changed if the spelling thereof is altered.

(5) Nothing in this section shall apply to the assumption or use—

(a) of any name in pursuance of a Royal licence; or

(b) by any married woman, of her husband's name.

6. Any District Magistrate and any Commissioner of Police, or, where there is no Commissioner of Police, any Superintendent of Police, may, for any purpose connected with the enforcement of this Act or any order made thereunder, enter, with such assistance as he may think fit any vessel or aircraft at any port or place in British India and may—

(a) direct the master of the vessel or the pilot of the aircraft, as the case may be,—

(i) before any passenger disembarks, or before the vessel or aircraft leaves such port or place, as the case may be, to furnish a list in writing of the passengers who are on board or who have been carried on board at any time since the vessel or aircraft commenced its journey, or who have signified their intention of departing from British India on board such vessel or aircraft, setting out the ports or places at which they embarked, the ports or places of their disembarkation or intended disembarkation, and such other particulars as may be prescribed, and

(ii) to answer to the best of his ability any question relating to the passengers who are on board or who have disembarked in any part of British India; and

(b) if any foreigner seeking to enter British India on board such vessel or aircraft does not give satisfactory reasons for entering British India, either—

(i) refuse to allow such foreigner to disembark from such vessel or aircraft, or

(ii) place him under such restraint as may be prescribed or specified.

7. If any question arises with reference to this Act or any order made or

Burden of proof. direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person.

8. The Central Government may, by order, declare that any or all of the

Power to exempt from application of Act. provisions of this Act or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner or any class or description of foreigner.

9. (1) Any authority empowered by or under or in pursuance of the pro-

Power to give effect to orders, directions, etc. visions of this Act to give any direction or to exercise any other power, may, in addition to any other action expressly provided for in this Act, take or cause to be taken, such steps and use, or cause to be used, such force as may, in its opinion, be reasonably necessary for securing compliance with such direction or for preventing or rectifying any breach thereof, or for the effective exercise of such power, as the case may be.

(2) Any police-officer may take such steps and use such force as may, in his opinion, be reasonably necessary for securing compliance with any order made or direction given under or in pursuance of the provisions of this Act or for preventing or rectifying any breach of such order or direction.

(3) The power conferred by this section shall be deemed to confer upon any person acting in exercise thereof a right of access to any land or other property whatsoever.

10. Any authority upon which any power to make or give any direction,

Power to delegate authority. consent or permission or to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf, and thereupon the said subordinate authority shall, subject to such conditions as may be contained in the authorisation, be deemed to be the authority upon which such power is conferred by or under this Act.

11. (1) Any person who attempts to contravene, or abets, or attempts to

Attempts, etc., to contravene the provisions of this Act, etc. abet, or does any act preparatory to, a contravention of, the provisions of this Act or of any order made or direction given thereunder, or fails to comply with any direction given in pursuance of any such order, shall

be deemed to have contravened the provisions of this Act.

(2) Any person who, knowing or having reasonable cause to believe that any other person has contravened the provisions of this Act or of any order made or direction given thereunder, gives that other person any assistance with intent thereby to prevent, hinder or otherwise interfere with his arrest, trial or punishment for the said contravention, shall be deemed to have abetted that contravention.



(3) The master of any vessel or the pilot of any aircraft, as the case may be, by means of which any foreigner enters or leaves British India in contravention of any order made under, or direction given in pursuance of, section 3 shall, unless he proves that he exercised all due diligence to prevent the said contravention, be deemed to have contravened this Act.

12. If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if such person has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

13. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

14. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Foreigners Act, 1864, the Registration of Foreigners Act, 1939, and of any other enactment for the time being in force.

15. (1) The Foreigners Ordinance, 1939, is hereby repealed.

(2) Notwithstanding such repeal, all orders made, directions given things done and action taken under the said Ordinance, shall be deemed to have been made, given, done or taken under the provisions of this Act, as if this Act had come into force on the 26th day of August, 1939, references to the said Ordinance in any rule made under any enactment shall be construed as references to this Act, and offences committed against or proceedings commenced under the said Ordinance may be punished or may be continued and completed as if such offences were committed against or such proceedings were commenced under this Act.

### THE INDIAN FOREIGN MARRIAGE ACT (XIV OF 1903).<sup>1</sup> [Amended by Act XXXIV of 1939.]

[23rd October, 1903.

*An Act to give effect to the Foreign Marriages Order in Council, 1903.*

WHEREAS it is expedient to give effect to the Foreign Marriages Order in Council, 1903; It is hereby enacted as follows:—

Short title, extent and application. 1. (1) This Act may be called THE INDIAN FOREIGN MARRIAGE ACT, 1903.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas, the Shan States and the Pargana of Spiti; and

(3) It applies also to all British subjects and to all servants of the King, whether British subjects or not, in <sup>2</sup>[any Indian State].

2. (1) Notice in writing of a marriage which it is intended to solemnize under the Foreign Marriage Act, 1892, may be given by one of the parties intending such marriage, to—

Notice of marriage intended to be solemnized under 55 and 56 Vict., c. 23.

#### LEG. REF.

<sup>1</sup>For Statement of Objects and Reasons, see *Gazette of India*, 1903, Pt. V, p. 466;

for proceedings in Council, see *ibid.*, Part VI, pp. 157 and 165.

<sup>2</sup>Substituted by A.O., 1937.

(a) a Marriage Registrar appointed under the Indian Christian Marriage Act, 1872, where either of such parties is a person professing the Christian religion;

(b) a District Magistrate, Chief Presidency Magistrate or Political Agent, where neither of such parties is a person professing the Christian religion:

Provided that the party giving such notice as aforesaid shall have had his usual place of abode for not less than three consecutive weeks immediately preceding the giving of notice within the local limits of the area for which the Marriage Registrar, Magistrate or Political Agent to whom the notice is given, is appointed.

(2) Every notice given under this section shall state—

(a) the name, surname, age and profession or condition of each of the parties intending marriage;

(b) the residence of each of them;

(c) the time during which each of them has dwelt there; and

(d) the place in which the intended marriage is to be solemnized;

and it shall contain a declaration by the party giving the notice to the effect that he believes that there is no impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage.

(3) A copy of every notice given under this section shall be published by being affixed in some conspicuous place in the office of the officer to whom the notice is given.

(4) On the expiration of four clear days after such notice as aforesaid has been published in the manner prescribed by sub-section (3), the officer to whom the notice is given, unless he is aware of any impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage shall, on payment of such fee (if any) as <sup>1</sup>[the Provincial Government for each Province and the Central Government for British subjects and servants of the Crown in any Indian State] may fix in this behalf, furnish the party by whom the notice was given, with a certificate, under his hand and seal, to the effect that the notice has been so given and published.

## THE FOREIGN RELATIONS ACT (XII OF 1932).

[8th April, 1932.

*An Act to provide against the publication of statements likely to prejudice the maintenance of friendly relations between His Majesty's Government and the Governments of certain foreign States.*

WHEREAS it is expedient to provide against the publication of statements likely to prejudice the maintenance of friendly relations between His Majesty's Government and the Governments of certain foreign States; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE FOREIGN RELATIONS ACT, 1932.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. Where an offence falling under Chapter XXI of the Indian Penal Code

Power of Central Government to prosecute in certain cases of defamation.

is committed against a Ruler of a State outside but adjoining India, or against the consort or son or principal Minister of such Ruler, the Central Government may make, or authorise any person to make,

complaint in writing of such offence, and, notwithstanding anything contained

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in Council" by A.O., 1937.

<sup>1</sup> Substituted for "the Governor-General

in section 198 of the Code of Criminal Procedure, 1898, any Court competent in other respects to take cognizance of such offence may take cognizance thereof on such complaint.

*Explanation.*—<sup>1</sup>[\* \* \* \* \*].

3. The provisions of sections 19-A to 99-G of the Code of Criminal Procedure, 1898, and of sections 27-B to 27-D of the Indian Post Office Act, 1898, shall apply in the case of any book, newspaper or other document containing matter which is defamatory of a Ruler of a State outside but adjoining India or of the consort or son or principal Minister of such Ruler and tends to prejudice the maintenance of friendly relations between His Majesty's Government and the Government of such State, in like manner as they apply in the case of a book, newspaper or document containing seditious matter within the meaning of those sections:

Provided that for the purposes of this section the said provisions shall be construed as if for the words "Provincial Government" wherever they occur, the words "Central Government" were substituted.

4. Where, in any trial of an offence upon a complaint under section 2, or in any proceeding before a High Court arising out of section 3, there is a question whether any person is a Ruler of any State, or is the consort or son or principal Minister of such Ruler, a certificate under the hand of a Secretary to the Central Government that such person is such Ruler, consort, son or principal Minister shall be conclusive proof of that fact.

## THE INDIAN FOREST ACT (XVI OF 1927).

Year.	No.	Title.	Amendment.
1927.	XVI.	The Indian Forest Act, 1927.	Amended, XXVI of 1930 and III of 1933.

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THE INDIAN FOREST ACT (XVI OF 1927).<sup>1</sup>

[21st September, 1927.]

*An Act to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce.*

WHEREAS it is expedient to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce; It is hereby enacted as follows:—

## CHAPTER I.

## PRELIMINARY.

Short title and extent.  
(Old Act, S. 1.)

1. (1) This Act may be called THE INDIAN FOREST ACT, 1927.

(2) It extends to Bombay, Bengal, Bihar and Orissa, the United Provinces, the Punjab, the Central Provinces and the North-West Frontier Province (except the District of Hazara).

(3) The Provincial Government of any other province may, by notification in the Official Gazette extend this Act to the whole or any specified part of the province. (Cf. Act XXXVIII of 1920, S. 2 and Sch. I.).

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<sup>1</sup>For the forest law in force in the Hazara Districts, see the Hazara Forest Regulation, 1893 (VI of 1893), P. and N. W. Code.

For Madras, Ajmere-Merwara, Burma, British Baluchistan and Assam there are special forest laws—see Madras Forest Act, 1882 (V of 1882), Madras Code; the Ajmere Forest Regulation, 1874 (VI of 1874), A.J. Code; the Burma Forest Act, 1902 (IV of 1902); the British Baluchistan Forest Regulation, 1890 (V of 1890), Bal. Code; the Assam Forest Regulation, 1891 (VII of 1891), E.B. and A. Code.

In the Punjab, the Land Preservation (Chos.) Act, 1900 (Punjab Act II of 1900), is to be read with and taken as part of this Act, see P. and N. W. Code. For rules for the conservancy of forests and jungles in the hill district of the Punjab-territories,

see appendix to *ibid*. These rules are also in force in the North-West Frontier Province, see sec. 4 and second schedule to Reg. VII of 1901, *ibid*.

SEC. 1.—The Act does not oust jurisdiction of Civil Courts to decide whether certain land is forest land or waste land. 7 Bom.L.R. 496. This Act is one that curtails proprietary rights. See 55 P.L.R. 1901 (Cr.) (where the scope and nature of this Act is discussed). As to construction of Act see 1943 N.L.J. 130 cited under sec. 63. Infringement of the Forest Rules not provided for in the rules should be tried under the Penal Code. 4 P.R. 1869 (Cr.). If a person is found with a gun and ammunition in a Reserved Forest it may be presumed until the contrary is shown that hunting was being engaged in. 1929 M.W.N. 808.

Interpretation clause. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "cattle" includes elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kinds;

(2) "forest-officer" means any person whom <sup>1</sup>[\* \*] the Provincial Government or any officer empowered by <sup>1</sup>[\* \*] the Provincial Government in this behalf, may appoint to carry out all or any of the purposes of this Act or to do anything required by this Act or any rule made thereunder to be done by a forest-officer;

(3) "forest-offence" means an offence punishable under this Act or under any rule made thereunder;

(4) "forest-produce" includes—

(a) the following whether found in, or brought from, a forest or not that is to say:—(Cf. Act V of 1890, S. 2.)

timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds <sup>2</sup>[Kuth] and myrabolams, and (see Act XV of 1911, S. 2.).

(b) the following when found in, or brought from, a forest, that is to say,—

(i) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees.

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and

(iv) peat, surface soil, rock, and minerals (including limestone, laterite, mineral oils and all products of mines or quarries);

<sup>3</sup>[(4-A) "owner" includes a Court of Wards in respect of property under the superintendence or charge of such Court];

(5) "river" includes any stream, canal, creek or other channels, natural or artificial;

(6) "timber" includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not; and [see Act V of 1890, S. 2, cl. (2)].

(7) "tree" includes palms, bamboos, stumps, brush-wood and canes. [See Act V of 1890, S. 2, cl. (1).]

## CHAPTER II.

### OF RESERVED FORESTS.

#### 3. The Provincial Government may constitute any forest-land or waste-

#### LEG. REF.

<sup>1</sup> Words 'the Governor-General in Council, or' omitted by A.O., 1937.

<sup>2</sup> Inserted by Act XVII of 1930.

<sup>3</sup> This clause has been newly inserted by Amendment Act (III of 1933).

Sec. 2.—For notification appointing Forest Officers for the Santhal Parganas and empowering them to compound for offences mentioned in sec. 67 within certain specified areas, see *Calcutta Gazette*, 1901, Pt. I, p. 28; in the North-West Frontier Province for certain specified forest for all purposes of the Act, see *Gazette of India*, 1904, Pt. II, p. 113; in the Punjab, for Rawalpindi Forest division for the purpose of carrying out the duties of Forest-officer,

C.G.M. 328

see *Punjab Gazette*, 1907, Pt. I, p. 32.

Sec. 2.—Forest-officer is a public servant. 10 B. 124. Forest Settlement-officer, whether a Civil Court, 17 Mad. 193; Karkones who issue process if Forest-officers, see 2 Bom.L.R. 675 (679). Forest produce—Stems of trees are such produce. 1 Weir 757, but not logs fastened to buildings. 9 M. 373.

Sec. 3.—As to application of provisions relating to reserved forests (1) to village-forests, see sec. 27, last paragraph; (2) to forests and lands not the property of the Government, see secs. 36, 38; (3) to forest waste lands or produce the joint property of the Government and other persons, see sec. 79.

Power to reserve forests  
(Old Act, S. 3.)

the Government is entitled, a reserved forest in the manner hereinafter provided.

Notification by provincial Government.  
(Old Act S. 4.)

land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which

4. (1) Whenever it has been decided to constitute any land a reserved forest, the Provincial Government shall issue a notification in the Official Gazette—

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying as nearly as possible, the situation and limits of such land; and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest-produce, and to deal with the same as provided in this Chapter.

*Explanation.*—For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges, or other well-known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the Provincial Government from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act.

5. After the issue of a notification under section 4, no right shall be

Bar of accrual of forest rights.  
(Old Act, S. 5.)

acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of [the Crown] or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the Provincial Government in this behalf.

Proclamation by Forest Settlement-officer.  
(Old Act, S. 6 and S. 5 of Act V of 1890.)

6. When a notification has been issued under section 4, the Forest Settlement-officer shall publish in the local vernacular in every town and village in the neighbourhood of the land comprised therein, a proclamation—

(a) specifying, as nearly as possible, the situation and limits of the proposed forest;

(b) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(c) fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in

#### LEG. REF.

<sup>1</sup> Substituted for 'Government' by A.O., 1937.

SEC. 4: SCOPE OF SECTION.—29 B. 480; power of Government to reserve forest—What is reserved forest. 29 B. 484; Tenmis can claim compensation for land notified as reserved forest. 7 M.L.J. 13. Absence of

notification—Effect of. 1 Weir 759.

SEC. 5.—When a person cuts trees in a plot marked as waste number, the prosecution should lie not under the Forest Act, but under the Land Revenue Code or the rules framed thereunder. Rat. 873=Cr. Rg. 49 of 1896. See also 22 P.R. 1876 (Cr.).

SEC. 6 (c).—As to presumption from long possession and enjoyment and as to burden



section 4 or section 5 within such period either to present to the Forest Settlement-officer a written notice specifying or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof.

7. The Forest Settlement-officer shall take down in writing all statements

Inquiry by Forest Settlement-officer. (Old Act, S. 7.)

made under section 6, and shall at some convenient place inquire into all claims duly preferred under that section, and the existence of any rights mentioned in

section 4 or section 5 and not claimed under section 6 so far as the same may be ascertainable from the records of Government and the evidence of any persons likely to be acquainted with the same.

Powers of Forest Settlement-officer. (Old Act, S. 8.)

8. For the purpose of such inquiry, the Forest Settlement-officer may exercise the following powers, that is to say:—

(a) power to enter, by himself or any officer authorised by him for the purpose upon any land, and to survey, demarcate and make a map of the same; and

(b) the powers of a Civil Court in the trial of suits.

9. Rights in respect of which no claim has been preferred under section 6,

Extinction of rights. (Old Act, S. 9.)

and of the existence of which no knowledge has been acquired by inquiry under section 7, shall be extinguished, unless before the notification under section 20

is published, the person claiming them satisfies the Forest Settlement-officer that he had sufficient cause for not preferring such claim within the period fixed under section 6.

10. (1) In the case of a claim relating to the practice of shifting cultivation,

Treatment of claims relating to practice of shifting cultivation. (S. 5 of Act V of 1890.)

the Forest Settlement-officer shall record a statement setting forth the particulars of the claim and of any local rule or order under which the practice is allowed or regulated, and submit the statement to the Provincial Government, together with his opinion as

to whether the practice should be permitted or prohibited wholly or in part.

(2) On receipt of the statement and opinion, the Provincial Government may make an order permitting or prohibiting the practice wholly or in part.

(3) If such practice is permitted wholly or in part, the Forest Settlement-officer may arrange for its exercise—

(a) by altering the limits of the land under settlement so as to exclude land of sufficient extent, of a suitable kind, and in a locality reasonably convenient for the purposes of the claimants, or

(b) by causing certain portions of the land under settlement to be separately demarcated, and giving permission to the claimants to practice shifting cultivation therein under such conditions as he may prescribe.

(4) All arrangements made under sub-section. (3). shall be subject to the previous sanction of the Provincial Government.

(5) The practice of shifting cultivation shall in all cases be deemed a privilege subject to control, restriction and abolition by the Provincial Government.

11. (1) In the case of a claim to right in or over any land, other than a

of proof in such cases. See 15 M. 315; 7 M.L.T. 241; 3 M.L.J. 231.

Sec. 8.—As to the powers of Forest Settlement-officer, see 14 M. 247. Notification closing forest for an indefinite period is not bad for indefiniteness, when it is not known at that time, how long it may be necessary to close the forest. 19 F.R. 1880 (Cr.).

Sec. 9.—See 1942 Cal. 371=48 C.W.N. 347, cited under sec. 20.

Sec. 11.—As to acquisition of land over which riparian rights are claimed, see 20 M. 279; as to claim on mortgage, see 21 B. 396. As to burden of proof on questions of title, see 3 M.L.J. 231; 15 M. 315; 7 M.L.T. 241; 1929 Nag. 190.

Power to acquire land over which right is claimed. (Old Act, S. 10.) right-of-way or right-of-pasture, or a right to forest-produce or a water-course, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

(2) If such claim is admitted in whole or in part, the Forest Settlement-officer shall either—

(i) exclude such land from the limits of the proposed forest;

(ii) come to an agreement with the owner thereof for the surrender of his rights; or

(iii) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894.

(3) For the purpose of so acquiring such land—

(a) the Forest Settlement-officer shall be deemed to be a Collector proceeding under the Land Acquisition Act, 1894;

(b) the claimant shall be deemed to be a person interested and appearing before him in pursuance of notice given under section 9 of that Act;

(c) the provisions of the preceding sections of that Act shall be deemed to have been complied with; and

(d) the collector, with the consent of the claimant, or the Court, with the consent of both parties, may award compensation in land, or partly in land, and partly in money.

Order on claims to rights to pasture or to forest-produce. (Old Act, S. 11.)

12. In the case of a claim to rights of pasture or to forest-produce, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

Record to be made by Forest Settlement-officer. (Old Act, S. 12.)

13. The Forest Settlement-officer, when passing any order under section 12, shall record, so far as may be practicable,—

(a) the name, father's name, caste, residence and occupation of the person claiming the right; and

(b) the designation, position and area of all fields or groups of fields (if any) and the designation and position of all buildings (if any) in respect of which the exercise of such rights is claimed.

14. If the Forest Settlement-officer admits in whole or in part any claim

Record where he admits claim. (Old Act, S. 13.) under section 12, he shall also record the extent to which the claim is so admitted, specifying the number and description of the cattle which the claimant is from time to time entitled to graze in the forest, the season during which such pasture is permitted, the quantity of timber and other forest-produce which he is from time to time authorised to take, or receive, and such other particulars as the case may require. He shall also record whether the timber or other forest-produce obtained by the exercise of the rights claimed may be sold or bartered.

15. (1) After making such record the Forest Settlement-officer shall to the best of his ability, and having due regard to the maintenance of the reserved forest in respect of which the claim is made, pass such orders as will ensure the continued exercise of the right so admitted.

(2) For this purpose the Forest Settlement-officer may—

(a) set out some other forest-tract of sufficient extent, and in a locality reasonably convenient, for the purposes of such claimants, and record an order conferring upon them a right of pasture or to forest-produce (as the case may be) to the extent so admitted; or

(b) so alter the limits of the proposed forest as to exclude forest land of sufficient extent, and in a locality reasonably convenient, for the purposes of the claimants; or

(c) record an order, continuing to such claimants, a right of pasture or to forest-produce, as the case may be, to the extent so admitted, at such seasons, within such portions of the proposed forest, and under such rules, as may be made in this behalf by the Provincial Government.

16. In case the Forest Settlement-officer finds it impossible, having due regard to the maintenance of the reserved forest, to make such settlement under section 15 as shall ensure the continued exercise of the said rights to the extent so admitted, he shall, subject to such rules as the Provincial Government may make in this behalf, commute such rights, by the payment to such persons of a sum of money in lieu thereof, or by the grant of land, or in such other manner as he thinks fit.

17. Any person who has made a claim under this Act, or any forest-officer or other person generally or specially empowered by the Provincial Government in this behalf, may, within three months from the date of the order passed on such claim by the Forest Settlement-officer under section 11, section 12, section 15 or section 16, present an appeal from such order to such officer of the Revenue Department, of rank not lower than that of a Collector, as the Provincial Government may, by notification in the Official Gazette, appoint to hear appeals from such orders:

Provided that the Provincial Government may establish a Court (hereinafter called the Forest Court) composed of three persons to be appointed by the Provincial Government, and when the Forest Court has been so established, all such appeals shall be presented to it.

18. (1) Every appeal under section 17 shall be made by petition in writing and may be delivered to the Forest Settlement-officer who shall forward it without delay to the authority competent to hear the same.

(2) If the appeal be to an officer appointed under section 17, it shall be heard in the manner prescribed for the time being for the hearing of appeals in matters relating to land-revenue.

(3) If the appeal be to the Forest Court, the Court shall fix a day and a convenient place in the neighbourhood of the proposed forest for hearing the appeal, and shall give notice thereof to the parties, and shall hear such appeal accordingly.

(4) The order passed on the appeal by such officer or Court, or by the majority of the members of such Court, as the case may be, shall, subject only to revision by the Provincial Government, be final.

19. The Provincial Government, or any person who has made a claim under this Act, may appoint any person to appear, plead and act on its or his behalf before the Forest Settlement-officer, or the appellate officer or Court, in the course of any inquiry or appeal under this Act.

Sec. 17.—See 17 M. 193; power to excuse delay in filing appeal, see 10 M. 210.

Sec. 18 (4): APPELLATE ORDER BECOMING FINAL—JURISDICTION OF CIVIL COURT.—Where an appellate order rejecting the claim of a person to land included within a proposed forest has become final under sec. 18 (4) of the Forest Act, the Civil Court has no power to restore that land

or to grant compensation in respect thereof to him or to his successor-in-interest. I.L.R. (1942) 2 Cal. 35=46 C.W.N. 347=A.I.R. 1942 Cal. 371.

SECS. 18 AND 21.—Contract to work Government forest—Partnership of contractor with third person—Not void. See 117 I.C. 298 (case-law discussed).

Notification declaring forest reserved. (Old Act, S. 19.) 20. (1) When the following events have occurred, namely:—

(a) the period fixed under section 6 for preferring claims has elapsed, and all claims, if any, made under that section or section 9 have been disposed of by the Forest Settlement-officer;

(b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894, have become vested in the Government under section 16 of that Act, the Provincial Government shall publish a notification in the Official Gazette, specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

Publication of translation of such notification in the neighbourhood of forest. (Old Act, S. 20.)

21. The Forest-officer shall, before the date fixed by such notification, cause a translation thereof into the local vernacular to be published in every town and village in the neighbourhood of the forest.

22. The Provincial

Power to revise arrangement made under S. 15 or S. 18. (Old Act, S. 21.)

Government may, within five years from the publication of any notification under section 20, revise any arrangement made under section 15 or section 18, and may for this purpose rescind or modify any order made under section 15 or section 18 and direct that any one of the proceedings specified in section 15 be taken in lieu of any other of such proceedings, or that the rights admitted under section 12 be computed under section 16.

23. No right of any description shall be acquired in or over a reserved

No right acquired over reserved forest, except as here provided. (Old Act S. 22.)

forest except by succession or under a grant or contract in writing made by or on behalf of the <sup>1</sup>[Crown] or some person in whom such right was vested when the notification under section 20 was issued.

24. (1) Notwithstanding anything contained in section 23, no right continued under clause (c) of sub-section (2) of

Rights not to be alienated without sanction. (Old Act, S. 23.)

section 15 shall be alienated by way of grant, sale, lease, mortgage or otherwise, without the sanction of the Provincial Government:

Provided that, when any such right is appended to any land or house, it may be sold or otherwise alienated with such land or house.

(2) No timber or other forest-produce obtained in exercise of any such right shall be sold or bartered except to such extent as may have been admitted in the order recorded under section 14.

#### LEG. REF.

<sup>1</sup>Substituted for 'Government' by A.O., 1937.

SEC. 20.—See 12 M. 226; removal of grass from Government land, when offence. I Weir 492.

SECS. 20 AND 9: PUBLICATION OF NOTIFICATION—EXTINCTION OF RIGHTS.—On the

publication of a notification declaring a forest reserved under sec. 20 of the Forest Act, all rights in respect of which no claim has been preferred under sec. 6 and of the existence of which no knowledge has been acquired by inquiry under sec. 7 become extinguished by virtue of the provisions of sec. 9. I.L.R. (1942) 2 Cal. 35=46 C.W.N. 347=A.I.R. 1942 Cal. 371.

25. The forest-officer may, with the previous sanction of the Provincial

Power to stop ways and water-courses in reserved forests. (Old Act, S. 24.)

Government or of any officer duly authorised by it in this behalf, stop any public or private way or water-course in a reserved forest, provided that a substitute for the way or water-course so stopped, which the Provincial Government deems to be reasonably convenient, already exists, or has been provided or constructed by the forest-officer in lieu thereof.

Acts prohibited in such forests. (Old Act, S. 25; Act V of 1890, S. 7.)

26. (1) Any person who—

(a) makes any fresh cleaning prohibited by section 5, or

(b) sets fire to a reserved forest, or, in contravention of any rules made by the Provincial Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest; or who, in a reserved forest—

(c) kindles, keeps or carries any fire except at such seasons as the forest-officer may notify in this behalf;

(d) trespasses or pastures cattle, or permits cattle to trespass;

(e) causes any damage by negligence in felling any tree or cutting or dragging any timber;

#### LEG. REF.

Sec. 26.—For rules made under this clause for—

(1) Bombay, *see* Bom. R. and O.;

(2) Central Provinces, *see* C.P.R. and O.; and

(3) United Provinces, *see* p. 59 of the North Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894.

Sec. 26 (1)—For notification prohibiting the killing, injuring or capturing of any rhinoceros in reserved forests in the Jalpaiguri and Darjeeling Districts, *see* Calcutta Gazette, 1899, Pt. I, p. 1368. For rules under this clause in conjunction with sec. 75 (d) as to hunting, shooting, fishing, etc., in reserved forests in the United Provinces, *see* United Provinces Gazette, 1906, Pt. I, p. 651; *ibid.*, for Central Provinces, *see* C. P. Gazette, 1907, Pt. I, p. 678.

Sec. 25.—Sec. 25 pre-supposes the existence of public rights of way before a forest is reserved and that such public rights are recognized; and the powers given to deal with them are exceptional powers hedged with the proviso that suitable alternatives be provided in the case of the special power to close them being used. The alternatives referred to cannot be clogged with any restriction such as the imposition of a transit fee for cattle. A.I.R. 1938 Nag. 415.

Sec. 26, Cl. (b).—A person sets fire to a thing if he puts a match to it or sets it on fire directly, and not if it catches fire as an indirect consequence of his act. The accused kindled a fire in his master's garden which spread to an unclassified forest, and then to a reserved forest. The accused should not be said to have set fire to either of the forests within the meaning of sec. 25 (b). 30 P.R. (Cr.) 1916=17 Cr.L.J. 458=36 I.C. 138.

Cl. (c): POSSESSION OF FLINT OR STEEL.

—The mere possession of a flint or steel with-

in forest limits does not constitute an offence under sec. 25 (c). 4 Bom.L.R. 935.

Cl. (d).—The trespass of a human being in a reserved forest is punishable under sec. 25 (d). Rat. 602. *See also* 87 I. C. 918=26 Cr.L.J. 1030. The words of sec. 25 (d) clearly apply only to the person who does any of the acts mentioned therein. 16 Cr.L.J. 485=29 I.C. 325=11 N.L.R. 76. A person's cattle were found grazing in the Government forest in charge of a boy. Where the person had not authorized either directly or indirectly the boy to graze the cattle in the forest, he could not be convicted. (11 N.L.R. 76, Ref.) 120 I.C. 414 (1)=1930 N. 64. The question whether the owner of cattle, whose animals trespass in a reserved forest is criminally liable for committing an offence under sec. 25, depends upon the whole circumstances of each case. 16 P.R. 1909 (Cr.). In a great many cases the question will resolve itself into, "did he or did he not take proper precautions to prevent such trespass," and it does not depend upon the presence of the owner at the moment. 16 P.R. 1909 (Cr.). The levy of pound fines under Act I of 1871, sec. 12, in respect of an offence of allowing cattle to trespass in a reserved forest is not a punishment, and does not, therefore, bar a prosecution, under sec. 25 of the Forest Act. 19 P.R. 1885 (Cr.).

Barar grazing Rules do not enforce a liability on a master for the acts of his servants. 87 I.C. 918=26 Cr.L.J. 1030. *See also* A.I.R. 1938 Nag. 365=39 Cr.L.J. 700; 1926 N. 73. Cattle are instrumental in the theft of grass which they eat and in the damage to grass and young trees which they cause in grazing and such cattle used in committing an offence under sec. 26 (d) of the Forest Act are as much liable to confiscation as cattle drawing a cart containing illicitly felled timber. 39 Cr.L.J. 700=175 I.C. 795 =A.I.R. 1938 Nag. 365.

(f) fells, girdles, lops, taps or burns any tree or strips off the bark or leaves, from, or otherwise damages, the same;

(g) quarries stone, burns lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest-produce;

(h) clears or breaks up any land for cultivation or any other purpose;

(i) in contravention of any rules made in this behalf by the Provincial Government hunts, shoots, poisons water or sets traps or snares; or

(j) in any area in which the Elephants' Preservation Act, 1879, is not in force, kills or catches elephants in contravention of any rules so made; shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid.

(2) Nothing in this section shall be deemed to prohibit—

(a) any act done by permission in writing of the forest-officer, or under any rule made by the Provincial Government; or

CL. (f).—A person felling a number of trees in a forest is guilty of as many offences under sec. 25 (f) as the number of the trees felled by him. 19 Cr.L.J. 161=43 I.C. 577 (A). There is no provision, either in the Act or the rules framed thereunder, to award compensation for damages in respect of the protected forest. 8 Bom. L.R. 987=5 Cr.L.J. 9. In the absence of anything in a Special Act (like the Forest Act) to exclude the operation to the general criminal law, an intention on the part of the legislature to exclude it should not be inferred. Further sec. 66 negatives any such intention. Theft of wood from a Government forest to which the Forest Act had not been applied, is punishable under the Penal Code. 10 P.R. 1885 (Cr.). [22 P.R. 1876 (Cr.), Disapproved.]

CL. (h).—Where it is clear from evidence that the accused has been cultivating land alleged to be part of a Government forest for at least seven years and the probabilities are that his father had done the same before him he cannot be held to have cleared or broken up the land for cultivation or any other purpose and his conviction under sec. 26 (h) cannot be sustained. 1929 N. 190. Where the charge against the accused is that he has made an encroachment on Government forest land, the onus is on the prosecution to establish that the land forms part of the Government forest. 1929 N. 190.

CL. (i).—The word 'hunt' implies motion, a chase and a pursuit. Hence any person who is one of the party beating up game in a reserved forest in this fashion is a member of the hunt, and even though he himself may not be within the prohibited area he is guilty of the offence along with the rest of the hunt. 1935 N. 23. Hunting and shooting without a permit in a reserved forest is punishable under sec. 25. 40 A. 38=15 A.L.J. 824=19 Cr.L.J. 10. Hunting and killing a tiger in a reserved forest even though it be for killing the tiger which killed the cattle of the accused, amounts to hunting 42 B. 406=19 Cr.L.J. 616=20 Bom.L.R. 384. A conviction under sec. 25 (i), for

shooting in a reserved forest in contravention of rules, is illegal where no such rules have been passed by the Government. Rat. 684=Cr. Rg. 50 of 1893. Accused who had licence for a gun was going along the District Board road running through a reserved forest with the gun loaded. On this he was convicted under sec. 26 (1) (i). *Held*, that from the mere fact that accused was carrying a loaded gun it did not follow that he was going with intention of shooting. *Held, further*, that what is made penal is not the intention to shoot but actual shooting itself and that unless accused was alleged to have been found shooting or hunting in the forest he could not be convicted. 145 I.C. 735=34 Cr.L.J. 1050=1933 A.L.J. 704=1933 A. 630.

MISCELLANEOUS CASES UNDER THE OLD ACT —CONVICTION UNDER THE ACT—ORDER FOR CONFISCATION.—An order for confiscation cannot be regarded as an order incidental to a conviction under the Act. The confiscation is by the terms of sec. 54 declared to be a punishable, for it is in addition to any other punishment prescribed for the offence, the order for confiscation should be passed simultaneously with the punishment for the offence. 24 C. 450 (4 A. 417, R.). It is illegal to impose a fine where the Forest Act provides the penalty of confiscation. Col. Dig. Cr. 69 of 1877. Payment of rewards out of fines and confiscations is not a part of the sentence, but is a matter for the Executive Government to deal with in the exercise of the power vested in them by the rules framed under the Act. Rat. 950. These rules give the Government the power to pay one half of the proceeds of fines and confiscations by way of reward without any order of the convicting Court, but more than one half cannot, however, be paid unless the Magistrate so directs. Rat. 950.

FOREST OFFENCE — COURT-FEES.—Where persons convicted of an offence under the Forest Act, were each sentenced to pay a fine of thirteen annas, compensation for the loss of forest fuel and Rs. 1-4-0 as Court-fees expenses under sec. 31 of the Court-Fees Act,

(b) the exercise of any right continued under clause (c) of sub-section (2) of section 15, or created by grant or contract in writing made by or on behalf of <sup>1</sup>[the Crown] under section 23.

(3) Whenever fire is caused wilfully or by gross negligence in a reserved forest the Provincial Government may (notwithstanding that any penalty has been inflicted under this section) direct that in such forest or any portion thereof the exercise of all rights of pasture or to forest-produce shall be suspended for such period as it thinks fit.

Power to declare forest no longer reserved. (Old Act, S. 26 and Act XV of 1911, S. 3.)

27. (1) The Provincial Government may <sup>2</sup>[\*] by notification in the Official Gazette, direct that, from a date fixed by such notification, any forest or any portion thereof reserved under this Act shall cease to be a reserved forest.

(2) From the date so fixed, such forest or portion shall cease to be reserved; but the rights (if any) which have been extinguished therein shall not revive in consequence of such cessation.

### CHAPTER III. OF VILLAGE FORESTS.

28. (1) The Provincial Government may assign to any village community the rights of Government to or over any land which has been constituted a reserved forest, and may cancel such assignment. All forests so assigned shall be called village forests.

(2) The Provincial Government may make rules for regulating the management of village forests, preserving the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce or pasture, and their duties for the protection and improvement of such forest.

(3) All the provisions of this Act relating to reserved forest shall (so far as they are not inconsistent with the rules so made) apply to village forests.

### CHAPTER IV. OF PROTECTED FORESTS.

29. (1) The Provincial Government may, by notification in the Official Gazette, declare the provisions of this Chapter applicable to any forest-land or waste-land which is not included in a reserved forest, but which is the property of Government, or over which the Government has proprietary rights or to the whole or any part of the forest-produce of which the Government is entitled.

(2) The forest-land and waste-land comprised in any such notification shall be called a "protected forest".

(3) No such notification shall be made, unless the nature and extent of the rights of Government and of private persons in or over the forest-land or

#### LEG. REF.

<sup>1</sup> Substituted for 'Government' by A.O., 1937.

<sup>2</sup> Words 'subject to the control of the Governor-General in Council' omitted by A.O., 1937.

*Held*, that the order as to payment of Court-fees was not a valid order. 10 P.R. 1885 (Cr.).

ACQUITTAL—FURTHER ENQUIRY—REVISION—A case under sec. 25 is a "Summons case" and the Tahsildar, if he does not find the accused guilty, is bound to acquit him, and no

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order under sec. 437, Cr. P. Code, directing further enquiry, could be passed. 50 P.L.R. 1900 (Cr.)=19 P.R. 1900 (Cr.).

SECS. 29, 30 AND 33.—*See* 7 Bom.L.R. 462; 46 A. 128=1924 A. 539. A notification regarding a reserved forest that does not state the date from which it shall come into force, is invalid, and cannot be the basis for an offence under sec. 33. A Forest-officer is not entitled to arrest a person for the breach of sec. 30 (a) and his custody cannot be said to be lawful. 54 C. 296=28 Cr.L.J. 562=1927 C. 516.



waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the Provincial Government thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved:

Provided that, if, in the case of any forest-land or waste-land, the Provincial Government thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government, the Provincial Government may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.

Power to issue notification  
reserving trees, etc. (Old  
Act, S. 29.)

30. The Provincial Government may, by notification in the Official Gazette,—

(a) declare any trees or class of trees in a protected forest to be reserved from a date fixed by the notification;

(b) declare that any portion of such forest specified in the notification shall be closed for such term, not exceeding thirty years, as the Provincial Government thinks fit, and that the rights of private persons, if any, over such portion shall be suspended during such terms, provided that the remainder of such forest be sufficient, and in a locality reasonably convenient, for the due exercise of the rights suspended in the portion so closed; or

(c) prohibit, from a date fixed as aforesaid, the quarrying of stone, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal of, any forest-produce in any such forest, and the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, of any land in any such forest.

31. The Collector shall cause a translation into the local vernacular of every notification issued under section 30 to be affixed in a conspicuous place in every town and village in the neighbourhood of the forest comprised in the notification.

Publication of translation  
of such notification in  
neighbourhood. (Old Act,  
S. 30.)

Power to make rules for  
protected forests. (Old  
Act, S. 31.)

32. The Provincial Government may make rules<sup>1</sup> to regulate the following matters, namely:—

(a) the cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest-produce, from protected forests;

(b) the granting of licences to the inhabitants of towns and villages in the vicinity of protected forests to take trees, timber or other forest-produce for their own use, and the production and return of such licences by such persons;

(c) the granting of licences to persons felling or removing trees or timber or other forest-produce from such forests for the purposes of trade, and the production and return of such licences by such persons;

(d) the payments, if any, to be made by the persons mentioned in clauses (b) and (c) for permission to cut such trees, or to collect and remove such timber or other forest-produce;

(e) the other payments, if any, to be made by them in respect of such trees, timber and produce, and the places where such payment shall be made;

#### LEG. REF.

<sup>1</sup>For rules under this section for—

(1) Bombay, *see* Bom. R. and O.;

(2) for protected Forests of Naini Tal, Ranikhet and Lalipur, *see* p. 62 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894;

(3) for rules made by the Government of Bengal under this section and sec. 41 for the

protected forests in the Sonthal Parganas, *see* Calcutta Gazette, 1901, Pt. I, p. 571; in the Sundarbans, *see* Calcutta Gazette, 1906, Pt. I, p. 1973; in the Angul Protected Forests, *see* Calcutta Gazette, 1901, Pt. I, p. 879;

(4) for protected forests in the Punjab, *see* Punjab Gazette, 1904, Pt. I, p. 76.

- (f) the examination of forest-produce passing out of such forest;
- (g) the clearing and breaking up of land for cultivation or other purposes in such forest;
- (h) the protection from fire of timber lying in such forests and of trees reserved under section 30;
- (i) the cutting of grass and pasturing of cattle in such forests;
- (j) hunting, shooting, fishing, poisoning water and setting traps or snares in such forests, and the killing or catching of elephants in such forests in areas in which the Elephants' Preservation Act, 1879, is not in force;
- (k) the protection and management of any portion of a forest closed under section 30; and
- (l) the exercise of rights referred to in section 29.

Penalties for acts in contravention of notification under S. 30 or of rules under S. 32. (Old Act, S. 32.)

33. (1) Any person who commits any of the following offences, namely:—

- (a) fells, girdles, lops, taps or burns any tree reserved under section 30, or strips off the bark or leaves from, or otherwise damages, any such tree;
- (b) contrary to any prohibition under section 30, quarries any stone, or burns any lime or charcoal, or collects, subjects to any manufacturing process, or removes any forest-produce;
- (c) contrary to any prohibition under section 30, breaks up or clears for cultivation or any other purpose any land in any protected forest;
- (d) sets fire to such forest, or kindles a fire without taking all reasonable precautions to prevent its spreading to any tree reserved under section 30, whether standing, fallen or felled, or to any closed portion of such forest;
- (e) leaves burning any fire kindled by him in the vicinity of any such tree or closed portion;
- (f) fells any tree or drags any timber so as to damage any trees reserved as aforesaid;
- (g) permits cattle to damage any such tree;
- (h) infringes any rule made under section 32;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(2) Whenever fire is caused wilfully or by gross negligence in a protected forest, the Provincial Government may, notwithstanding that any penalty has been inflicted under this section, direct that in such forest or any portion thereof the exercise of any right of pasture or to forest-produce shall be suspended for such period as it thinks fit. (Cf. Act V of 1901, S. 2.)

34. Nothing in this Chapter shall be deemed to prohibit any act done with the permission is writing of the Forest-officer, or in accordance with rules made under section 32, or, except as regards any portion of a forest closed under section 30, or as regards any rights the exercise of which has been suspended under section 33, in the exercise of any right recorded under section 29.

Nothing in this Chapter to prohibit acts done in certain cases. (Old Act, S. 33; cf. also Act V of 1901, S. 3.)

SEC. 32, CL. (g).—Mere 'clearing' does not amount to 'breaking' of ground where the notification issued under the Forest Act prohibited 'breaking' of ground in a protected forest, and where the evidence only showed that the accused had cleared the ground no offence is committed. 49 A. 291=28 Cr.L.J. 151=1927 A. 121. See also 102 I.C. 559

=28 Cr.L.J. 591. On this section, see 11 A.L.J. 340=20 I.C. 408.

SEC. 33, CL. (c).—Where breaking of ground only is forbidden by notification under the Forest Act, no offence is committed when there has been only 'clearing'. 102 I.C. 559=28 Cr.L.J. 591; 49 A. 291=99 I.C. 407=1927 A. 121.

## CHAPTER V.

OF THE CONTROL OVER FORESTS AND LANDS NOT BEING THE  
PROPERTY OF GOVERNMENT.

Protection of forest for special purposes. (Old Act, S. 35.) 35. (1) The Provincial Government may, by notification in the Official Gazette, regulate or prohibit in any forest or waste-land—

- (a) the breaking up or clearing of land for cultivation;
- (b) the pasturing of cattle; or
- (c) the firing or clearing of the vegetation;

when such regulation or prohibition appears necessary for any of the following purposes:—

(i) for protection against storms, winds, rolling stones, floods and avalanches;

(ii) for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of land slips or of the formation of ravines and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel;

(iii) for the maintenance of a water-supply in springs, rivers and tanks;

(iv) for the protection of roads, bridges, railways and other lines of communication;

(v) for the preservation of the public health.

(2) The Provincial Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the Provincial Government.

36. (1) In case of neglect of, or wilful disobedience to, any regulation or prohibition under section 35, or if the purposes of any work to be constructed under that section so require, the Provincial Government may, after notice in writing to the owner of such forest or land and after considering his objections, if any, place the same under the control of a Forest-officer, and may declare that all or any of the provisions of this Act relating to reserved forests shall apply to such forest or land.

(2) The net profits, if any, arising from the management of such forest or land shall be paid to the said owner.

37. (1) In any case under this Chapter in which the Provincial Government considers that in lieu of placing the forest or land under the control of a Forest-officer, the same should be acquired for public purposes, the Provincial Government may proceed to acquire it in the manner provided by the Land Acquisition Act, 1894.

(2) The owner of any forest or land comprised in any notification under section 35 may, at any time not less than three or more than twelve years from the date thereof, require that such forest or land shall be acquired for public purposes, and the Provincial Government shall acquire such forest or land accordingly.

38. (1) The owner of any land or, if there be more than one owner thereof, the owners of shares therein amounting in the aggregate to at least two-thirds thereof may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector their desire—

(a) that such land be managed on their behalf by the Forest-officer as a reserved or a protected forest on such terms as may be mutually agreed upon; or

(b) that all or any of the provisions of this Act be applied to such land.

(2) In either case, the Provincial Government may, by notification in the Official Gazette, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants.

#### CHAPTER VI.

##### OF THE DUTY ON TIMBER AND OTHER FOREST-PRODUCE.

Power to impose duty on timber and other forest produce. [Old Act, S. 39: cf. Act V of 1890, S. 8 (2).]

39. (1) The <sup>1</sup>[Central Government] may levy a duty in such manner, at such places and at such rates as it may declare by notification in the Official Gazette on all timber or other forest-produce—

(a) which is produced in British India, and in respect of which the <sup>2</sup>[Crown] has any right;

(b) which is brought from any place outside British India;

<sup>3</sup>[\* \* \* \* \*].

(2) In every case in which such duty is directed to be levied *ad valorem* the <sup>4</sup>[Central Government] may fix by like notification the value on which such duty shall be assessed.

(3) All duties on timber or other forest-produce which, at the time when this Act comes into force in any territory, are levied therein under the authority of the Provincial Government, shall be deemed to be and to have been duly levied under the provisions of this Act.

<sup>4</sup>[(4) Until provision to the contrary is made by the Central Legislature any Provincial Government which was, immediately before the commencement of Part III of the Government of India Act, 1935, levying a duty on any timber or other forest-produce produced in that Province may continue to levy that duty on such timber or forest-produce:

Provided that nothing in this sub-section authorizes the levy of any duty which as between timber or other forest-produce of the Province and similar produce of the locality outside the Province, discriminates in favour of the former, or which, in the case of timber or other forest-produce of localities outside the Province, discriminates between timber or other forest-

#### LEG. REF.

<sup>1</sup> Substituted for 'Local Government' by A.O., 1937.

<sup>2</sup> Substituted for 'the Government' by A.O., 1937.

<sup>3</sup> Proviso repealed by A.O., 1937.

<sup>4</sup> Sub-sec. (4) of sec. 39 inserted by *ibid*.

Sec. 38.—Sec. 38 (1) is merely a provision which enables an owner of any land to apply to the Collector in order that the provisions of the Act may be applied to his land or that the land may be managed for him as a reserved forest under sec. 38 (2). The Provincial Government may in either case, by notification, apply to such land such provisions of the Act as it thinks suitable to the circumstances thereof and as may be desired by the applicant. Where the Government issue a notifi-

cation under sec. 38 to the effect that the Government "are pleased to apply to the forest lands described in the schedule below all the provisions of the said Forest Act which are applicable or may hereafter be extended to apply to the reserved forests belonging to Government in the Singbhum District," the immediate effect of the notification is to apply to the lands in question all the provisions of the Act which are applicable to reserved forests of Government in that District. The provisions of sec. 26 of the Act therefore apply to the forest lands in question from that moment. 24 Pat. 477.

Sec. 38: SCOPE.—If *ultra vires*. Sec. 38 does not deprive any owner of any right in property. It is not *ultra vires*. 24 Pat. 477.

produce of one locality and similar timber or other forest-produce of another locality.]

40. Nothing in this Chapter shall be deemed to limit the amount, if any chargeable as purchase-money or royalty on any timber or other forest-produce, although the same is levied on such timber or produce while in transit, in the same manner as duty is levied.

Limit not to apply to purchase-money or royalty.  
(Old Act, S. 40.)

## CHAPTER VII.

### OF THE CONTROL OF TIMBER AND OTHER FOREST-PRODUCE IN TRANSIT.

41. (1) The control of all rivers and their banks as regards the floating of timber, as well as the control of all timber and other forest-produce in transit by land or water, is vested in the Provincial Government, and it may make rules to regulate the transit of all timber and other forest-produce.

(2) In particular and without prejudice to the generality of the foregoing power such rules may—

(a) prescribe the routes by which alone timber or other forest-produce may be imported, exported or moved into, from or within <sup>1</sup>[the Province].

(b) prohibit the import or export or moving of such timber or other produce without a pass from an officer duly authorised to issue the same, or otherwise than in accordance with the conditions of such pass;

(c) provide for the issue, production and return of such passes and for the payment of fees therefor;

(d) provide for the stoppage, reporting, examination and marking of timber or other forest-produce in transit, in respect of which there is reason to believe that any money is payable to <sup>2</sup>[the Crown] on account of the price thereof, or on account of any duty, fee, royalty or charge due thereon, or to which it is desirable for the purposes of this Act to affix a mark;

(e) provide for the establishment and regulation of depots to which such timber or other produce shall be taken by those in charge of it for examination, or for the payment of such money or in order that such marks may be affixed to it; and the conditions under which such timber or other produce shall be brought to, stored at and removed from such depots;

(f) prohibit the closing up or obstructing of the channel or banks of any river used for the transit of timber or other forest-produce, and the throwing of grass, brushwood, branches or leaves into any such river or any act which may cause such river to be closed or obstructed;

(g) provide for the prevention of removal of any obstruction of the channel or banks of any such river, and for recovering the cost of such prevention or removal from the person whose acts or negligence necessitated the same;

(h) prohibit absolutely or subject to conditions, within specified local

#### LEG. REF.

<sup>1</sup> Substituted for 'British India' by A.O., 1937.

<sup>2</sup> Substituted for 'Government' by A.O., 1937.

SECS. 39-41.—See 76 I.C. 104=1925 L. 225.

SEC. 41.—See 21 Cr.L.J. 659=57 I. C. 816 (C.). The words "Timber" and "Forest produce" in this section are used in their widest sense. See 106 I.C. 790=1928 L. 80.

RULE FRAMED BY GOVERNMENT OF BOMBAY UNDER SEC. 41 (B)—ULTRA VIRES.—Rule 4 of the rules for Sind framed by the Government

of Bombay under sec. 41 (b) of the Act, prohibiting the moving of timber from private land without a certificate from the holder or manager of such land is *ultra vires*; consequently a conviction for a breach of that rule under sec. 42 of the Act cannot stand. 17 Cr.L.J. 364=35 I.C. 668=10 S.L.R. 9.

COMPENSATION IN ADDITION TO IMPOSITION OF FINE.—Where a person is convicted of an offence under Rr. 21, 26, framed under sec. 41, compensation cannot be awarded in addition to the imposition of fine. 5 Bom.L.R. 126. On this section, see 1925 L. 225; 1924 B. 489=84 I.C. 250=26 Cr.L.J. 250.

limits, the establishment of saw-pits, the converting, cutting, burning, concealing or marking of timber, the altering or effacing of any marks on the same, or the possession or carrying of marking hammers or other implements used for marking timber;

(i) regulate the use of property marks for timber, and the registration of such marks; prescribe the time for which such registration shall hold good; limit the number of such marks that may be registered by any one person, and provide for the levy of fees for such registration.

(3) The Provincial Government may direct that any rule made under this section shall not apply to any specified class of timber or other forest-produce or to any special local area.

<sup>1</sup>[41-A. Notwithstanding anything in section 41, the Central Government

Powers of Central Government as to movements of timber across customs frontiers.

may make rules to prescribe the route by which alone timber or other forest-produce may be imported, exported or moved into or from British India across any customs frontier as defined by the Central Government, and any rules made under section 41 shall have effect subject to the rules made under this section.]

Penalty for breach of rules made under section 41 (Old Act, S. 42.)

42. (1) The Provincial Government may by such rules prescribe as penalties for the contravention thereof imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

(2) Such rules may provide that penalties which are double of those mentioned in sub-section (1) may be inflicted in cases where the offence is committed after sunset and before sunrise, or after preparation for resistance to lawful authority, or where the offender has been previously convicted of a like offence.

43. The <sup>2</sup>[Crown] shall not be responsible for any loss or damage which

Crown and Forest-officers not liable for damage to forest-produce at depot. (Old Act, S. 43.)

may occur in respect of any timber or other forest-produce while at a depot established under a rule made under section 41, or while detained elsewhere, for the purposes of this Act; and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

44. In case of any accident or emergency involving danger to any property at any such depot, every person employed at

All persons bound to aid in case of accident at depot. (Old Act, S. 44.)

such depot whether by the <sup>2</sup>[Crown] or by any private person, shall render assistance to any Forest-officer or Police-officer demanding his aid in averting such danger or securing such property from damage or loss.

#### CHAPTER VIII.

##### OF THE COLLECTION OF DRIFT AND STRANDED TIMBER.

45. (1) All timber found adrift, beached, stranded or sunk;

Certain kinds of timber to be deemed property of Government until title thereto proved, and may be collected accordingly. (Old Act, S. 45.)

all wood or timber bearing marks which have not been registered in accordance with the rules made under section 41, or on which the marks have been obliterated, altered or defaced by fire or otherwise; and

in such areas as the Provincial Government directs, all unmarked wood and timber;

shall be deemed to be the property of Government; unless and until any person establishes his right and title thereto, as provided in this Chapter.

(2) Such timber may be collected by any Forest-officer or other person entitled to collect the same by virtue of any rule made under section 51, and may be brought to any depot which the Forest-officer may notify as a depot for the reception of drift timber.

(3) The Provincial Government may, by notification in the Official Gazette, exempt any class of timber from the provisions of this section.

46. Public notice shall from time to time be given by the Forest-Officer of timber collected under section 45. Such notice shall contain a description of the timber, and shall require any person claiming the same to present to such officer, within a period not less than two months from the date of such notice, a written statement of such claim.

Notice to claimants of drift-timber. (Old Act, S. 46.)

Procedure on claim preferred to such timber. (Old Act, S. 47.)

47. (1) When any such statement is presented as aforesaid, the Forest-officer may, after making such inquiry as he thinks fit, either reject the claim after recording his reasons for so doing, or deliver the timber to the claimant.

(2) If such timber is claimed by more than one person, the Forest-officer may either deliver the same to any of such persons whom he deems entitled thereto, or may refer the claimants to the Civil Courts, and retain the timber pending the receipt of an order from any such Court for its disposal.

(3) Any person whose claim has been rejected under this section may, within three months from the date of such rejection, institute a suit to recover possession of the timber claimed by him; but no person shall recover any compensation or costs against the <sup>1</sup>[Crown], or against any Forest-officer, on account of such rejection, or the detention or removal of any timber, or the delivery thereof to any other person under this section.

(4) No such timber shall be subject to process of any Civil, Criminal or Revenue Court until it has been delivered, or a suit has been brought, as provided in this section.

48. If no such statement is presented as aforesaid, or if the claimant omits to prefer his claim in the manner and within the period fixed by the notice issued under section 46, or on such claim having been so preferred by him and having been rejected, omits to institute a suit to recover possession of such timber within the further period fixed by section 47, the ownership of such timber shall vest in the Government, or when such timber has been delivered to another person under section 47 in such other person free from all encumbrances not created by him.

Disposal of unclaimed timber. (Old Act, S. 48 and Act V of 1890, S. 10.)

49. The <sup>1</sup>[Crown] shall not be responsible for any loss or damage which may occur in respect of any timber collected under section 45, and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

Crown and its officers not liable for damage to such timber. (Old Act, S. 49.)

50. No person shall be entitled to recover possession of any timber collected or delivered as aforesaid until he has paid to the Forest-officer or other person entitled to receive it such sum on account thereof as may be due under any rule made under section 51.

Payments to be made by claimant before timber is delivered to him. (Old Act, S. 50.)

#### LEG. REF.

<sup>1</sup> Substituted for 'Government' by A.O., 1937.



Power to make rules and prescribe penalties. (Old Act, S. 51.)

51. (1) The Provincial Government may make rules to regulate the following matters, namely:—

(a) the salving, collection and disposal of all timber mentioned in section 45;

(b) the use and registration of boats used in salving and collecting timber;

(c) the amounts to be paid for salving, collecting, moving, storing or disposing of such timber; and

(d) the use and registration of hammers and other instruments to be used for marking such timber.

(2) The Provincial Government may prescribe, as penalties for the contravention of any rules made under this section, imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

## CHAPTER IX.

### PENALTIES AND PROCEDURE.

52. (1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-officer or Police-officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest-produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

53. Any Forest-officer of a rank not inferior to that of a Ranger, who, or whose subordinate, has seized any tools, boats, carts or cattle under section 52, may release the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made.

54. Upon the receipt of any such report, the Magistrate shall, with all

SEC. 51.—A warrant drawn up in the name of a Forester can be validly endorsed by him to a Forest Watcher. *Per Curiam*.—In order to justify the action of a Police or Forest-officer in arresting without warrant a person suspected of a forest offence he must either have refused to give his name or must have given a false name and residence or there must have been reason to believe that he would abscond. In the absence of any of these conditions, no Police-officer or Forest-officer could lawfully arrest without a warrant. 1928 M.W.N. 310.

SEC. 52: SUB-ASSISTANT CONSERVATOR OF FOREST—SEIZURE AND DETENTION OF TIMBER.—WARRANT OF VALID PASS.—Where a Sub-Assistant Conservator of Forest seized timber under the suspicion that it was property stolen

from the Government forests, held, that he could justify the seizure on the ground of the commission of a forest offence arising from the want of a valid pass. 15 B. 229. According to sec. 52, a Forest-officer cannot justify the detention of goods on the ground of an offence against the Forest laws, where he had not taken the course which that section prescribes of taking the matter before a Magistrate. 15 B. 229. Under sec. 52 the forest produce alone can be seized in relation to which a forest offence is believed to have been committed, and no forest offence can be said to have been committed in relation to any forest produce unless it is definitely established that the produce belonged to Government. 41 P.L.R. 423=A.I.R. 1939 Lah. 469.

Procedure thereupon. (Old Act, S. 53.)

55. (1) All timber or forest-produce which is not the property of Government and in respect of which a forest-offence has been committed, and all tools, boats, carts and cattle used in committing any forest-offence, shall be liable to confiscation.

(2) Such confiscation may be in addition to any other punishment prescribed for such offence.

56. When trial of Disposal, on conclusion of trial for forest-offence, of produce in respect of which it was committed. (Old Act, S. 55.)

convenient despatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

any forest-offence is concluded, any forest-produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest-officer and, in any other case, may be disposed of in such manner as the Court may direct.

57. When the offender not known, or cannot be found. (Old Act, S. 56 and Act V of 1890, S. 11.)

may, if he finds that an offence has been committed, order the property in respect of which the offence has been committed to be confiscated and taken charge of by the Forest-officer, or to be made over to the person whom the Magistrate deems to be entitled

to the same:

Provided that no such order shall be made until the expiration of one month from the date of seizing such property, or without hearing the person,

Sec. 55.—N.B. See also notes under sec. 26 and sec. 33.

SCOPE AND OBJECT.—The object of the legislature in enacting sec. 55 is to make the owner liable to a certain extent for the acts of his servant, civilly, not criminally. In the case of cattle trespassing in Government forest unless duly licensed, the master cannot be criminally liable for the acts of his grazier in taking his cattle into such forest, unless he permits the cattle so to graze by some overt acts or by some negligent omission. Where a large herd of cattle is entrusted to a youth and two children, in the vicinity of a closed forest, it might be held to amount to such negligence as to suggest connivance at a breach of the law. 175 I.C. 795=A.I.R. 1938 Nag. 365.

CONFISCATION OF FOREST-PRODUCE, ETC., THE PROPERTY OF GOVERNMENT.—No confiscation order is necessary or can be made, in respect of forest-produce, which is the property of Government, and regarding which a forest-offence has been committed. All that need be done is, to direct that it should be taken by some Forest-officer. 4 A. 417; Rat. 361. Cattle are instrumental in the theft of grass which they eat and in the damage to grass and young trees which they cause in grazing and such cattle used in committing an offence under sec. 26 (d) of the Act are as much liable to confiscation as cattle drawing a cart containing illicitly felled timber. 175 I.C. 795=A.I.R. 1938 Nag. 365.

POWER TO CONFISCATE.—It is only in respect of forest-produce with regard to which an offence has been committed, that power to direct confiscation is given by law. Such an order, regarding forest-produce not be-

longing to Government, can only be made at the time when the offender is convicted. 4 A. 417 followed in 27 C. 450.

REWARD—FOREST-PRODUCE.—Since there can be no legal confiscation of Government property, a reward cannot be paid out of such property. Rat. 620.

Sec. 56.—See also notes under sec. 33.

DISPOSAL OF PROPERTY.—Under sec. 55 the property, regarding which an offence is committed, should be awarded to Government. 5 Bom.L.R. 124.

GOVERNMENT FOREST-PRODUCE, OFFENCE RELATING TO—PROPER ORDER.—When the forest-produce, in respect of which an offence is committed, is found to be the property of Government the only order which the Magistrate can legally make regarding it, under sec. 56 is that it should be taken charge of by a Forest-officer. An order for its sale and the payment of a reward to the informer from its proceeds is therefore illegal. Rat. 361; 4 A. 417; Rat. 620.

SEC. 57: FORFEITURE FOR FOREST-OFFENCE WHEN A GOOD TITLE HAS VESTED IN A THIRD PERSON.—Under the orders issued by the Collector of Kandesh, certain Bhils entered the forest, brought from it teak logs under the customary passes, and sold them in open market to applicants who purchased in good faith. The Government sought to forfeit them on the ground that a forest-offence had been committed in respect of them, inasmuch as the permission under which the Bhils acted, only allowed them to cut deadwood and the logs did not fall under the description.

Held, ordering the logs to be restored to the custody of purchasers, that it was clear from the terms of sec. 57 that a forfeiture was not

if any, claiming any right thereto, and the evidence, if any, which he may produce in support of his claim.

58. The Magistrate may, notwithstanding anything hereinbefore contained, direct the sale of any property seized under section 52 and subject to speedy and natural decay and he may deal with the proceeds as he would have dealt with such property if it had not been sold.

59. The officer who made the seizure under section 52, or any of his official superiors, or any person claiming to be interested in the property so seized may, within one month from the date of any order passed under section 55, section 56 or section 57, appeal therefrom to the Court to which orders made by such Magistrate are ordinarily appealable, and the order passed on such appeal shall be final.

60. When an order for the confiscation of any property has been passed under section 55 or section 57, as the case may be and the period limited by section 59 for an appeal from such order has elapsed, and no such appeal has been preferred, or when, on such an appeal, being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the Government free from all incumbrances.

61. Nothing hereinbefore contained shall be deemed to prevent any officer empowered in this behalf by the Provincial Government from directing at any time the immediate release of any property seized under section 52.

62. Any forest-officer or Police-officer who vexatiously and unnecessarily seizes any property on pretence of seizing property liable to confiscation under this Act shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Penalty for counterfeiting or defacing marks on trees and timber and for altering boundary marks. (Old Act, S. 62.)

63. Whoever, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code—

(a) knowingly counterfeits upon any timber or standing tree a mark used by Forest-officers to indicate that such timber or tree is the property of the Government or of some person, or that it may lawfully be cut or removed by same person; or

(b) alters, defaces or obliterates any such mark placed on a tree or on timber by or under the authority of a Forest-officer; or

(c) alters, moves, destroys or defaces any boundary-mark of any forest or waste-land to which the provisions of this Act are applied,

a consequence of a forest-offence under the conditions stated in that section, where a good title has vested in a third person. 2 Bom.L.R. 675.

SEC. 59: REVISION BY HIGH COURT OF AN ORDER OF A SUBORDINATE TRIBUNAL.—The terms of sec. 59 do not exclude the ordinary revisional powers of the High Court over a subordinate tribunal in the exercise of its criminal jurisdiction, where there had been judicial proceeding. 4 A. 417. Under sec. 59 even a third person who was not a party to the proceedings in the original Court and

whose claim for relief from confiscation was not adjudicated upon is entitled to prefer an appeal. The phrase "any person claiming to be interested in the property so seized" in sec. 59 cannot be construed as limited to the case contemplated by sec. 57. And, the words "so seized" refer to the seizure under sec. 52. 34 C. W. N. 956=1930 C. 577.

SEC. 63 (c).—Although penal statutes are to be construed strictly, beneficial construction to promote the object of an Act is not excluded and a genus may include a species whether or not that species was in direct con-

shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

64. (1) Any Forest-officer or Police-officer may, without orders from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any forest-offence punishable with imprisonment for one month or upwards.

Power to arrest without warrant. (Old Act, S. 63; Act I of 1918, S. 4 and Act V of 1890, S. 12.)

(2) Every officer making an arrest under this section shall, without unnecessary delay and subject to the provisions of this Act as to release on bond, take or send the person arrested before the Magistrate having jurisdiction in the case, or to the officer in charge of the nearest police station.

(3) Nothing in this section shall be deemed to authorise such arrest for any act which is an offence under Chapter IV unless such act has been prohibited under clause (c) of section 30.

65. Any Forest-officer of a rank not inferior to that of a Ranger, who, or whose subordinate, has arrested any person under the provisions of section 64, may release such person on his executing a bond to appear, if and when so required, before the Magistrate having jurisdiction in the case, or before the officer in charge of the nearest police station.

Power to release on a bond person arrested. (Act I of 1918, S. 5.)

Power to prevent commission of offence. (Old Act, S. 64.)

66. Every Forest-officer and Police-officer shall prevent, and may interfere for the purpose of preventing, the commission of any forest-offence.

67. The District Magistrate or any Magistrate of the first class specially empowered in this behalf by the Provincial Government may try summarily, under the Code of Criminal Procedure, 1898, any forest-offence punishable with imprisonment for a term not exceeding six months, or fine not exceeding five hundred rupees, or both.

Power to try offences summarily. (Old Act, S. 65.)

Power to compound offences. (Act V of 1890, S. 13.)

68. (1) The Provincial Government may, by notification in the Official Gazette, empower a Forest-officer—

(a) to accept from any person against whom a reasonable suspicion exists that he has committed any forest-offence, other than an offence specified in section 62 or section 63, a sum of money by way of compensation for the offence which such person is suspected to have committed, and

(b) when any property has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money, or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, and no further proceedings shall be taken against such person or property.

(3) A Forest-officer shall not be empowered under this section unless he is a Forest-officer of a rank not inferior to that of a Ranger and is in receipt of a monthly salary amounting to at least one hundred rupees, and the sum of money accepted as compensation under clause (a) of sub-section (1) shall in no case exceed the sum of fifty rupees.

templation of the Legislature. Hence the expression 'boundary marks of a forest' in sec. 63 (c), Forest Act (which makes cutting trees within the forest an offence) should be taken to include boundary marks within

forest placed to separate what may be felled from what may not. 1943 N.L.J. 130=1943 Nag. 139=I.L.R. 1943 Nag. 358.

Sec. 68.—See Rat. 591.

69. When in any proceedings taken under this Act, or in consequence of anything done under this Act a question arises as to whether any forest produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved.

Presumption that forest produce belongs to Government. (Old Act, S. 68.)

## CHAPTER X.

### CATTLE TRESPASS.

70. Cattle trespassing in a reserved forest or in any portion of a protected forest which has been lawfully closed to grazing shall be deemed to be cattle doing damage to a public plantation within the meaning of section 11 of the Cattle Trespass Act, 1871, and may be seized and impounded as such by any Forest-officer or Police-officer.

71. The Provincial Government may, by notification in the Official Gazette, direct that, in lieu of the fines fixed under section 12 of the Cattle Trespass Act, 1871, there shall be levied for each head of cattle impounded under section 70 of this Act such fines as it thinks fit, but not exceeding the following, that is to say:

For each elephant	..	ten rupees.
For each buffalo or camel	..	two "
For each horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow or heifer	..	one rupee.
For each calf, ass, pig, ram, ewe, sheep, lamp, goat or kid	..	eight annas.

## CHAPTER XI.

### OF FOREST-OFFICERS.

Provincial Government may invest Forest-officers with certain powers. Old Act, S. 71.)

72. (1) The Provincial Government may invest any Forest-officer with all or any of the following powers, that is to say:—

(a) power to enter upon any land and to survey, demarcate and make a map of the same;

(b) the powers of a Civil Court to compel the attendance of witnesses and the production of documents and material objects;

(c) power to issue a search-warrant under the Code of Criminal Procedure, 1898; and

(d) power to hold an inquiry into forest-offences, and, in the course of such inquiry, to receive and record evidence.

(2) Any evidence recorded under clause (d) of sub-section (1) shall be admissible in any subsequent trial before a Magistrate, provided that it has been taken in the presence of the accused person.

Forest-officers deemed public servants. (Old Act, S. 72.)

73. All Forest-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

Indemnity for acts done in good faith. (Old Act, S. 73.)

74. No suit shall lie against any public servant for anything done by him in good faith under this Act.

75. Except with the permission in writing of the Provincial Government, no Forest-officer shall, as principal or agent, trade in timber or other forest-produce, or be or become interested in any lease of any forest or in any contract for working any forest, whether in or outside British India.

## CHAPTER XII.

## SUBSIDIARY RULE.

Additional powers to make rules. (Old Act, S. 75.) 76. The Provincial Government may make rules<sup>1</sup>—

(a) to prescribe and limit the powers and duties of any Forest-officer under this Act;

(b) to regulate the rewards to be paid to officers and informers out of the proceeds of fines and confiscation under this Act;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act.

77. Any person contravening any rule under this Act, for the contravention of which no special penalty is provided, shall be punishable with imprisonment for a term which may extend to one month, or fine which may extend to five hundred rupees, or both.

## LEG. REF.

<sup>1</sup>For rules made under this section for—

(1) Bombay, *see* Bom. R. and O.;

(2) Central Provinces, *see* C. P. R. and O. and Central Provinces Gazette, 1900, Pt. I, p. 214;

(3) United Provinces, *see* pp. 68 to 70 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894. *See also* North-Western Provinces and Oudh Gazette, 1899, Pt. p. 494; *ibid.*, 1900 Pt. I, p. 491; U. P. Gazette, 1907, Pt. I, p. 189.

(4) Punjab, *see* Punjab Gazette, 1899, Pt. I, p. 748.

For notification declaring that certain officers shall exercise the powers of Forest-officers under certain sections, *see* Calcutta Gazette, 1901, Pt. I, p. 28.

For rules made by the Government of Bengal, *see* Calcutta Gazette, 1906, Pt. I, p. 1094.

For rules under this clause as to measurement and registration of boats in the Sundarban Division, *see* Calcutta Gazette, 1906, Pt. I, p. 1657.

*See also* notes under sec. 26.

SEC. 76.—Interpretation of section—Exercise law—Confiscation in the owner's absence. *See* 12 C.W.N. 139. Any rule made by the Provincial Government under sec. 76 which deals with the disposal of trees not belonging to Government will be *ultra vires*. 42 P.L.R. 423=A.I.R. 1939 Lah. 469.

RULES FRAMED UNDER THE ACT BY LOCAL GOVERNMENT.—When the Local Government has framed rules under the Forest Act prohibiting hunting and shooting in reserved forest

during such periods and in such portions as the conservator may appoint, the conservator, in notifying periods and localities left unascertained by the Local Government cannot be said to be exercising the authority delegated to the Local Government by the Act. 19 P.R. 1880 (Cr.).

PASS — CONTRACTOR — AUTHORITY.—Of the rules framed under the Forest Act, R. 13 prohibits the removal of forest-produce beyond certain limits without a pass from the conservator or some person duly authorised in that behalf under r. 13, *held*, that a contractor under the Forest Department to whom the Forest-Officer has given a pass book containing passes bearing the office seal with an endorsement that he might thereby remove timber was sufficiently authorised under R. 13 to issue passes. Rat. 424.

OFFENCE UNDER THE SECTION, WHAT CONSTITUTES.—The offence under sec. 75 of the Forest Act is only committed under the express terms of the Act and rules, when the trees cut are the property of Government. The Court, before convicting is bound to satisfy itself of Government proprietary rights in the usual modes and by means of the usual materials recognised in Courts. The declared opinion of the executive Government merely as such can have no more weight with the Court than that of the humblest of Her Majesty's subjects. 18 B. 670 (Rat. 828, Foll.). Rules made by Bombay Government prohibiting a person who has made a tender from withdrawing it, valid. *See* 49 B. 759 =1925 B. 485.

SEC. 77.—*See* 18 B. 670 cited under sec.

78. All rules made by the Provincial Government under this Act shall be published in the Official Gazette, and shall thereupon, so far as they are consistent with this Act, have effect as if enacted therein.

## CHAPTER XIII.

## MISCELLANEOUS.

79. <sup>1</sup>[(1) Every person who exercises any right in a reserved or protected forest, or who is permitted to take any forest-produce from, or to cut and remove timber or to pasture cattle in, such forest, and every person who is employed by any such person in such forest, and every person in any village contiguous to such forest who is employed by the <sup>2</sup>[Crown] or who receives emoluments from the <sup>2</sup>[Crown] for services to be performed to the community,

shall be bound to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information he may possess respecting the commission of or intention to commit, any forest-offence, and shall forthwith take steps, whether so required by any Forest-officer or Police-officer or not,—

(a) to extinguish any forest fire in such forest of which he has knowledge or information;

(b) to prevent by any lawful means in his power any fire in the vicinity of such forest of which he has knowledge or information from spreading to such forest, and shall assist any Forest-officer or Police-officer demanding his aid;

(c) in preventing the commission in such forest of any forest-offence; and

(d) when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender.

<sup>1</sup>[(2) Any person who, being bound so to do, without lawful excuse (the burden of proving which shall lie upon such person) fails—

(a) to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information required by sub-section (1);

(b) to take steps as required by sub-section (1) to extinguish any forest fire in a reserved or protected forest;

(c) to prevent, as required by sub-section (1), any fire in the vicinity of such forest from spreading to such forest; or

(d) to assist any Forest-officer or Police-officer demanding his aid in preventing the commission in such forest of any forest-offence, or, when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender;

shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.]

## LEG. REF.

<sup>1</sup> Sec. 79 re-numbered and Cl. (2) added by Act I of 1928, sec. 6.

<sup>2</sup> Substituted for 'Government' by A.O., 1937.

75 and see also notes under sec. 26 *supra*.

RULES FRAMED UNDER THE ACT—MISQUOTING OF THE SECTION—APPEAL.—A misquoting of the section of the Act under which a rule otherwise valid has been framed, does not render the rule void. 19 P.R. 1880 (Cr.). Where a conviction and sentence proceeds under the provisions of the Act it is not competent to a Magistrate to pass an order of reward to the complainant for detecting the of-

fence. Cr. Rg. 48 of 1896.

SEC. 79: REFUSAL TO SERVE AS MEMBER OF PANCH.—A person refusing to serve as member of a panch appointed for the purpose of drawing panchnama with reference to certain wood alleged to have been illegally cut in the reserved forests, was held not to be liable to be convicted under sec. 187, I.P. Code, as he was not shown to be a person contemplated in the provisions of the first three paragraphs of sec. 78 of Act VII of 1878, and as the purpose for which he was called upon to give his assistance was also not one of the purposes mentioned in Cls. (a) and (d) of that section. 22 B. 769.



Management of forest the joint property of Government and other persons. (Old Act, S. 79.)

80. (1) If the Government and any person be jointly interested in any forest or waste-land, or in the whole or any part of the produce thereof, the Provincial Government may either—

(a) undertake the management of such forest, waste-land or produce, accounting to such person for his interests in the same; or

(b) issue such regulations for the management of the forest, waste-land or produce by the person so jointly interested as it deems necessary for the management thereof and the interests of all parties therein.

(2) When the Provincial Government undertakes under clause (a) of sub-section (1) the management of any forest, waste-land or produce, it may, by notification in the Official Gazette, declare that any of the provisions contained in Chapters II and IV shall apply to such forest, waste-land or produce, and thereupon such provisions shall apply accordingly.

81. If any person be entitled to a share in the produce of any forest which is the property of Government or over which the Government has proprietary rights or to any part of the forest produce of which the Government is entitled, upon the condition of duly performing any service connected with such forest, such share shall be liable to confiscation in the event of the fact being established to the satisfaction of the Provincial Government that such service is no longer so performed:

Provided that no such share shall be confiscated until the person entitled thereto, and the evidence, if any, which he may produce in proof of the due performance of such service, have been heard by an officer duly appointed in that behalf by the Provincial Government.

82. All money payable to the Government under this Act, or under any rule made under this Act, or on account of the price of any forest-produce, or of expenses incurred in the execution of this Act in respect of such produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land-revenue.

83. (1) When any such money is payable for or in respect of any forest-produce, the amount thereof shall be deemed to be a first charge on such produce, and such produce may be taken possession of by a Forest-officer until such amount has been paid.

(2) If such amount is not paid when due, the Forest-officer may sell such produce by public auction, and the proceeds of the sale shall be applied first in discharging such amount.

(3) The surplus, if any, if not claimed within two months from the date of the sale by the person entitled thereto, shall be forfeited to His Majesty.

84. Whenever it appears to the [Provincial Government] that any land is required for any of the purposes of this Act, such land shall be deemed to be needed for a public purpose within the meaning of section 4 of the Land Acquisition Act, 1894.

85. When any person, in accordance with any provision of this Act, or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond or instrument that he, or that he and his servants and agents will abstain from any act, the whole sum mentioned in

Failure to perform service for which a share in produce of Government forest is enjoyed. (Old Act, S. 80.)

Recovery of money due to Government. (Old Act, S. 81.)

Lien on forest-produce for such money. (Old Act, S. 82.)

Land required under this Act to be deemed to be needed for a public purpose under the Land Acquisition Act, 1894. (Old Act, S. 83.)

Recovery of penalties due under bond. (Cf. Act V of 1880, S. 14 and Act V of 1918, S. 7.)

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

Sec. 83.—Sec. 83 expressly provides that

the sale proceeds should be applied first in discharging the amount due. 31 I.C. 436= 9 S.L.R. 51.

such bond or instrument as the amount to be paid in case of a breach of the conditions thereof, may, notwithstanding anything in section 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land revenue.

<sup>1</sup>85-A. As from the commencement of Part III of the Government of India Act, 1935, nothing in this Act shall authorize any Provincial Government to make any order or to any other thing in relation to any Crown property not vested in His Majesty for the purposes of that Province or otherwise to prejudice any Crown rights, without the consent of the Government or authority concerned.

Repeals.

86. The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

### THE SCHEDULE.

(See section 86.)

#### ENACTMENTS REPEALED.

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1878	VII	The Indian Forest Act, 1878.	So much as has not already been repealed.
1890	V	The Forest Act, 1890	Do.
1891	XII	The Amending Act, 1891 ..	So much of Part I of Schedule II as relates to the Indian Forest Act, 1878.
1901	V	The Indian Forest (Amendment) Act, 1901 ..	So much as has not already been repealed.
1911	XV	The Indian Forest (Amendment) Act, 1911.	Do.
1914	X	The Repealing and Amending Act, 1914 ..	So much of the Second Schedule as relates to the Indian Forest Act, 1878, the Forest Act, 1890 and the Indian Forest (Amendment) Act, 1901.
1918	I	The Indian Forest (Amendment) Act, 1918.	The whole.
1920	XXXVIII	The Devolution Act, 1920 ..	So much of Schedule I, Part I, as relates to the Indian Forest Act, 1878.

### THE MADRAS FOREST (AMENDMENT) ACT (VII OF 1936).

[9th March, 1936 and 27th March, 1936.

*An Act further to amend the Madras Forest Act, 1882, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Forest Act, 1882, for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

1. This Act may be called THE MADRAS FOREST (AMENDMENT) ACT, 1936.

2. In section 2 of the Madras Forest Act, 1882 (hereinafter referred to as the said Act), for the words "Sub-Assistant Conservator" occurring in the definition of "Forest-Officer" the words "Extra Assistant Conservator" shall be substituted.

LEG. REF.

<sup>1</sup> Sec. 85-A inserted by A.O., 1937.

Insertion of new section 17-A in Madras Act V of 1882.

3. After section 17 of the said Act, the following section shall be inserted, namely:—

“17-A. (1) Where

Power of the Local Government to re-define the limits of reserved forests in certain cases.

the description of the limits of any reserved forest notified under section 16 is defective or is not clear in reference to existing facts, the Local Government may, by notification in the *Fort St. George Gazette*, declare their intention to re-define the limits of such reserved forest so as to remove the defect or to make the description clear in refer-

ence to existing facts. Such notification shall specify as nearly as possible the corrections which it is proposed to effect to the limits of the reserved forest.

(2) On the issue of a notification under sub-section (1), the District Forest Officer shall publish in the Official Gazette of the district concerned and in such other manner as may be prescribed by rules made in that behalf a notice—

(a) specifying the corrections proposed by the notification under sub-section (1); and

(b) stating that any objections which may be made in person or in writing to the District Forest Officer, within a period of thirty days from the date of publication of the notice, will be considered by him.

(3) After the expiry of the period referred to in clause (b) of sub-section (2) and after considering the objections, if any, received by him, the District Forest Officer shall submit to the Local Government the record of the proceedings held by him together with a report thereon.

(4) The Local Government may, after considering the report of the District Forest Officer, by notification in the *Fort St. George Gazette* re-define the limits of the reserved forest, as proposed by the notification under sub-section (1), with such modifications as they think fit or without any modifications.

(5) Save as provided in this section, it shall not be necessary to follow the procedure laid down in sections 4 to 16 before issuing a notification under sub-section (4).”

Amendment of section 24, Madras Act V of 1882.

4. To section 24 of the said Act, the following paragraph shall be added at the end, namely:—

“The Local Government shall also have power to appoint any person to discharge any function of a Forest-officer under any of the provisions of this Act which have been extended to any land or to any forest or waste land or produce thereof by a notification under section 32 or section 33 or under any rule made in pursuance of any provision so extended.”

Amendment of sections 41 and 43, Madras Act V of 1882.

5. In sections 41 and 43 of the said Act, for the word ‘carts,’ the word ‘vehicles’ shall be substituted.

Substitution of new section for section 46, Madras Act V of 1882.

6. For section 46 of the said Act, the following section shall be substituted, namely:—

Procedure in regard to perishable property seized under section 41.

“46. (1) Notwithstanding anything hereinbefore contained—

(a) the Magistrate may direct the sale of any property seized under section 41 which is subject to speedy and natural decay; and

(b) if, in the opinion of the officer seizing such property, it is not possible to obtain the orders of the Magistrate under clause (a) in time, such officer may sell the property himself, remit the sale-proceeds into the nearest Government treasury, and make a report of such seizure, sale and remittance.

to the Magistrate and thereupon the Magistrate shall take such measures as may be necessary for the trial of the accused.

(2) The Magistrate may deal with the proceeds of the sale of any property held under clause (a) or clause (b) of sub-section (1) in the same manner as he might have dealt with the property if it had not been sold."

### THE FORFEITURE ACT (IX OF 1859).

[*Rep. in Part by Acts VIII of 1868 and XII of 1891*].

[30th April, 1859.

*An Act to provide for the adjudication of claims to property seized as forfeited.*

WHEREAS it is expedient to remove doubts concerning the powers of officers or other persons to whom commissions may have been issued for the trial of heinous offences in certain districts, and concerning the validity of convictions and adjudications of forfeiture made by such officers or other persons; It is enacted as follows:

1 to 15. [*Constitution, procedure, etc., of Special Commission Courts.*] *Rep. by the Repealing Act, 1868 (VIII of 1868).*

Convictions involving forfeiture not questionable in suits relating to forfeited property.

16. Whenever any person shall have been convicted of an offence for which his property was forfeited to Government, no Court has power in any suit or proceeding relating to such property to question the validity of the conviction.

17. Whenever any person shall have been convicted as above by an officer having power to try and convict, the validity of any such conviction shall not be questioned upon the ground that the record of the conviction does not show in what capacity such officer acted, or that it represents him to have acted in a different capacity from that in which he had power to convict.

18. Whenever any property shall have been attached or seized without either conviction or an adjudication of forfeiture by any officer of Government as property forfeited or liable to be forfeited to Government for an offence for which, upon conviction, the property of the offender would be forfeited, the validity of such attachment or seizure shall not be called in question by any Court or other authority in any suit or proceeding, unless the offender or alleged offender shall, within one year after the seizure of his property have surrendered himself for trial, and upon trial before a competent Court shall have been or shall be acquitted of the offence, and shall prove to the satisfaction of the Court that he did not escape or keep out of the way for the purpose of evading justice.

Nothing in this section shall extend to persons entitled to pardon upon Her Majesty's proclamation published in the *Calcutta Gazette Extraordinary*, dated the 1st of November, 1858, or to any person who, having surrendered himself within the period of one year after the seizure of his property shall be [duly discharged] without a prosecution.

19. [*Release of property attached as forfeited.*] *Rep. by the Repealing Act, 1868 (VIII of 1868).*

20. Nothing in this Act shall be held to affect the rights of parties not

LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

Sec. 20 of the Act to provide for the ad-

judication of claims to property seized as forfeited, requires, that persons who have any claim that they are the owners of property which has been confiscated as the property of

Rights of parties not charged with offence involving forfeiture.  
Proviso.

charged with any offence for which upon conviction the property of the offender is forfeited in respect of any property attached or seized as forfeited or liable to be forfeited to Government: Provided that no suit brought by any party in respect of such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates.

### THE GENERAL CLAUSES ACT (X OF 1897).

Year.	No.	Short title.	Amendments.
1897	IX	The General Clauses Act, 1897.	Repealed in part, I of 1903. Repealed in part and amended, X of 1941; XVIII of 1919; XXI of 1920. Amended, I of 1903; XVII of 1914, S. 2; XXIV of 1917, S. 2; XI of 1923; XVIII of 1928; Government of India (Adaptation of Indian Laws) Order, 1937; Act XIX of 1936 and Act XXXII of 1940.

another, should bring such a claim within one year from the attachment or seizure of the property which they claim. Though Act VIII of 1868 has repealed various sections of the Act of 1859. Sec. 20 of the latter Act is not affected by Act VIII of 1868, and the application of sec. 20 is permanent, because it was intended to be a permanent bar against subsequent suits in Civil Courts, and hence has remained in force up to the present day. Limitation for the purposes of the section begins to run from the date of attachment which in those days took the form of a ~~process~~ being issued to the Sub-Inspector of Police for the attachment of the property. 1909 A.L.J. 1079=A.L.R. 1940 All. 121.

~~Case on the Act.~~ **FORFEITURE ACT, 1859.**—*Held*, judgment creditor, who has *bona fide* attached property, at the time when the property of the debtor becomes forfeited to Government under the above Act, is entitled in priority to Government. Marsh. 259=2 Hay 117. On this Act see also 17 W.R. 80=8 B.L.R. 83. The plaintiff joined with the rebels and took a leading part with them. A reward was set upon him as a rebel leader and, after a time, he was captured; no formal proceedings were taken, under secs. 2 and 7 of the Act XXV of 1857 for adjudicating his property (which consisted of little more than annuity) to be forfeited. The property charged with the annuity was in the hands of the Collector as the Manager under the Court of Ward, the annuity was withheld and was no longer regarded as a charge on the estate but was treated as merged. *Held*, that the mere withdrawal of the payment of annuity by those who had the management of the estate which was charged with the payment would be an illegal act in no way affecting the plaintiff's right, but, as the withholding of the payment was under the authority and direction of the official who was authorized to make the attachment of the rebel's property, it was with reference to the

nature of the property equivalent to an attachment or seizure and could not be questioned except under the provisions of sec. 18 of Act IX of 1859, notwithstanding there had been no adjudication of forfeiture. 3 Agra 281. A person who was in possession of an estate was found to be guilty of rebellion. All his property was forfeited to the Government, and he was subsequently sentenced to death and executed. A suit was eventually instituted on behalf of his infant son for the restoration of the land and the house which had been confiscated. The case made had two aspects:—One, that the estate, which had been granted towards maintaining the title and dignity of the Thakur was inalienable; the other, that it was subject to the Mitakshara Law, modified by the family-custom of primogeniture, and that the plaintiff became, on his birth, a co-sharer with his father: *Held* that the grant being for maintenance, and the descent being to the heirs made, did not make the estate inalienable. So long as there was an heir male, the grantor or his heirs could not resume such an estate; but a particular law or custom is necessary to convert an estate, which is conditional upon there being an heir male, into an estate which cannot be aliened: *Held*, that the Mitakshara, by which each son has by birth a property in the ancestral estate, is inconsistent with the custom that the estate is impartible, and descends to the eldest son, and was not applicable to this estate. *Held*, that the suit was also barred under sec. 9, Act XXV of 1857. 22 W.R. 17=13 B.L.R. 445.

**SEIZURE AND ATTACHMENT OF PROPERTY OF REBELS—PROCEDURE.**—See 14 W.R. 114.

**EFFECT OF FORFEITURE.**—Confiscation of village under Act X of 1853 for rebellion cancels the right of tenants. 2 Agra 324.

**EFFECT OF ORDER ACQUITTING A PERSON** and ordering release of his property. (1897) A.W.N. 129.

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## THE SCHEDULE.

*N.B.*—Throughout the Act, for “Acts of the Governor-General in Council” and “Act of the Governor-General in Council” the words “Central Acts” and “Central Act” have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

## THE GENERAL CLAUSES ACT (X OF 1897).

[11th March, 1897.]

An Act to consolidate and extend the General Clauses Acts, 1868 and 1887.

WHEREAS it is expedient to consolidate and extend the General Clauses Acts, 1868 and 1887; It is hereby enacted as follows:—

*Preliminary.*

Short title and commencement. 1. (1) This Act may be called ~~THE GENERAL CLAUSES ACT, 1897~~; [\*]<sup>1</sup>

(2) [\* \* \* \* \*]

2. [Repealed.] Rep. by the Repealing and Amending Act (I of 1908).

## GENERAL DEFINITIONS.

3. In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

## Definitions.

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1897, Pt. V, p. 38; for Report of Sel. Com., see *ibid.* p. 77; for Proceedings in Council, see *ibid.*, Part VI, pp. 35, 40, 56 and 76.

<sup>2</sup> Rep. by Act X of 1914, Sch. II.

Cl. (2).—*Cf.* The Indian Penal Code (Act XLV of 1860), and the Madras Ge-

neral Clauses Act, 1891 (Madras Act III of 1891).

SECS. 1 AND 3: APPLICABILITY TO BOMBAY ABKARI ACT.—The General Clauses Act has no application to the Bombay Abkari Act, passed by the Governor of Bombay in Council. 1 Bom.L.R. 164 (16 B. 692 Foll.).

- (1) "abet" with its grammatical variations and cognate expressions shall have the same meaning as in the Indian Penal Code:
- "Abet."
- (2) "act", used with reference to an offence or a civil wrong shall include a series of acts, and words which refer to acts done extend also to illegal omissions:
- "Act."
- (3) "affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing:
- "Affidavit."
- <sup>1</sup>(3-a) "Assam Act" shall mean an Act made by the Chief Commission of Assam in Council under the [Indian Councils Acts, 1861 to 1909] <sup>2</sup>[or the Government of India Act, 1915,] <sup>3</sup>[or by the Local Legislature or the Governor of Assam under the Government of India Act,] <sup>4</sup>[or by the Provincial Legislature or the Governor of Assam under the Government of India Act, 1935]:
- "Assam Act."
- (4) "barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland:
- "Barrister."
- <sup>1</sup>[(5) "Bengal Act" shall mean in the case of Acts passed prior to the 1st April, 1912, an Act made by the Lieutenant Governor of Bengal in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892, or the Indian Councils Act, 1861 to 1909, and in the case of Acts passed after that date, an Act made by the Governor of the Presidency of Fort William in Bengal in Council under the Indian Councils Acts, 1861 to 1909.] <sup>2</sup>[or the Government of India Act, 1915,] <sup>3</sup>[or by the local Legislature or the Governor of the Presidency of Bengal under the Government of India Act,] <sup>4</sup>[or by the Provincial Legislature or the Governor of Bengal under the Government of India Act, 1935]:
- "Bengal Act."
- <sup>4</sup>[5-(a) 'Berar' shall have the same meaning as in the Government of India Act, 1935:]
- "Berar."
- <sup>1</sup>[<sup>4</sup>[5-b] "Bihar and Orissa Act" shall mean an Act made by the Lieutenant-Governor of Bihar and Orissa in Council under the Indian Councils Acts, 1861 to 1909] <sup>2</sup>[or the Government of India Act, 1915] <sup>4</sup>[or by the local Legislature or the Governor of Bihar and Orissa] <sup>4</sup>[or Bihar] under the Government of India Act]:
- "Bihar and Orissa Act."
- <sup>1</sup>[5-b] "Bihar Act" shall mean an Act made by the Provincial Legislature or the Governor of Bihar under the Government of India Act, 1935:]
- "Bihar Act."
- (6) "Bombay Act" shall mean an Act made by the Governor of Bombay in Council under <sup>5</sup>[the Indian Councils Act 1861, or] the Indian Councils Acts, 1861 and 1892 <sup>1</sup>[or the Indian Councils Acts, 1861 to 1909] <sup>2</sup>[or the Government of India Act, 1915,] <sup>3</sup>[or by the local Legislature or the Governor of the Presidency of Bombay under the Government of India Act] <sup>1</sup>[or by the Provincial Legislature or the Governor of Bombay under the Government of India Act, 1935:]
- "Bombay Act."

## LEG. REF.

<sup>1</sup> Ins. by Act X of 1914.<sup>2</sup> Ins. by Act XXIV of 1917, secs. 2 and Sch. I.<sup>3</sup> Ins. by Act XVIII of 1928, sec. 2 and Sch. I.<sup>4</sup> Ins. by A.O., 1937.<sup>5</sup> Inserted by Act I of 1903, sec. 3 and Sch. II.CL. (3).—*Cf.* The definitions of "Oath" and "Swear" in sub-secs. (36 and 55), respectively, *infra*. As to affidavits in civil proceedings, *see* Code of Civil Procedure(Act V of 1908), 1st Sch., Order XIX; as to Criminal Proceedings, *see* Code of Criminal Procedure (Act V of 1898).CL. (4).—*Cf.* The Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), secs. 19, Col. Stats. Ind., Vol. I.This Act applies only to Acts passed by the Governor-General in Council and not to Acts passed by the Local Legislature. 1 Bom.L.R. 614. As to its applicability to Oudh Rent Act, *see* 16 O.C. 341.



<sup>1</sup>[(7) 'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions, which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar:]

(8) "British possession" shall mean any part of Her Majesty's dominions, exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local Legislature, all parts under the Central Legislature shall, for the purposes of this definition, be deemed to be one British possession:

<sup>2</sup>[(8-a) 'Burma Act' shall mean an Act made by the Lieutenant-Governor of Burma in Council under the Indian Councils Acts 1861 and 1892,] <sup>3</sup>[or the Indian Councils Acts, 1861 to 1909], <sup>4</sup>[or the Government of India Act, 1915,] <sup>5</sup>[or by the local Legislature or the Governor of Burma under the Government of India Act]:

<sup>6</sup>[(8-aa) 'Central Act' shall mean an Act of the Central Legislature, and shall include, except in section 5, an Act made by the Governor-General under section 67-B of the Government of India Act, or section 44 of the Government of India Act, 1935:]

"Central Government." <sup>7</sup>[(8-ab) 'Central Government' shall—

(a) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935, mean the Federal Government; and

(b) in relation to anything done before the commencement of Part III of the said Act, mean the Governor-General in Council, or the authority competent at the relevant date to exercise the functions corresponding to those subsequently exercised by the Governor-General in Council:]

<sup>8</sup>[(8-ac) "Central Legislature" shall mean the Governor-General in Council acting in a legislative capacity under the Government of India Act, 1853, the Government of India Act, 1858, the Indian Councils Acts, 1861 to 1909, or any of those Acts, or the Government of India Act, 1915, the Indian Legislature acting under the Government of India Act, or the Government of India Act, 1935, or the Federal Legislature acting under the Government of India Act, 1935, as the case may require:]

<sup>9</sup>[(8-b) "Central Provinces Act" shall mean an Act made by the Chief Commissioner of the Central Provinces in Council under the Indian Councils Act 1861 to 1909,] <sup>10</sup>[or Government of India Act, 1915,] <sup>11</sup>[or by the local Legislature or the Governor of the Central Provinces under the Government of India Act:]

#### LEG. REF.

<sup>1</sup> Inserted by A.O., 1937.  
Cl. (7).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), sec. 18 (2), Col. Stats. Ind., Vol. II. For definition of "India," see *infra*, sub-sec. (27).

Cl. (8).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), sec. 18 (2), Col. of Stats. Ind., Vol. II.

<sup>2</sup> Inserted by Act I of 1908, secs. 3 and Sch. II.

<sup>3</sup> Inserted by Act X of 1914.

<sup>4</sup> Inserted by Act XXIV of 1937.

<sup>5</sup> Inserted by Act XVIII of 1936.

<sup>6</sup> Substituted for the original clause (7) by A.O., 1937.

<sup>7</sup> Inserted by Act XVII of 1914, sec. 2 and Sch. I.

Sec. 3, Cl. (7).—*See* 6 P.R. 1373 (Or.). Quetta does not form part of "British India" as defined in sec. 3 of the General Clauses Act. It is what is known as an "administered area." 39 S.L.R. 54—1934 Sind 123. "Berar," if included in British India, see 39 Bom.L.R. 1267.

<sup>1</sup>[(8-c) 'Central Provinces and Berar Act' shall mean an Act made by the Provincial Legislature or the Governor of the Central Provinces and Berar under the Government of India Act, 1935:]

"Chapter."

"Chief Controlling Revenue Authority."

(9) "Chapter" shall mean a Chapter of the Act or Regulation in which the word occurs:

<sup>1</sup>[(9-a) 'Chief Controlling Revenue Authority' or 'Chief Revenue Authority' shall mean—

(a) in provinces where there is a Board of Revenue, that Board:—

(b) in provinces where there is a Revenue Commissioner, that Commissioner;

(c) in the Punjab, the Financial Commissioner; and

(d) elsewhere, such authority as, in relation to matters enumerated in List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government, and in relation to other matters, the Provincial Government, may by notification in the Official Gazette appoint:]

(10) "Collector" shall mean, in a Presidency town, the Collector of Calcutta, Madras or Bombay, as the case may be and elsewhere the chief officer in charge of the revenue-administration of a district:

"Collector."

(11) 'Colony' shall mean any part of Her Majesty's dominions exclusive of the British Islands and of British India and, where parts of those dominions are under both a central and a local Legislature, all parts under the Central Legislature shall for the purposes of this definition be deemed to be one colony: <sup>1</sup>[Provided that in any Central Act passed after the commencement of Part III of the Government of India Act, 1935, 'Colony' shall not include any dominion as defined in the Statute of Westminster, 1931, any Province or State forming part of such a dominion, or British Burma:]

"Colony."

(12) 'Commencement', used with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force:

"Commencement."

(13) "Commissioner" shall mean the chief officer in charge of the revenue administration of a division:

"Commissioner."

(14) 'consular officer' shall include consul-General, consul, vice-consul, consular agent, prob-consul and any person for the time being authorized to perform the duties of consul-general, consul, vice-consul or consular agent:

"Consular officer."

<sup>1</sup>[(14-a) 'Crown contracts' and equivalent expressions shall include contracts made by or on behalf of the Secretary of State in Council, contracts made in the exercise of the executive authority of the Central or any Provincial Government, contracts made by the Federal Railway Authority, and contracts made in connection with the exercise of the functions of the Crown in its relations with Indian States:

"Crown contracts."

(14-b) 'Crown debts' and equivalent expressions shall include debts due to the Secretary of State in Council, the Secretary of State, the Central Government, any Provincial Government, the Federal Railway Authority or the Crown Representative:

"Crown debts."

#### LEG. REF.

<sup>1</sup>Inserted by A.O., 1937.  
Cl. (11).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 693), sec. 18 (3), Col. Stats. Ind., Vol. II.  
Cl. (12).—For rules determining when

any given Act is to come into force, *see* sec. 5, *infra*.

Cl. (14).—*Cf.* The Consular Salaries and Fees Act, 1891 (54 and 55 Vict., c. 36), sec. 3.

(14-c) 'A grant' (including a transfer of land or of any interests therein or a payment of money) shall be deemed to be made by the Crown if it is made by or on behalf of His Majesty, the Secretary of State in Council, the Central Government, any Provincial Government, the Federal Railway Authority or the Crown Representative:

"Crown grants." "Crown liabilities." (14-d) 'Crown liabilities' and equivalent expressions shall include the liabilities of the Secretary of State in Council, the Secretary of State, the Central Government, any Provincial Government, the Federal Railway Authority or the Crown Representative:

(14-e) 'Crown property' and equivalent expressions shall include any property vested in His Majesty or otherwise held for the purposes of the Central or any Provincial Government, the Federal Railway Authority or the Crown Representative:

(14-f) 'Crown Representative' shall mean His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States:

"Crown revenues." (14-g) 'Crown revenues' and equivalent expressions shall include any revenues vesting in His Majesty:]

(15) 'District Judge' shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction:

"District Judge." (16) 'document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter:

<sup>1</sup>[(16-a) 'Eastern Bengal and Assam Act' shall mean an Act made by the Lieutenant-Governor of Eastern Bengal and Assam in Council under the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909:]

"Eastern Bengal and Assam Act." (17) 'enactment' shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code and shall also include any provision contained in any Act or in any such Regulation as aforesaid:

"Enactment." (18) 'father,' in the case of any one whose personal law permits adoption, shall include an adoptive father:

"Father." <sup>2</sup>(18-a) 'Federal Government' shall—

"Federal Government." (a) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935, but before the establishment of the Federation, mean, as respects matters with respect to which the Governor-General is by and under the provisions of the said Act for the time being in force required to act in his discretion, the Governor-General, and as respects other matters, the Governor-General in Council; and

#### LEG. REF.

CL. (15).—As to definition of High Court, see sub-sec. (24), *infra*.

In Lower Burma the District Court is the Court of the District Judge as defined by this clause, see Lower Burma Courts Act (VI of 1900), sec. 25 (c), Bur. Code.

CL. (16).—*Cf.* Indian Evidence Act (I

of 1872). As to definition of "written", see sub-sec. (58).

<sup>1</sup> Inserted by Act X of 1914.

<sup>2</sup> Cls. (18-a) and (18-b) added by A.O., 1937.

CL. (15).—As to status of High Court on Original Side, see 27 M.L.J. 645.

(b) in relation to anything done or to be done after the establishment of the Federation mean the Governor-General acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act; and shall include—

(i) in relation to functions entrusted under section 124 (1) of the said Act to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

(ii) in relation to the administration of a Chief Commissioner's province, the Chief Commissioner acting within the scope of the authority given to him under section 94 (3) of the said Act:

(18-b) 'Federal Railway Authority' shall mean the Federal Railway Authority constituted by the Government of India Act, 1935, or, before the establishment of that Authority, the Central Government:]

"Financial year." (19) "financial year" shall mean the year commencing on the first day of April:

(20) a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not:

"Good faith."

(21) "Government" or 'the Government' shall include <sup>1</sup>[both the Central Government and any Provincial Government:]

(22) <sup>1</sup>['Government securities' shall mean securities of the Central or any Provincial Government and shall include sterling securities of the Secretary of State for India in Council or the Secretary of State:]

(23) 2[\* \* \* \* \*]

(24) "High Court," used with reference to civil proceedings, shall mean the highest Civil Court of appeal <sup>3</sup>[not including the Federal Court] in the part of British India in which the Act or Regulation containing the expression operates:

#### LEG. REF.

CL. (19).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vic., c. 63), sec. 22, Col. Stats. Ind., Vol. II.

CL. (20).—*Cf.* The Bills of Exchange Act, 1882 (45 and 46 Vic., c. 61), sec. 90; and the Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), sec. 62. *Cf. also* sec. 52 of the Indian Penal Code (XLV of 1860).

As to discussion in Council regarding definition of "good faith", see *Gazette of India*, 1897, Pt. VI, pp. 56 to 62 and 76 to 79.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> Repealed by Act XVIII of 1919.

<sup>3</sup> Inserted by A.O., 1937.

CL. (20).—*Per Sen, J.*—Good faith as defined in sec. 3 (20) is equivalent to honesty of dealing and does not entail upon the auction-purchaser the necessity of searching the registry. Even if there were facts indicative of negligence in investigating title that by itself is not predicative of lack of *bona fides*. 53 A. 334=1931 A. 277 (F.B.). See 13 I.C. 260=5 S.L.R. 181; 12 I.C. 809=4 Bur. L.T. 128.

CL. (21).—As to definition of Local Gov-

ernment, see sub-sec. (29), *infra*; see 6 P. W.R. 1913 (Cr.).

CLS. (21) AND (40).—"THE GOVERNMENT"—WHETHER INCLUDES BRITISH GOVERNMENT—"SHALL INCLUDE"—MEANING.—The expression, "includes" or "shall include" is used in interpretation clauses in two senses. The ordinary and general sense in which it is used is to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. This expression is also susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expression defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to those words or expression. The expression in sec. 3, Cls. 21

(25) "immovable property" shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth:

"Immovable property."

(26) "imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code:

<sup>1</sup>[(27) 'India' shall mean British India together with all territories of any

"India."

Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Central Government and the Central Legislature, declare to be part of India:]

<sup>2</sup>[(27-a) 'Indian law' shall include any law, ordinance order, by-law, rule or regulation passed or made at any time by any competent Legislature, authority, or person in British

India:

#### LEG. REF.

<sup>1</sup> Cl. (27) substituted for old Cl. (27) by A.O., 1937.

<sup>2</sup> Cl. (27-a) added by *ibid*.

and 40, is used in the restricted sense as equivalents to mean and include. 28 S.L.R. 27=1934 Sind 96.

CL. (25).—As to growing crops and timber so far as they are affected by the Indian Registration Act (XVI of 1908), *see* sec. 2 (6) of that Act. Doors, whether immovable property. 16 M.L.T. 429=25 I.C. 837.

MORTGAGE OF FRUIT-BEARING TREES.—Whether or not a mortgage of fruit-bearing trees is a mortgage of immovable property is a question dependent in each case upon the intention of the contracting parties and cannot be settled by an inflexible rule. Where there is a mortgage with possession of fruit-bearing trees with the intention that the mortgagee is to remain in possession during the years of the mortgage and enjoy the fruits and should not cut down the trees so as to convert them to either timber or firewood, it must be held that the trees so mortgaged were either immovable property or at least an interest in immovable property and should be effected with the formalities prescribed by sec. 59, T.P. Act. 54 All. 437=140 I.C. 491. Though trees are immovable property, there is no presumption that whenever the word "land" is used in an enactment, the trees standing thereon are included. 29 N.L.R. 1=1933 N. 53. The expression "benefits to arise out of land" in the Act was never intended to cover such a matter as the security held by a mortgagee under a simple mortgage bond, by such 'benefits' as the right to a ferry. L.R. 5 All. 674. A mortgage is not "a benefit to arise out of land" within the meaning of sec. 3, Cl. (25). 57 Cal. 328=34 C.W.N. 605. *See also* 58 Cal. 136=1931 Cal. 223. Per Lord Atkin.—"Debts may be secured whether on immovable property or on merchandise; they may be wholly secured or partly secured; the security may have been

given when the debt was created or later, but in any case the debts exist as *movable* property and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debts and security is well established". 24 C.W.N. 1034=1931 P.C. 245=61 M.L.J. 589 (P.C.). As to mortgagee's interest, *see* 51 All. 494. A kolhu (i.e., an iron sugarcane press) fastened to the ground is immovable property. 23 I.C. 250. The term "immovable property" in the General Clauses Act may include a right of way, but is not always necessarily included. It is not excluded by T.P. Act, sec. 3. 34 I.C. 459=20 C.W.N. 1158. *Malikana*, if immovable property, *see* 21 I.C. 779=19 C.W.N. 410. Standing crops are immovable property. 23 M.L.J. 623=17 I.C. 185; 25 M.L.J. 447=21 I.C. 218; also standing trees, 25 A.L.J. 195. Standing timber which has been cut and removed is movable property. 133 I.C. 157=1931 A.L.J. 608=1931 All. 392 (F.B.). A right to fishery is an interest in immovable property. 43 I.C. 962=14 N.L.R. 35. General fishery, 23 Bom.L.R. 939. A simple mortgage debt is *not* to be attached as a debt and not as immovable property. 59 I.C. 157=21 O.C. 400. *See also* 47 All. 317. The interest of the mortgagee in the mortgaged property is manifestly a "benefit to arise out of land" and is therefore itself immovable property. 19 B. 379=1934 Rang. 253 (F.B.). As to money charged on immovable property, *see* 83 I.C. 556. A pug-mill affixed to the earth is immovable property. 43 I.C. 625=11 Bur.L.T. 199. *Bazar dues* constitute a benefit arising out of the land and therefore a lease of bazar dues is a lease of immovable property within the meaning of sec. 3 (25) of the Act. 1940 Oudh 409=16 Luck. 191. On this clause, *see also* 9 Rang. 303=1931 Rang. 189.

CL. (25).—*See* 9 A. 240=7 A.W.N. 540.

CL. (27).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), sec. 18 (5). *See* 7 C.W.N. 635.

<sup>1</sup>[27-b) 'Indian State' shall mean any territory, not being part of British India, which His Majesty recognises as being such a State whether described as a State, an Estate, a Jagir

"Indian State."

or otherwise:]

(28) "local authority" shall mean a municipal committee, district board,

"Local authority." body of port commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund:

(29) [Omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.]

(30) "Madras Act" shall mean an Act made by the Governor of Fort St.

"Madras Act."

George in Council under <sup>2</sup>[the Indian Councils Act, 1861, or] the Indian Councils Acts, 1861 and 1892,

<sup>3</sup>[or the Indian Councils Acts, 1861 to 1909,] <sup>4</sup>[or the Government of India Act, 1915], <sup>5</sup>[or by the local Legislature or the Governor of the Presidency of Madras under the Government of India Act]; <sup>6</sup>[or by the Provincial Legislature or the Governor of Madras under the Government of India Act, 1935:]

(31) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force:

"Magistrate."

(32) "master," used with reference to a ship, shall mean any person (except a pilot or harbour-master) having for the time being control or charge of the ship:

"Master" of a ship.

(33) "month" shall mean a month reckoned according to the British calendar:

"Month."

"Movable property."

(34) "movable property" shall mean property of every description, except immovable property:

<sup>7</sup>[(34-a) "North-West Frontier Province Act" shall mean an Act made by the Local Legislature or the Governor of the North-West Frontier Province under the Government of India Act, or by the Provincial Legislature or the

"North-West Frontier Province Act."

Governor of the North-West Frontier Provinces under the Government of India Act, 1935:]

(35) "North-Western Provinces, and Oudh Act" shall mean an Act made by the Lieutenant-Governor of the North-Western

"North-Western Provinces and Oudh Act."

Provinces and Oudh in Council under <sup>7</sup>[the Indian Councils Act, 1861 or] the Indian Councils Acts, 1861 and 1892:

#### LEG. REF.

<sup>1</sup> Cl. (27-b) substituted by Act XXXII of 1940.

<sup>2</sup> Inserted by Act I of 1903.

<sup>3</sup> Inserted by Act X of 1914.

<sup>4</sup> Inserted by Act XXIV of 1917.

<sup>5</sup> Inserted by Act XVIII of 1928.

<sup>6</sup> Inserted by A.O., 1937.

<sup>7</sup> Inserted by Act I of 1903, S. 3.

The definition of 'land' must be applied to the word 'land' as used in the C.P. Code and therefore 'land' in C.P. Code includes trees. 10 I.C. 473=7 N.L.B. 63.

Cl. (28).—*Cf.* The Local Authorities Loans Act (XI of 1879). The words "local authority" includes port trust. 44 L.W. 328=1936 M. 789.

Cl. (31).—The Code now in force is Act V of 1898. Village Munsif, if Magistrate, see 2 Mad. 5; 2 Weir 128=27 Mad. 223; 2

Weir 208=14 M.L.J. 74; 2 Weir 577. Magistrate in the section is confined to Magistrate exercising jurisdiction under Cr. P. Code. See 56 M.L.J. 628.

Cl. (32).—See S. 742 of the Merchant Shipping Act, 1894 (57 and 58 Viet., i. 60), Col. Stats. Ind. Vol., II.

Cl. (33).—See 13 C.W.N. 425.

Cl. (34).—For a compensation definition of the word 'property,' see sec. 168 of the Bankruptcy Act, 1883 (46 and 47 Viet., c. 52). Immovable property includes a debt. 4 L.W. 613=36 I.C. 833. Shares in company are goods but peculiar kind of movable property which cannot pass freely from hand to hand. 25 Bom.L.B. 414.

Cl. (35).—Read now "United Provinces of Agra and Oudh"; see sec. 2 of the U.P. (Designation) Act (VIII of 1902) and see sub-sec. 55-a, *infra*.

- (36) "oath" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing:
- "Oath."
- "Offence." (37) "offence" shall mean any act or omission made punishable by any law for the time being in force:
- "Official Gazette." <sup>1</sup>(37-a) "Official Gazette" or "Gazette" shall mean the Gazette of India, or, as the case may be, the official Gazette of a province:
- "Orissa Act." (37-b) "Orissa Act" shall mean an Act made by the Provincial Legislature, or the Governor of Orissa under the Government of India Act, 1935:]
- "Part." (38) "Part" shall mean a part of the Act or Regulation in which the word occurs:
- "Person." (39) "person" shall include any company or association or body of individuals, whether incorporated or not;
- "Political Agent." (40) "Political Agent" shall include—
- (a) the principal officer representing the <sup>2</sup>[Crown] in any territory or place beyond the limits of British India, and
- (b) any officer <sup>3</sup>[\* \* \* \* \*] appointed <sup>2</sup>[\* \* \* \* \*] to exercise all or any of the powers of a Political Agent for any place not forming part of British India, under the law for the time being in force relating to foreign jurisdiction <sup>3</sup>[\* \* \* \* \*];
- (41) "Presidency-town" shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay, as the case may be:
- "Presidency-town."
- (42) "Privy Council" shall mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council:
- "Privy Council."
- "[(43) "Province" shall mean a Presidency, a Governor's Province, a Lieutenant-Governor's Province or a Chief Commissioner's Province:
- "Province."
- (43-a) "Provincial Government," as respects anything done or to be done after the commencement of Part III of the Government of India Act, 1935, shall mean—
- "Provincial Government."
- (a) in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act; and

## LEG. REF.

<sup>1</sup> Cls. (37-a) and (37-b) added by A.O., 1937.

<sup>2</sup> Substituted by A.O., 1937, for "Governor."

<sup>3</sup> Omitted by *ibid.*

<sup>4</sup> Cls. (43) and (43-a) have been substituted by A.O., 1937.

CL. (37).—See a similar definition in sec. 4 (c) of the Code of Criminal Procedure (V of 1898). Offence committed under Stamp Act, 1862 (since repealed) while it was in force, is still an offence and may be tried under the Act. 7 M.H.C.R. App. 8.

CL. (39).—The word "person" clearly includes a firm and when the return is made on behalf of the firm by a partner, it is the

firm that is the person who makes the return. 48 Mad. 602=1925 Mad. 1048=49 M.L.J. 124. A company is a "person" and can sue through its liquidator *in forma pauperis*. 41 Mad. 684=34 M.L.J. 421=45 I. C. 164. "Person" includes a corporation. 72 I.C. 623.

CL. (40).—"Shall include" meaning of. See 28 S.L.R. 27=1924 Cr. C. 821=1924 Sind 96. Cited under Cl. 21, *supra*.

CL. (41).—See sec. 4 (b) of the repealed Cr.P. Code (X of 1882) and cf. sec. 3 (25) of the Mad. General Clauses Act (Mad. Act I of 1891).

CL. (42).—Cf. sec. 12 (5) of the Interpretation Act, 1889 (52 and 53 Vict., c. 63).

CL. (43).—Cf. sec. 4 (g) of the repealed Cr. P. Code (X of 1882).



(b) in a Chief Commissioner's Province, the Central Government, and, as respects anything done before the commencement of Part III of the said Act, shall mean the authority or person authorized at the relevant date to administer executive government in the Province in question:]

"Public nuisance."

(44) "Public nuisance" shall mean a public nuisance as defined in the Indian Penal Code;

<sup>1</sup>[(44-a) "Punjab Act" shall mean an Act made by the Lieutenant-Governor of the Punjab in Council under the Indian Councils Acts, 1861 and 1892], [or the Indian Councils Acts, 1861 to 1909,] [or the Government of India Act, 1915], [or by the local Legislature or the Governor of the Punjab under the Government of India Act,] <sup>2</sup>[or by the Provincial Legislature or the Governor of the Punjab under the Government of India Act: <sup>3</sup>[or under section 95 or section 96 of the Government of India Act, 1935:]

(45) "'registered", used with reference to a document, shall mean registered in British India under the law for the time being in force for the registration of documents:

"Registered."

(46) "Regulation" shall mean a Regulation made <sup>2</sup>[by the Central Government] under the Government of India Act, 1870, <sup>3</sup>[or the Government of India Act, 1915,] <sup>4</sup>[or the Government of India Act, 1935;]

"Regulation."

(47) "rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment:

"Rule".

"Schedule."

(48) "schedule" shall mean a schedule to the Act or Regulation in which the word occurs:

"Scheduled district."

(49) "Scheduled district" shall mean a "Scheduled district" as defined in the Scheduled Districts Act, 1874;

"Section."

(50) "section" shall mean a section of the Act or Regulation in which the word occurs:

"Ship."

(51) "ship" shall include description of vessel used in navigation not exclusively propelled by oars:

(52) "sign," with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions:

"Sign."

<sup>5</sup>[(52-a) "Sind Act" shall mean an Act made by the Provincial Legislature or the Governor of Sind under the Government of India Act, 1935:]

"Sind Act."

"Son."

(53) "son" in the case of any one whose per-

#### LEG. REF.

<sup>1</sup>First brackets in Cl. (44-a) inserted by Act I of 1903, sec. 3; second inserted by Act X of 1914; third added by Act XXIV of 1917; and 4th added by Act XVIII of 1928.

<sup>2</sup>Inserted by A.O., 1937.

<sup>3</sup>Added by Act XXIV of 1917.

<sup>4</sup>Inserted by Act XVIII of 1928.

<sup>5</sup>Cl. (52-a) added by A., 1937.

CL. (45).—*Cf.* sec. 3 (11) of the Mad. General Clauses Act (Mad. Act I of 1891). As to law now in force, see the Indian Registration Act (XVI of 1908).

CL. (47).—The provisions of sec. 20 to 24, *infra*, apply to rules defined in the—

section.

CL. (51).—*Cf.* sec. 742 of the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60).

CL. (52).—See also definition of "in subsec. 58," *infra*. See 32 C. 550=2 Cr.L.J. 405. Mark by a person able to write. 78 L.C. 79. Meaning of signature. 50 C. 120. The writing of a word or expression. 'Sahi' at the foot of a document cannot be considered to be a 'mark' made by that person under sec. 3 (52), in the absence of proof that in fact the particular person was unable to write his own name. 14 Luck. 393=1939 Oudh 96.

CL. (53).—See 34 P.R. 1883. Where the

personal law permits adoption, shall include an adopted son;

“Sub-section.”

(54) “sub-section” shall mean a sub-section of the section in which the word occurs:

<sup>1</sup>[(54-a) “suits by or against the Crown” and equivalent expressions shall

“Suits by or against the Crown.”

include suits by or against the Secretary of State, the Secretary of State in Council, the Central Government, a Provincial Government or the Crown

Representative:]

(55) “swear,” with its grammatical variations and cognate expressions,

“Swear.”

shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead

of swearing;

<sup>2</sup>[55-a) “United Provinces Act” shall mean an Act made by the Lieu-

tenant-Governor of the North-Western Provinces and

“United Provinces Act.” Oudh (or of the United Provinces of Agra and Oudh) in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892,] <sup>3</sup>[or the Indian Councils Act, 1861 to 1909,] <sup>4</sup>[or the Government of India Act, 1915,] <sup>5</sup>[or by the Local Legislature or the Governor of the United Provinces under the Government of India Acts,] <sup>6</sup>[or by the Provincial Legislature or the Governor of the United Provinces under the Government of India Act, 1935:]

“Vessel.”

(56) “vessel” shall include any ship or boat or any other description of vessel used in navigation;

“Will.”

(57) “will” shall include a codicil and every writing making a voluntary posthumous disposition of property:

(58) expressions referring to “writing” shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in

“Writing.”

a visible form: and

“Year.”

(59) “year” shall mean a year reckoned according to the British calendar.

4. (1) The definitions in section 3 of the following words and expres-

#### LEG. REF.

<sup>1</sup> Cl. (54-a) added by A.O., 1937.

<sup>2</sup> Inserted by Act I of 1903, sec. 3.

<sup>3</sup> Inserted by Act X of 1914.

<sup>4</sup> Inserted by Act XXIV of 1917.

<sup>5</sup> Added by Act XVIII of 1928.

<sup>6</sup> Inserted by A.O., 1937.

personal law of the parties admits adoption the word ‘son’ will include an adopted son. Minor adopted son of deceased held to be a ‘defendant’ and therefore entitled to compensation under sec. 2 (1) (d) of the Workmen’s Compensation Act, 1923. 12 L. 50= 1931 Lah. 661.

Cl. (55).—See also definition of “affidavit” and “oath” *supra*, sub-sec. (3) and (36), respectively, and as to oath, see the Indian Oaths Act (X of 1873).

Cl. (56).—Cf. sec. 742 of the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60). This definition supplements the definition of ship in sub-sec. (51), *supra*. See also definition of vessel in sec. 48 of the Indian Penal Code, 1860 (Act XLV of 1860), and

in sec. 3 (4) of the Northern India Canal and Drainage Act (VIII of 1873) in sec. 3 (f) of the Sea Customs Act (VIII of 1873).

Cl. (57).—See the definition of “will” in sec. 2 of the Indian Succession Act (XXXIX of 1925). Mere authority to adopt though revocable and taking effect on the death of a person, cannot be considered a will, though the document is styled a will. There must be a disposition of property in addition to the authority to adopt, if it is to be treated as a will. 9 L.W. 385=49 I. C. 929. A mere direction for management of the property by a manager during minority is not a disposition by a will. (1942)

Cl. (58).—Cf. sec. 20 of the Interpretation Act, 1889 (52 and 53 Vict., c. 63).

Cl. (59).—As to financial year, see sub-sec. (19), *supra*. Where the probabilities are not, and the evidence does not show, that the parties usually went by the Gregorian Calendar, provisions of sec. 3 (59) do not apply. 1922. Nag. 265.

Application of foregoing definitions to previous enactments. sions, that is to say, "affidavit", "barrister", 1[\* \* \* \* \*] "District Judge", "father," 1[\* \* \*] 2[\* \* \*] 1[\* \* \*] "immovable property", "imprisonment," 1[\* \* \*], "magistrate", "month", "movable property," "oath," "person", "section," "son," "swear," "will"; and "year," apply also, unless there is anything repugnant in the subject or context to all <sup>3</sup>[Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

(2) The definitions in the said section of the following words and expressions, that is to say, "abet," "chapter," "commencement," "financial year," "local authority," "master," "offence," "part," "public nuisance," "registered," "schedule," "ship," "sign," "sub-section," and "writing," apply also; unless there is anything repugnant in the subject or context to all <sup>3</sup>[Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

<sup>4</sup>[4-A. (1) The definitions in section 3 of the expressions "British India," "Central Act," "Central Government," "Central Legislature," "Chief Controlling Revenue Authority," "Chief Revenue Authority," "Crown contracts," "Crown debts," "Crown grants," "Crown liabilities," "Crown property," "Crown Representative," "Crown Revenues," "Federal Government," "Federal Railway Authority," "Gazette," "Government," "Securities," "High Court," "India," "Indian law," "Indian State," "Official Gazette," "Provincial Government", and "suits by or against the Crown," apply also, unless there is anything repugnant in the subject or context to all Indian laws.

(2) In any Indian law, references to the "Provincial Government" or "Central Government" in any provision conferring power to make appointments to the civil services of, or civil posts under, the Crown in India include references to such person as the Provincial Government or the Central Government, as the case may be, may direct, and in any provision conferring power to make rules prescribing the conditions of service of persons serving His Majesty in a civil capacity in India, include references to any person authorised by the Provincial Government or the Central Government, as the case may be, to make rules for the purpose.

(3) The references in any Indian law to servants of or under, or to service of or under, a Government or a Province, to property of, or belonging to, or vested in, the Secretary of State in Council or a Government or a Province, and to forfeitures to a Government or a Province, shall be construed as references respectively to persons in the service of the Crown, to the service of the Crown, to property vested in the Crown and to forfeitures to the Crown.]

#### *General Rules of Construction.*

5. (1) Where any <sup>3</sup>[Central Act] is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor-General.

<sup>3</sup>[(2) Where any <sup>5</sup>[Central Act] is reserved, under section 68 of the Government of India Act, 1915, <sup>6</sup>for under section 32 of the Government of India Act, 1935,] for the signification of His Majesty's pleasure thereon, then, if no later date is expressed, it shall come into operation, if assented to by His Majesty, on the day on which that assent is duly notified.]

#### LEG. REF.

<sup>1</sup>The words "British India," "Government of India," "High Court," and "Local Government" omitted by A.O., 1937.

<sup>2</sup>Words "Her Majesty" or "the Queen"

omitted by Act XVIII of 1919.

<sup>3</sup>Substituted by A.O., 1937.

<sup>4</sup>Added by *ibid*.

<sup>5</sup>Substituted by Act XXIV of 1917.

<sup>6</sup>Inserted by A.O., 1937.

(3) Unless the contrary is expressed, a <sup>1</sup>[Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

<sup>2</sup>[5-A. Where any Act made by the Governor-General under section 44 of the Government of India Act, 1935, is not expressed to come into operation on a particular day it shall come into operation on the date on which it is enacted by the Governor-General.]

6. Where this Act, or any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) receive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> Inserted by A.O., 1937.

SEC. 5, CL. (3).—*Cf.* sec. 36 (2) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). 1939 A.L.J. 7=1939 All. 154. As to power to make rules between the passing and commencement of an Act which does not come into force at once, *see* sec. 22, *infra*. Section applies only to offences and sentences passed under Acts which came into force after General Clauses Act came into force. L.B.R. (1872-1892) 473; not to Acts and Regulations passed prior to passing of the Act. Rat. 57. *See also* 9 N. L. R. 49; 1939 A.L.J. 7=1939 All. 154.

SEC. 6.—*Cf.* sec. 38 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). As to the effect and application of the section, *see* 15 R.D. 757=12 L.R. (Rev.) 351; 15 R.D. 710. This section applies only to cases where the change in the law is the result of the repeal of an enactment and does not extend where it is due to an addition to it. 13 I.C. 264=5 S.L.R. 184 (22 C. 767, Foll.). *See also* 58 A. 495. According to sec. 6 the rights that have become secured under the old Act cannot be the subject of fresh re-examination in the light of subsequent legislation. 1939 A.L.J. (Supp.) 49=1939 R.D. 303. It is doubtful if an application for setting aside an *ex parte* decree comes under a right of privilege under sec. 6. 37 I.C. 292=101 P.R. 1916. In the event of its being deemed to be a right, its acquisition must be under the C. P. Code and not under the Limitation Act. (*Ibid.*) A vested right under the old Code which had been repealed by the new Code is saved by sec. 6 if the right had already vested before the coming into force of the new Code. 9 I.C. 337=14 O.C. 10; 8 Pat.L.T. 397. A

new law of limitation or an amendment of such law cannot divest a person of a vested right under the old law. 1936 A.L.J. 1373=1936 All. 858. *See also* 20 C.W.N. 952=34 I.C. 27; 1 P.L.J. 214; 97 I.C. 607=1926 Pat. 561. The Defence of India Rules are not a Central Act or a Regulation within the meaning of sec. 6, General Clauses Act and nothing in that Act nor r. 3 (1). Defence of India Rules can extend the scope of sec. 6, General Clauses Act. 23 Pat. 240=1944 P.W.N. 147=A.I.R. 1944 Pat. 217. Offence under Newspaper Control Order, 1942—Prosecution after News Paper Control Order, 1944, came into force is maintainable. (1945) 2 M.L.J. 295=55 L.W. 470=(1943) Mad. 521.

CL. (b).—An acknowledgment of liability only extends the period of limitation and does not confer title and is not a thing done within sec. 6 (b) of the Act. 35 All. 227=40 I.A. 74=25 M.L.J. 131 (P.C.) (affirming 32 A. 38=6 A.L.J. 931).

CL. (c).—Where an execution sale was held under the old C. P. Code, 1882, the auction-purchaser had a contingent right to sue for recovery of the purchase money in case the judgment-debtor had no saleable interest. 45 I.C. 109=40 M. 1009. The right is not affected by the new provision of O. 21, R. 93 which negatives a right of suit in such a case. (*Ibid.*) An agreement executed when Agra Tenancy Act, II of 1901, was in force is not affected by the repeal of that Act. A document takes effect from the date of its execution, not of its attestation or registration. 14 L.R. 108 (Rev.)=17 R. D. 83.

CL. (d).—Offence may be tried under repealed enactment if committed while the old Act was in force. 7 M.H.C.R. App. 89=1 Weir 781.

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed.

<sup>1</sup>[6-A. Where any <sup>2</sup>[Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the

Repeal of Act making textual amendment in Act or Regulation.

text of any <sup>2</sup>[Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention ap-

pears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.]

7. (1) In any <sup>2</sup>[Central Act] or Regulation made after the commencement of this Act, it shall be necessary, for the purpose

Revival of repealed enactments.

of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that

purpose.

(2) This section applies also to all <sup>2</sup>[Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

<sup>3</sup>[8. (1)] Where this Act, or any <sup>2</sup>[Central Act] or Regulation made after

#### LEG. REF.

<sup>1</sup> Added by Act XIX of 1936.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> Re-numbered as sec. 8 (1) and cl. (2) added by Act XVIII of 1919.

CL. (e).—*See* 58 All. 495=160 I.C. 277=1936 A. 3. The rule laid down in sec. 6 (e) applies to those cases only, where an Act or Ordinance has been repealed by a subsequent enactment. It has no reference to temporary or expiring statutes which automatically lapse at a certain date, or on the happening of a certain contingency, without fresh legislation. 43 P.L.R. 103=1941 Lah. 175=I.L.R. (1941) Lah. 773. Trial of criminal cases to be in accordance with rules in force at time of commencement. 6 M. 836; what is a legal proceeding, 16 C. 267; includes both judicial and ministerial. 15 C. 357. Sanction obtained before amendment of sec. 195, C. P. Code, in 1923—Amending Act abolishing provision as to sanction and revocation, effect of. *See* 91 I.C. 395=1925 M. 911. An agreement executed when Act II of 1901 was in force is not affected by the repeal of that Act. It is contrary to the long established practice of the Board to entertain appeals which have no relation to existing rights created or purported to be created; the Judicial Committee would therefore decline to hear arguments as to the validity of an Act which has, since the decision of the Court below, been repealed and cannot, therefore, be brought into operation—Such an appeal is of no practical interest. 1909 M.W.N. 142=1939 P.C. 53 (P.C.).

SECS. 6 AND 30: APPLICABILITY TO TEMPORARY ORDINANCES.—No doubt the General Clauses Act would certainly be applicable to the two Ordinances 2 and 10 of 1932 but sec. 6 is applicable to a case where a previous Ordinance has been “repealed” by a subsequent Ordinance or by a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires after the period, during which it is in operation, is over. Hence although sec. 30 makes the Act applicable to the Ordinances, sec. 6 has no application to such temporary Ordinances. (1933 Cal. 280, Dist.) 1933 A. L. J. 875=1933 All. 669 (F.B.).

SEC. 6-A.—Effect of the section on sec. 7 of the Criminal Law Amendment Act. *See* (1938) 2 M.L.J. 863.

SEC. 7.—*Cf.* sec. 11 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

REPEAL OF A REPEALING ENACTMENT.—EFFECT OF.—The mere repeal of a Repealing Act or the repealing portion of a Repealing Act does not, by itself, revive the original Act or the repealed portion thereof. 1 Weir 781=7 M.H.C. App. 8. *See also* 6 M. 336; 25 C. 333. The repeal of a statute repealing a certain enactment does not revive the repealed enactment. The law on this point as embodied in sec. 7 of Act X of 1897 is the same as in England. 25 C. 333=2 C. W.N. 11 (12 M. 94; 14 B. 381, Ref. and Appr.).

SEC. 8.—*Cf.* sec. 38 (1) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). *See*

Construction of references to repealed enactments. the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

<sup>1</sup>[(2) Where any Act of Parliament repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any <sup>2</sup>[Central Act,] or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.]

9. (1) In any <sup>2</sup>[Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

(2) This section applies also to all <sup>2</sup>[Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

10. (1) Where, by any <sup>2</sup>[Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

(2) This section applies also to all <sup>2</sup>[Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

#### LEG. REF.

<sup>1</sup> See footnote 3, page 2658.

<sup>2</sup> Substituted by A.O., 1937.

a similar provision in sec. 3 of the Code of Criminal Procedure (V of 1898). An amending section cannot be said to take retrospective effect so as to validate a pending action which would otherwise be barred under the old section. 35 C.W.N. 1147. An order of Government delegating its powers under a rule of the Defence of India Act to District Magistrates is not an "instrument" or an enactment within the meaning of sec. 8 (1) of this Act. A delegation cannot therefore be deemed to cover the delegation of such powers as might thereafter be brought into existence for the first time by re-enactment of the rules. 46 Bom.L.R. 495 = A. I. R. 1944 Bom. 259 = I.L.R. (1945) Bom. 103.

SEC. 9.—This section would not apply in terms to a decree or order of Court, but it is desirable that for the sake of uniformity the same interpretation should be given to

an expression occurring in a judicial order as would be given to it in a statute. I.L.R. (1938) Bom. 734 = 40 Bom.L.R. 892 = 1938 Bom. 447.

SEC. 10.—See Madras General Clauses Act (Madras Act I of 1891), sec. 11. See 2 Weir 200; 22 C. 176. This section is applicable to those cases where period of limitation has been given in the section and to the condition put in the decree. 41 A. 47 = 48 I.C. 353. This section does not apply to the period of grace allowed by sec. 31 (1) of the Limitation Act. 36 B. 268 = 12 I.C. 811. When a certain day is fixed for complying with an order of the Court the party is entitled to have reasonable opportunity of presenting his case or substantiating it in the proper course. 35 I.C. 650. Sec. 10 does not apply to an application under sec. 54 of the Provincial Insolvency Act, though the same result is achieved by sec. 4 of the Limitation Act. 1933 M.W.N. 1049. Sec. 10 applies to a case in which an act is allowed or ordered to be done by an Act of the Legislature; it does not apply to an act ordered to be done by a com-

11. In the measurement of any distance, for the purposes of any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane.

12. Where, by any enactment now in force or hereafter to be in force, any duty of customs or excise, or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise, then a like duty is leviable according to the same rate on any greater or less quantity.

13. In all <sup>1</sup>[Central Acts] and Regulations, unless there is anything repugnant in the subject or context—

(1) words importing the masculine gender shall be taken to include females; and

(2) words in the singular shall include the plural, and *vice versa*.

<sup>2</sup>[13-A. In all <sup>1</sup>[Central Acts] and Regulations, references to the Sovereign or to the Crown shall, unless a different intention appears, be construed as references to the Sovereign for the time being.]

#### *Powers and Functionaries.*

14. (1) Where, by any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, any power is conferred <sup>3</sup>[\* \* \* \*], then, <sup>4</sup>[unless a different intention appears,] that power may be exercised from time to time as occasion requires.

(2) This section applies also to all <sup>1</sup>[Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

15. Where, by any <sup>1</sup>[Central Act] or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office.

16. Where, by any <sup>1</sup>[Central Act] or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having <sup>5</sup>[for the time being] power to make the appointment shall also have power to suspend or dismiss any person appointed <sup>6</sup>[whether by itself or any other authority] in exercise of that power.

#### LEG. REF.

- <sup>1</sup> Substituted by A.O., 1937.
- <sup>2</sup> Inserted by Act XVIII of 1919.
- <sup>3</sup> Omitted by A.O., 1937.
- <sup>4</sup> Inserted by *ibid*.
- <sup>5</sup> Inserted by Act XVIII of 1928.
- <sup>6</sup> Substituted for 'by it' *ibid*.

promise decree. 17 Pat. 191=19 Pat.L.T. 825=1938 Pat. 451. As to applicability of section to petitions under Provincial Insolvency Act, see 1942 A.L.J. 592 (F.B.).

Sec. 11.—Cf. sec. 34 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

SEC. 12.—As to definition of "enactment," see sec. 3, sub-sec. (17), *supra*.

SEC. 13: WORDS IN SINGULAR NUMBER.—The General Clauses Act provides that words in the singular shall include the plural and *vice versa*; this provision applies only where there is nothing repugnant in the subject or context. 33 C. 292=10 C.W.N. 32. The word "person" in Cr. P. Code, secs. 234 and 239 does not include "persons". 63 I.C. 449=19 A.L.J. 798.

SEC. 15.—See similar provision in sec. 39 of the Code of Criminal Procedure (V of 1898).



17. (1) In any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons<sup>2</sup> for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all <sup>1</sup>[Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

18. (1) In any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

(2) This section applies also to all <sup>1</sup>[Central Acts] made after the third day of January, 1861, and all Regulations made on or after the fourteenth day of January, 1887.

19. (1) In any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior to prescribe the duty of the superior.

(2) This section applies also to all <sup>1</sup>[Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

*Provisions as to Orders, Rules, etc., made under Enactments.*

20. Where, by any <sup>1</sup>[Central Act] or Regulation, a power to issue any <sup>2</sup>[notification], order, scheme, rule, form, or bye-law is conferred, then expressions used in the <sup>2</sup>[notification], order, scheme, rule, form, or bye-law if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power.

21. Where, by any <sup>1</sup>[Central Act] or Regulation, a power to [issue notifications]<sup>3</sup> orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add, to amend, vary or rescind any <sup>4</sup>[notifications], orders, rules or by-law so <sup>3</sup>[issued].

LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> Inserted by Act I of 1903, sec. 3—*Cf.* sec. 32 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63), and sec. 10 of the Madras General Clauses Act (Madras Act I of 1891).

<sup>3</sup> Substituted by Act I of 1903, sec. 3.

<sup>4</sup> Inserted by Act I of 1903.

Sec. 17 (1).—It is competent to an acting Magistrate to grant sanction for the prosecution of an offence wherever the permanent Magistrate could have done so. 42 M.

69=35 M.L.J. 736=49 I.C. 161.

Sec. 21.—*Cf.* sec. 32 (3) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). The Inspector of Factories approving a system of working a particular factory can, under sec. 21, cancel the approval. 59 I.C. 857=22 Cr.L.J. 153. But where an appeal is pending from the order of cancellation, it is not desirable, so long as the appeal is pending, to institute a criminal prosecution in respect of the factory having been worked in contravention of the order of cancellation. 59 I.C. 857=22 Cr.L.J. 153.

22. Where, by any <sup>1</sup>[Central Act] or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or by-laws, or to issue orders with respect to the application of the Act or Regulation, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

23. Where, by any <sup>1</sup>[Central Act] or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely:—

(1) the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Central Government or the Provincial Government prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or bye-laws, and where the rules or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;

(5) the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made.

24. Where any <sup>1</sup>[Central Act] or Regulation is after the commencement

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

SEC. 22.—*Cf.* sec. 37 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). Where a notification was made under sec. 3 of the Provincial Insolvency Act of 1907 investing certain officer with certain powers, the same remains in force without a fresh notification under the Act V of 1920, as sec. 3 has been re-enacted word for word in the new Act. 80 I.C. 858=1925 C. 335. Where the accused, who had kept in their compound a larger number of cattle than they were permitted to do under the bye-laws framed under sec. 142 (r) of the Municipal Act, were acquitted by the Magistrate on the ground that by sec. 10 of Act I of 1931, sec. 142 (r) had been deleted, with the result that the bye-laws were no longer in force. *Held*,

that sec. 9 of Act I of 1931 re-enacted the provisions of sec. 142 (r) in sec. 124 (a) of the Act and though no fresh bye-laws had been made under sec. 124 (a), the bye-laws made under sec. 142 (r) should be deemed to have been made under the re-enacted provisions under sec. 24 of the General Clauses Act (I of 1898) and so in force throughout and the acquittal of the accused was erroneous. 11 R. 532=1934 R. 12. Subsequent passing of the Registration Act, 1908—Effect—Notification exempting agricultural leases. 28 I.C. 577=12 A.L.J. 792. Notifications under earlier Acts continue in force by implication. 32 C.W.N. 576.

SEC. 24.—An ordinance is not an enactment and an ordinance which has expired, is not an enactment which is repealed. A.I.R. 1941 Rang. 1. As to the applicability and

Continuation of orders etc., issued under enactments repealed and re-enacted.

of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any <sup>1</sup>[appointment, notification] order; scheme, rule, form or bye-law, <sup>1</sup>[made or] issued under the repealed Act or Regulation shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been <sup>1</sup>[made or] issued under the provisions so re-enacted, unless and until it is superseded by any <sup>1</sup>[appointment, notification], order scheme, rule, form or bye-law <sup>1</sup>[made or] issued under the provisions so re-enacted <sup>2</sup>[and when any <sup>3</sup>[Central Act] or Regulation, which, by a notification under section 5 or 5-A of the Scheduled Districts Act, 1874<sup>4</sup> or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section].

#### Miscellaneous.

25. Sections 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.

26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.

#### LEG. REF.

<sup>1</sup> Inserted by Act I of 1903, sec. 3.

<sup>2</sup> Inserted by Act XVII of 1914—*Cf.* sec. 18 of the Madras General Clauses Act (Madras Act I of 1891).

<sup>3</sup> Substituted by A.O., 1937.

<sup>4</sup> Repealed by A.O., 1937.

scope of sec. 24, *see also* 43 Bom.L.R. 99=1941 Bom. 100 (sec. 24 would come into operation where a Central Act or Regulation has been repealed and re-enacted, and neither a Central Act or Regulation would include a rule made under an Act).

Sec. 25.—*See now* sec. 386, *et seq* of the Code of Criminal Procedure (Act V of 1898). *See* L.B.R. (1893-1900) 385; L.B.R. (1898-1900) 494; 1 L.B.R. 150: Mere temporary rights of a tenant-at-will to reap the produce as tenants are not "immovable property". 1 L. 567=58 I.C. 321. Sec. 25 if controls Sugarcane Act—Power of Court to award imprisonment in default of payment of fine. *See* 17 Pat.L.T. 806.

Sec. 26.—As to definition of "offence", *see supra*, sub-sec. (37) of sec. 3. L.B.R. 218 (F.B.). Where an act is punishable under a special law and also under a general statute, the offender can be proceeded with under either or both, but cannot be punished twice for the same act. Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it. 53 A.

642=1932 A. 18. Where the accused was found in possession of a stolen revolver without licence, there is no legal bar to his being charged and convicted for two offences, one under sec. 411 of the Penal Code and the other under sec. 19 of the Arms Act. The offence under the latter section is the possession of a revolver without licence; that under the former is the possession of an article knowing it to be stolen. It is immaterial that the article in both cases happens to be a revolver. 1933 A.L.J. 523=1933 A. 461. Where an act for the abetment of which conviction takes place is not a separate offence under the Penal Code but is an offence exclusively under the Salt Act, 1882, sec. 26 of the General Clauses Act is inapplicable. 1930 O. 497. As to permissibility of separate prosecutions in respect of different charges, *see* (1944) 1 M.L.J. 120.

CRIMINAL TRIAL.—No two punishments can be inflicted for the same act, though under two enactments. 76 I.C. 689=25 Cr. L.J. 225. *See also* 33 Bom.L.R. 648=1931 B. 409; 53 A. 642; 1941 M.W.N. 765 (conviction under sec. 352, Penal Code and sec. 3 (12) of Madras Town Nuisances Act). But the Court can impose a sentence of imprisonment in default of payment of fine imposed for breach of a statutory rule. 58 C. 1293=35 C.W.N. 865. Where a special enactment deals with an offence similar to the offence which is dealt with by a general enactment it does not follow that the provisions of the general enactment are repealed to

27. Where any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions, "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

28. (1) In any <sup>1</sup>[Central Act] or Regulation and in any rule, bye-law, instrument or document made under, or with reference to any such Act or Regulation, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In this Act and in any <sup>1</sup>[Central Act] or Regulation made after the commencement of this Act, a description or citation of a portion of another enactment shall, unless a different intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

29. The provisions of this Act respecting the construction of Acts, Regulations, rules or bye-laws made after the commencement of this Act shall not affect the construction of any Act, Regulation, rule or bye-law made before the commencement of this Act, Regulation, rule or bye-law made after the commencement of this Act.

<sup>2</sup>[30. In this Act, the expression <sup>1</sup>["Central Act"] wherever it occurs, except in section 5, and the word 'Act' in clauses (9), (12), (38), (48) and (50) of section 3 and in section 25 shall be deemed to include an Ordinance made and

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> This section was inserted by Act XVII of 1914.

that extent. 18 Cr.L.J. 992=42 I.C. 608. The prosecution in such a case may lie under either but not both of those enactments. 42 I.C. 608 (22 C. 131 at 139, Dist.). Where a person illegally sold a certain quantity of opium and retained possession of the residue after the sale, separate sentences for possession and sale under the Opium Act and the Bihar and Orissa Excise Act do not contravene sec. 26 of the Act. 44 I.C. 974=3 P. L.J. 433. Where one Act constitutes two offences, separate punishment for each offence can be inflicted only if both offences are against the same law. 1 P.L.J. 373=38 I. C. 433. Section has no application if the offences are distinct. 138 I.C. 491=1932 M. 537. When the petitioner has been convicted for disobeying a previous notice to produce a child for vaccination, he cannot once more be convicted on the same facts under the same sub-section for failure to comply with a second notice, to discontinue his breach of the previous notice. 131 I.C. 156=1931 Mad. 181

=60 M.L.J. 299. Offence falling under sec. 24 of Cattle Trespass Act, 1871, and also under sec. 380, I. P. Code—Procedure. See 1930 M.W.N. 529=1931 M. 18.

SEC. 27.—*Cf.* sec. 26 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). See 24 I.C. 437=16 Bom.L.R. 204.

PRESUMPTION REGARDING LETTER SENT BY POST.—Sec. 63, Income-tax Act is to be read along with sec. 27, General Clauses Act. The words "unless the contrary is proved" in sec. 27 refer both to the service and the time. Consequently, when a notice has been posted properly addressed and pre-paid in a register cover, the presumption raised even as regards the service is not conclusive but is rebuttable. 54 All. 548=1932 A.L.J. 409=1932 All. 374.

SEC. 28.—*Cf.* sec. 35 of the Interpretation Act, 1889 (52 and 53, Vic., c. 63). Short title has been conferred on the Unrepealed General Acts of the Governor-General in Council which had previously no short title.—See The Indian Short Titles Act (XIV of 1897).

SEC. 29.—*Cf.* sec. 40 of the Interpretation Act, 1889 (52 and 53 Vict., c. 63).

SECS. 30 AND 6: APPLICABILITY—TEMPORARY ORDINANCES.—No doubt the General

promulgated by the Governor-General under section 23 of the Indian Councils Act, 1861] <sup>1</sup>[or section 72 of the Government of India Act, 1915] <sup>2</sup>[or section 42 or section 43 of the Government of India Act, 1935.]

30-A. [\* \* \* \* \*]. Rep. by A.O., 1937.

31. [\* \* \* \* \*]. Rep. by A.O., 1937.

# THE SCHEDULE.

*Repealed by Act I of 1903, S. 4 and Sch. III.*

## THE GENEVA CONVENTION IMPLEMENTING ACT (XIV OF 1936).

[27th October, 1936.

*An Act to implement Article 28 of the Geneva Convention of the 27th day of July, 1929.*

WHEREAS India was a signatory to the International Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field, drawn up in Geneva and dated 27th day of July, 1929;

AND WHEREAS it is necessary to provide for the discharge of the obligations imposed by Article 28 of that Convention in so far as provision has not been made by the Geneva Convention Act, 1911;

It is hereby enacted as follows:

1. (1) This Act may be called THE GENEVA CONVENTION IMPLEMENTING ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

2. No person shall use for the purposes of his trade or business or for any other purpose whatsoever any sign constituting a colourable imitation of the heraldic emblem of the red cross on a white ground formed by reversing the federal colours of Switzerland.

3. No person shall use for the purposes of his trade or business the heraldic emblem of the white cross on a red ground, being the federal colours of Switzerland, or any sign constituting a colourable imitation of that heraldic emblem.

4. Any person contravening the provisions of S. 2 or S. 3 shall be punishable with fine which may extend to fifty rupees, and when such contravention is committed by a company, association or body of individuals, then, without prejudice to the liability of such company, association or body, every member thereof who is knowingly a party to the contravention shall be liable to the like penalty.

5. No Criminal Court shall take cognizance of any offence punishable under this Act except with the previous sanction of the [Central Government] <sup>3</sup>[\* \* \*].

6. Nothing in the foregoing sections shall affect the right of any person,

### LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1917.

<sup>2</sup> Inserted by A.O., 1937.

<sup>3</sup> The words "or the Local Government" omitted by A.O., 1937.

Clauses Act would certainly be applicable to the two Ordinances 2 and 10 of 1932, but sec. 6 is applicable to case where a previous Ordinance has been "repealed" by a subsequent Ordinance or by a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires.

ed after the period, during which it is in operation is over. Hence although sec. 30 makes the Act applicable to the Ordinances, sec. 6 has no application to such temporary Ordinances. (1933 Cal. 280, Dist.) 145 I.C. 683=34 Cr.L.J. 1030=1933 A.L.J. 875=A.I.R. 1933 All. 669 (F.B.). An ordinance framed under sec. 72 of the Government of India Act, 1915, read with sec. 315 of the Government of India Act, 1935, is a "Central Act" for the purpose of the definition of that term in this section (1946) 1 M.L.J. 145.

Saving.

to continue to use for a period of two years from the commencement of this Act any sign or emblem which it was not unlawful for him to use at the commencement of this Act.

### THE GOVERNMENT BUILDINGS ACT (IV OF 1899).<sup>1</sup>

[Sec. 1] *Rep. in pt. Act X of 1914; Am. Act, XXXVIII of 1920; Declared in force in the Sonthal Parganas Reg. III of 1872, Sec. 3 as amended by Reg. III of 1899, Sec. 3; Declared in force in British Baluchistan Reg. II of 1913, Sec. 3.]*

[3rd February, 1899.

*An Act to provide for the exemption from the operation of municipal building laws of certain buildings and lands which are the property, or in the occupation, of the Government and situate within the limits of a municipality.*

WHEREAS it is expedient to provide for the exemption from the operation of municipal building laws, of certain buildings and lands which are the property, or in the occupation, of the Government and situate within the limits of a municipality; It is hereby enacted as follows:—

Short title, extent and commencement. 1. (1) This Act may be called THE GOVERNMENT BUILDINGS ACT, 1899.

(2) It extends to the whole of British India. [\*]<sup>2</sup>

(3) [\* \* \*]<sup>2</sup>

2. In this Act the expression “municipal authority” includes a municipal corporation or a body of municipal commissioners constituted by, or under the provisions of, any law or enactment for the time being in force.

3. Nothing contained in any law or enactment for the time being in force to regulate the erection, re-erection, construction, alteration, or maintenance of buildings within the limits of any municipality shall apply to any building used or required for the public service or for any public purpose, which is the property, or in the occupation of the <sup>3</sup>[Crown] or which is to be erected on land which is the property, or in the occupation of the <sup>3</sup>[Crown]:

Provided that, where the erection, re-erection, construction or material structural alteration of any such building as aforesaid (not being a building connected with Imperial defence, or a building the plan or construction of which ought, in the opinion of the Government <sup>4</sup>[concerned], to be treated as confidential or secret) is contemplated, reasonable notice of the proposed work shall be given to the municipal authority before it is commenced.

4. (1) In the case of any such building as is mentioned in the last preceding section (not being a building connected with Imperial defence or a building the plan or construction of which ought, in the opinion of the Government <sup>4</sup>[concerned], to be treated as confidential or secret), the municipal authority, or any person authorized by it in this behalf, may, with the permission of the

Objections or suggestions as to erection, etc., of certain Government buildings within municipalities how to be made and dealt with.

#### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1896, Pt. V, p. 256; for Report of the Select Committee, see *ibid.*, 1899, Pt. V, p. 15; and for Proceedings in Council, see *ibid.*, 1899, Pt. VII, pp. 2, 15 and 20. The Act has been declared in force

in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation III of 1872, as amended by the Sonthal Parganas Justice and Laws Regulation, III of 1899, Ben. Code.

<sup>2</sup> Rep. by Act X of 1914, Sch. II.

<sup>3</sup> Substituted by A.O., 1937.

<sup>4</sup> Inserted by A.O., 1937.

Provincial Government previously obtained, but not otherwise, and subject to any restrictions or conditions which may, by general or special order, be imposed by the Provincial Government, inspect the land and building and all plans connected with its erection, re-erection, construction or material structural alteration, as the case may be, and may submit to the Provincial Government a statement in writing of any objections or suggestions which such municipal authority may deem fit to make with reference to such erection, re-erection, construction or material structural alteration.

(2) Every objection or suggestion submitted as aforesaid shall be considered by the Provincial Government, which shall, after such investigation (if any) as it shall think advisable, pass orders thereon, and the building referred to therein shall be erected, re-erected, constructed or altered, as the case may be, in accordance with such orders:

Provided that, if the Provincial Government overrules or disregards any such objection or suggestion as aforesaid, it shall give its reasons for so doing in writing.

(3) [Omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.]

## THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT (X OF 1892).<sup>1</sup>

Year.	No.	Short title.	Amendments.
1892	X	The Government Management of Private Estates Act, 1892.	Repealed in part, XIII of 1898, S. 18; X of 1914.

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#### SECTIONS.

1. Title, extent and commencement.
2. Definitions.
3. Power to levy rate.
4. Power to levy special charges.
5. Saving as to special expenditure.

#### SECTIONS.

6. Validation of levy of past rates.
7. Powers to make rules.
8. Exemption from jurisdiction of Courts.
9. [Repealed by Act X of 1914.]

40

[25th October, 1892.

*An Act to provide for the levy of a rate on private estates under the management of the Government to meet the cost of supervision and management.*

WHEREAS it is expedient to provide for the levy of a rate on private estates under the management of the Government to cover the cost of all Government establishments in so far as they are employed in the supervision and management of such estates, other than establishments specially entertained for any particular estate or group of estates, and to meet all contingent expenditure incurred by the Government in connection with such supervision and management; it is hereby enacted as follows:—

#### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1892, Pt. V, p. 14; for Report of the Select Committee, see *ibid.*, 1892, Pt. V, p. 69 and for Proceedings in Council, see *ibid.*, 1892, Pt. VI, p. 73.

The Act has been declared in force in Upper Burma (except the Shan States) by

the Burma Laws Act, 1898 (XIII of 1898), see the First Schedule and sec. 4, Bur. Code. The Act has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation, 1872 (III of 1872), sec. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, (III of 1899), sec. 3, Bengal Code, Vol. I.



Title and extent.

1. (1) This Act may be called THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT, 1892.

(2) It extends to the whole of British India, inclusive of <sup>1</sup>[\* \* \*] British Baluchistan; <sup>2</sup>[\*]

(3) [*Repealed by Act X of 1914*].

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops or grass;

(2) "gross income" includes all receipts of every kind in produce or cash, except money borrowed, recoveries of principal and the proceeds of sale of immovable property or of movable property properly classed as capital; and

(3) "private estates under the Government management" include—

(a) estates under the Court of Wards;

(b) encumbered estate under Government management;

(c) estates attached for default of payment of Government revenue;

(d) minor's estates placed under the guardianship of a revenue-officer of the Government by a Civil Court;

(e) estates managed by a Collector in pursuance of any order made under the Code of Civil Procedure; and

(f) all other estates made over to, or taken under the management of, a revenue-officer of the Government as such under any law for the time being in force or in virtue of any agreement.

Power to levy rate.

3. It shall be lawful for the Provincial Government<sup>3</sup>.

(1) to levy on all private estates under Government management a rate, not exceeding five per cent. on the gross income, calculated, as nearly as may be possible, to cover—

(a) the cost of all Government establishments in so far as they may be employed in the supervision or management of such estates other than establishments specially entertained for the supervision or management of any particular estate or group of estates, and

(b) all contingent expenditure incurred in consequence of such supervision or management;

(2) from time to time to vary such rate; and

(3) to reduce or remit such rate in any special case or cases as may be equitable:

Provided that, in deciding the amount of the rate to be levied under this Act on any particular estate or group of estates, the Provincial Government shall consider the expenditure incurred on special establishments for such estate or estates.

4. In cases where an officer of the Government is employed to give legal

Power to levy special charges. advice or to audit accounts on behalf of any estate, the Provincial Government, if it considers the

services rendered to be of a special nature, may, in its discretion, direct a special charge to be made against the estate on account of such services, irrespective of the rate leviable under the last foregoing section.

#### LEG. REF.

<sup>1</sup> The words "Upper Burma and" were repealed by the Burma Laws Act (XIII of 1896), Bur. Code.

<sup>2</sup> The word "and" omitted by Act X of

1914.

<sup>3</sup> For instance of notification issued under the powers conferred by this section fixing a rate to be levied on any estate, see Cent. Prov. R. and O. (List).

Saving as to special expenditure.

Validation of levy of past rates.

7. The Provincial Government may make any rules<sup>2</sup> and issue any orders, which may be necessary for carrying this Act into effect, and which are consistent therewith.

Exemption from jurisdiction of Courts.

9. Repeal [*Repealed by the Repealing and Amending Act X of 1914.*]

### THE GOVERNMENT OF INDIA ACT, 1919. (9 & 10, Geo. V, Ch. 101).

[23rd December, 1919.]

*An Act to make further provision with respect to the Government of India.*

WHEREAS it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the general development of self-governing institutions, with a view to the progressive realization of responsible government in British India as an integral part of the Empire:

#### LEG. REF.

<sup>1</sup> See foot note (3), p. 2668.

<sup>2</sup> For instances of rules made under the powers conferred by the section, see North-West Provinces and Oudh Gazette, 1893, Pt. 1, p. 533 and Punj. List of Local R. & O., and for other Provinces, their respective Local Rules and Orders. Sec. 17 of the Court of Wards Act, 1879, (passed by the Lieutenant-Governor of Bengal in Council), and so much of Act III of 1881 also passed by the Lieutenant-Governor of Bengal in Council) as relates to sec. 17 of the said Court of Wards Act, 1879, are hereby repealed.

The Preamble to the Government of India Act, 1919, was left unrepealed by the Government of India Act, 1935 (see sec. 321).

The Act of 1935, has not, unlike the Act of 1919 a preamble indicating the intentions of Parliament in enacting this measure. Indian opinion keenly desired the insertion in the Act of some provision indicating the goal of India as the attainment of Dominion Status. But perhaps for reasons explained by Lord Peel in the House of Lords, His Majesty's Government were against the proposal. Lord Peel stated:

"I believe that if, following the request of many Indian leaders, you had put in the sacred words Dominion Status, you would have had a considerable amount of enthusiasm, but, apart from the fact that from the draftsman's point of view the phrase is not artistic, the words, while rousing feelings of satisfaction in political India, might also give rise

to misunderstanding. Although the Indians may be emotional, and may respond to good will on our part, there are among them extremely acute and able lawyers. If you put this phrase in the Bill, those men would be constantly comparing the provisions of the Bill with the Constitutions of the self-governing Dominions and would draw most unfavourable comparisons between the powers granted to India and those enjoyed by the Dominions. The result—and a very dangerous result—would be that they would be led to charge us with that most terrible of all accusations, breach of faith, if we put the phrase into the Bill without perhaps fully appreciating all the deductions and inferences which could be drawn from it." (Par. Deb. H. L. Vol. 97, Col. 601).

The only concession that the Government were prepared to make was to retain, unrepealed the Preamble to the Act of 1919—notwithstanding that the Preamble therein referred to British India alone whereas this Act comprehends the Indian States in a Federation.

INTERPRETATION OF ACT—PRINCIPLES—DUTY OF COURT.—The constitution is not to be construed in any narrow or pedantic sense, and the Court will have regard to the fact that the subject-matter of the interpretation is a constitution—a mechanism under which laws are to be made and not a mere Act which declares what the Law shall be. 1939 F.C.R. 18=43 C.W.N. (F.C.R.) 1=49 L.W. 36=1939 F.C. 1=1939 M.L.J. (Supp.) 1.

AND WHEREAS progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken:

AND WHEREAS the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples:

AND WHEREAS the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility:

AND WHEREAS concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities:

Be it therefore enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

\* \* \* \* \*

## THE GOVERNMENT OF INDIA ACT, 1935. (26 Geo. V, Ch. 2.) (Extracts).

### PART III. CHAPTER IV.

[N. B.—See also 3 and 4, Geo. VI, Ch. 5, sec. 4.]

#### LEGISLATIVE POWERS OF GOVERNOR.

88. (1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require:

Power of Governor to promulgate ordinances during recess of Legislature.

**INTERPRETATION OF ACT—WHITE PAPER AND REPORT OF JOINT SELECT COMMITTEE.**—Gwyer, C.J. and Jayakar, J. The proposals for Indian Constitutional Reforms known as the White Paper and Report of the Joint Select Committee thereon are historical facts and their relation to the Constitution Act is a matter of common knowledge to which the Court is entitled to refer. (1939) 1 M.L.J. Sup. 1.

Gwyer, C.J., and Sulaiman, J.—The Legislative practice in India preceding the Constitution Act may be looked into, for Parliament must surely be presumed to have that in mind, and unless the context otherwise clearly requires not to have conferred a legislative power in a sense not understood by those to whom the Act was to apply. 1939 F.C.R. 18=43 C.W.N. (F.C.R.) 1=1939 (F.C.) 1=(1939) M.L.J. (Supp.) 1. The ministers of a province are not subordinate officers to the Governor within the meaning of the Government of India Act. I.L.R. (1939) 2 Cal. 411=43 C.W.N. 950=1939 Cal. 529 (S.B.). In the Constitution Act of India there is no statutory bar by which taxing clauses are forbidden from being introduced into measures dealing with other subjects. 1942 A.L.J. 112=1942 O.A. (Supp.) 94.

The reasons which led the Government to support the saving of the preamble to the

1919 Act from the repeal of it was thus explained in Parliament.

"The value of this Preamble is that it does express in terms to which the Government to-day still adhere, the intentions or policy of Parliament with regard to the progressive realisation of responsible Government in British India as an integral part of the Empire". (Parl. Deb., Vol. 300, Col. 1364).

"We desire to preserve the Preamble as a record of the intentions of Parliament; not the intentions of a party or of an individual or of a Minister, but the intentions of Parliament and, therefore of the great English People with regard to the future of India."

**SEC. 88: ORDINANCES DURING RECESS.**—Dealing with the Ordinances under this section it was said: "We are dealing with ordinances made upon the advice of Ministers. They are ordinances made in the field of special responsibility by the Governor, which are the kind of Ordinances that would be made here by the Government in a time of emergency as to which the Government of the day has to obtain parliamentary approval within a given time. I think the real check is the check of ministerial responsibility to the Provincial Council. These ordinances are made upon the advice of Ministers who are themselves responsible to the Provincial Council." (Parl. Deb. Vol. 299, Col. 1532).

Provided that the Governor—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; and

(b) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance, if a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature, or if he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance—

(a) shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council.

SECS. 88, 89: GOVERNOR'S ORDINANCE.—The Governor-General is the sole judge as regards the exercise of his powers and he is not bound to give any reasons for promulgating an ordinance such as the Criminal Law Amendment Act of 1935, which when once promulgated becomes a lawful Act. 48 L. W. 813=(1938) 2 M.L.J. 863. See also 1943 Pat. 24 (F.B.)=22 Pat. 160; 1943 Bom. 169=45 Bom.L.R. 323=I.L.R. (1943) Bom. 331; 1943 Cal. 285=44 Cr.L.J. 673. See also notes under sec. 240.

CASES UNDER GOVT. OF BURMA ACT.—The Court will not inquire whether circumstances in fact existed which rendered immediate action necessary before the promulgation of an ordinance. That is for the Governor to decide. The Court should not assume the burden of deciding for what purpose the action was necessary. Where in an ordinance the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions the Governor is the only judge of that. 1941 Rang.L.R. 101=193 I. C. 114=1941 Rang. 49. An ordinance duly promulgated has the same force and effect as an Act of the Legislature. 1941 Rang.L.R. 101=1941 Rang. 49. Responsibility of Governor for acts of Home Minister—Mode and effect of delegation of functions. (1945 2 M.L.J. 325 (P.C.).

ORDINANCE — PROMULGATION — DATE.—Promulgation of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. Promulgation of a new law takes place through the medium of the Official Gazette. It is wrong for the notifications which appear in the Gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinances"; they should say "The Governor hereby promulgates the following ordinances." An ordinance therefore is promulgated on the date on which it is published in the Gazette. 103 I.C. 91=1941 Rang. 5.

ORDINANCES—PROMULGATION—PUBLICATION—RELATION BETWEEN.—Promulgation and publication in the Official Gazette are not synonymous. There is a distinction between the two. Publication in the Official Gazette is not *sine qua non* of promulgation though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals. Reading of an ordinance by the speaker to the House of Representatives is sufficient promulgation. 1941 Rang.L.R. 101=193 I.C. 114=1941 Rang. 49.

ORDINANCES—PREAMBLE—DESIRABILITY.—It is not legally necessary that an ordinance should have a Preamble setting out that the Governor is satisfied as required by the terms of the section and also the purpose for which the ordinance is promulgated. Legally all that is necessary is that the Governor should declare that he promulgates the ordinance; but the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an ordinance. 1941 Rang.L.R. 101=193 I.C. 114=1941 Rang. 49.

GOVERNOR'S POWERS—SCOPE OF—ORDINANCES — IMPLICATION UNDERLYING.—The Governor's functions are capable of being exercised in any of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. Matters which are said to fall within the individual judgment of the Governor may fall within the second and third group according to the opinion formed by the Governor as to the course which he should take. Where therefore an ordinance issued is expressed to be under the powers conferred by sec. 89 it is implied that an opinion has been formed by the Governor and an individual judgment has

(b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature assented to by the Governor; and

(c) may be withdrawn at any time by the Governor.

(3) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.

89. (1) If at any time the Governor of a Province is satisfied that circum-

been exercised by him. 1941 Rang.L.R. 101=193 I.C. 114=1941 Rang. 49. Whether ordinance has retrospective operations, see 1941 Rang.L.R. 321=1931 Rang. 151.

HIGH COURT, IF CAN GO INTO QUESTION AS TO AN ORDINANCE BEING WITHIN OR OUTSIDE THE POWERS OF THE GOVERNOR.—High Court is not precluded from enquiring whether an ordinance promulgated by the Governor is or is not within his powers. The Court can go into the question whether any provision or an ordinance promulgated is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature would not have been valid. 193 I.C. 91=1941 Rang. 5. Ordinance—Duration—Computation of time. See 1941 Rang. 49=1941 Rang.L.R. 101; (1945) 2 M.L.J. 325 (P.C.).

The rationale and necessity for the power conferred by this section was thus explained on behalf of the Government to the committee of the House of Commons.

"This Bill sets up substantially Provincial autonomy, and the administration is carried on by Ministers. The Committee has already passed a clause which places on the Governor certain special responsibilities. Obviously, you cannot place special responsibilities on a man unless you give him the means of fulfilling those responsibilities. So far as executive action is concerned and any executive action taken is in his name, he can, of course, act in his individual judgment or discretion if the Bill empowers him to do so, but, obviously also, if you look at the special responsibilities placed upon him, occasions may arise where, in order to fulfil those responsibilities, it is necessary for him to proceed by ordinance. Therefore, everyone on the Committee, wherever he sits, and whatever his general views about democracy, must agree that, granted that these special responsibilities are to be placed on the Governor, it is quite clear that, in order to fulfil them, it may be necessary for him to proceed by Ordinance. Therefore, it would be quite wrong to put the responsibility upon him and not to confer the Ordinance-making power. The Committee having passed Clause 52 and the other Clauses giving the Governor special responsibilities, that must be unanswerable." (Parl. Deb. Vol. 299, Col. 1542).

Under the Government of India Act, 1919, sec. 72 the power of promulgating Ordinances was vested only in Governor-General and Provincial Governors had no such power. If any such ordinance was needed for any

particular Province, it had to be passed by the Governor-General. Where a detainee's application for *habeas corpus* is dismissed, but subsequently he is released by the Government on their own initiative in spite of the dismissal of the *habeas corpus* application it must be held that there is no longer any pending matter in which leave can be granted to appeal to His Majesty in Council. I.L.R. (1944) Kar. (F.C.) 1=(1944) F. L.J. 111: 57 L.W. 212 (1): A.I.R. 1944 F. C. 2=(1944) 1 M.L.J. 155 (P.C.) Act does not empower the High Court to interfere with a conviction and sentence passed in a criminal trial, apart from the appellate or revisional powers which it possesses under the Cr. P. Code. I.L.R. (1944) Nag. 728=1944 F.L.J. 190=1944 N.L.J. 280=A.I.R. 1944 Nag. 286. Validity of an Ordinance being impugned as being inconsistent with the Letters Patent of the High Court. See I.L.R. (1944) All. 758=46 Cr.L.J. 122. The Notification of the Government of India under sec. 124 (1) of the Act, issued on 1-4-1938, entrusting to the Provincial Governments the functions of the Central Government under sec. 8-A and some other sections of the Extradition Act is not *ultra vires*. 24 Pat. 699. Per *Derbyshire, C.J.*—An order of commitment which purports to be issued under Regulation III of 1818 by order of the Governor and which is authenticated in the manner required by the rules, must be taken to have been executed by the Governor. Objection cannot be taken to it on the ground that the Governor was absent from the place on the date it bears and it was not therefore, his work. 47 C.W.N. 854 (S.B.). A minister cannot be regarded as an officer subordinate to the Governor. 47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S.B.). A mere *ad hoc* decision given by the President of the Legislative Council is not an order regulating the procedure. 1945 F.L.J. 155=49 C.W.N. 405. Power of president to correct verbal mistake in announcing result of motion—Interference by Court. See 49 C.W.N. 405=1945 F.L.J. 155.

SEC. 89: "ASSUME TO HIMSELF ALL OR ANY OF THE POWERS".—"In the event of a breakdown of the constitutional machinery, the Governor is not bound to take over the whole Government of the Province and administer it himself on his own undivided responsibility. The intention is to provide also for the possibility of a partial breakdown and to enable the Governor to take over part only of the machinery of Government, leaving

stances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion, or to exercise his individual judgment, he may promulgate such ordinances as in his opinion the circumstances of the case require.

(2) An ordinance promulgated under the section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance—

(a) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature;

(b) may be withdrawn at any time by the Governor; and

(c) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith through the Governor-General to the Secretary of State and shall be laid by him before each House of Parliament.

(4) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature, it shall be void:

Provided that for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature, an ordinance promulgated under this section shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him.

(5) The functions of the Governor under this section shall be exercised by him in his discretion but he shall not exercise any of his powers thereunder except with the concurrence of the Governor-General in his discretion:

Provided that, if it appears to the Governor that it is impracticable to obtain in time the concurrence of the Governor-General, he may promulgate an ordinance without the concurrence of the Governor-General, but in that case the Governor-General in his discretion may direct the Governor to withdraw the ordinance and the ordinance shall be withdrawn accordingly.

90. (1) If at any time it appears to the Governor that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that

Power of Governor in certain circumstances to enact Acts.

provision should be made by legislation, he may by message to the Chamber or Chambers of the Legislature explain the circumstances which in his opinion render legislation essential and either—

(a) enact forthwith as a Governor's Act a Bill containing such provisions as he considers necessary; or

the remainder to function according to the ordinary law. Thus the Governor might, if the breakdown were in the legislative machinery of the Province alone, still carry on the Government with the aid of his Ministers, if they were willing to support him; we are speaking of course of such a case as the refusal of the Legislature to function at all, and not

merely of lesser conflicts or disputes between it and the Governor". (J.P.C. Report para. 109).

SECS. 89 AND 100.—Powers of Governor-General to make laws—Special Criminal Courts' Ordinance—Not void. See A.I.R. 1943 Pat. 24 (F.B.).

(b) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor takes such action as is mentioned in paragraph (b) of the preceding sub-section, he may, at any time after the expiration of one month, enact, as a Governor's Act, the Bill proposed by him to the Chamber or Chambers either in the form of the draft communicated to them, or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by the Chamber or either of the Chambers with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Provincial Legislature assented to by the Governor and, if and so far as it makes any provision which would not be valid if enacted in an Act of that Legislature, shall be void:

Provided that, for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature, a Governor's Act shall be deemed to be an Act reserved for the consideration of the Governor-General and assented to by him.

(4) Every Governor's Act shall be communicated forthwith through the Governor-General to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor under this section shall be exercised by him in his discretion, but he shall not exercise any of his powers thereunder except with the concurrence of the Governor-General in his discretion.

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## CHAPTER VI.

### PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY.

93. (1) If at any time the Governor of a Province is satisfied that a situation has arisen in which the government of the Province cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

Power of Governor to issue Proclamation. (a) declare that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion;

(b) assume to himself all or any of the powers vested in or exercisable by any Provincial body or authority;

and any such Proclamation may contain such incidental and consequential provisions as may appear him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Provincial body or authority:

Provided that nothing in this sub-section shall authorize the Governor to assume to himself any of the powers vested in or exercisable by a High Court or to suspend, either in whole or in part, the operation of any provision of this Act relating to High Courts.

Sec. 93.—The reference to the Governor-General in cl. 44 of the Letters Patent refers to all other competent authorities, *e.g.*, a Governor acting under sec. 93 of the Act. The effect of the proviso to sec. 93 of the Act is to prevent the Governor from assuming or suspending the powers and jurisdiction of the High Court by any proclamation under sec. 93, but does not extend to alteration of the law by or under the assumed legislative powers which are within the competency of the Provincial Legislature, once the Governor has assumed those powers. The assumption and the suspension mentioned in the proviso to sec. 93 are referential to the assumption mentioned in sec. 93 (1) (b) and the suspension mentioned in the particularization of the subject-matters which the proclamation may contain. 47 Bom.L.R. 294=1945 F.L.J. 119=A.I.R. 1945 Bom. 352. The effect of sec. 93 (1) (a) is to dispense with the necessity for the Governor of consultation with Ministers, and to authorise the Governor to exercise his functions in his discretion. 23 Pat. 968=A.I.R. 1945 Pat. 44 (F.B.). Powers of Governor—Power to legislate with retrospective effect in regard to concurrent list. See 47 Bom.L.R. 294.

visio to sec. 93 are referential to the assumption mentioned in sec. 93 (1) (b) and the suspension mentioned in the particularization of the subject-matters which the proclamation may contain. 47 Bom.L.R. 294=1945 F.L.J. 119=A.I.R. 1945 Bom. 352. The effect of sec. 93 (1) (a) is to dispense with the necessity for the Governor of consultation with Ministers, and to authorise the Governor to exercise his functions in his discretion. 23 Pat. 968=A.I.R. 1945 Pat. 44 (F.B.). Powers of Governor—Power to legislate with retrospective effect in regard to concurrent list. See 47 Bom.L.R. 294.



(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) A Proclamation under this section—

(a) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament;

(b) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months:

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this sub-section it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years.

(4) If the Governor, by a Proclamation under this section, assumes to himself any power of the Provincial Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the appropriate Legislature, and any reference in this Act to Provincial Acts, Provincial laws, or Acts or laws of a Provincial Legislature shall be construed as including a reference to such a law.

(5) The functions of the Governor under this section shall be exercised by him in his discretion and no Proclamation shall be made by a Governor under this section without the concurrence of the Governor-General in his discretion.

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## PART V.

### LEGISLATIVE POWERS.

#### CHAPTER I.

##### DISTRIBUTION OF POWERS.

99. (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any

Extent of Federal and Provincial laws.  
part thereof.

SEC. 99: SCOPE.—This section defines the territorial ambit of the powers conferred on the Federal and Provincial Legislatures as also the classes of persons over whom they have legislative competence. The succeeding sections of this Chapter together with the legislative lists in Schedule VII, delimit their competence with reference to the subject-matter of the legislation.

SECS. 99, 100: ACT OF INDIAN LEGISLATURE EXCLUDING RIGHT OF RESORT TO CIVIL COURT—IF ULTRA VIRES.—An act excluding the subjects right of resort to the Civil Courts is not *ultra vires* of the Indian Legislature. Sec. 32 of the Government of India Act (1915) does not affect the validity of an Act which creates an obligation and provides an exclusive code for its determination. 67 I.A. 222=I.L.R. (1940) Mad. 599=52 L.W. 1=44 C.W.N. 709=1940 P.C. 105=(1940) 2 M.L.J. 140 (P.C.). The Provincial Legislatures are statutorily sovereign within the limits of the powers assigned to them. The jurisdiction of the Courts is within the province of the Provincial Legislature. It fol-

lows therefore that the Provincial Legislature can take away the right of the Courts to try any dispute which the Legislature considers it inexpedient to be decided by Courts at all. 195 I.C. 17=43 P.L.R. 198=1941 Lah. 182 (F.B.). Within its own ambit, the Indian Legislature exercises the plenary powers of a Sovereign Legislature. The Indian Legislature within the limits which circumscribe its powers is not in any sense an agent or delegate of the Imperial Parliament and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself. When a question arises whether the prescribed limits have been exceeded, the Court must look to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which negatively they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition of restriction by which that power is limited, it is not for any Court of Justice to inquire further, or to enlarge constructive-

(2) Without prejudice to the generality of the powers conferred, by the preceding sub-section, no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies—

ly those conditions and restrictions. I.L.R. (1943) Kar. 449=A.I.R. 1944 Sind 1 (F.B.). The Indian Legislature is not a Sovereign Legislature. Its powers are conferred by the Government of India Act, 1935, but within the ambit of the very wide powers conferred by that Act, the Indian Legislature is a Sovereign Legislature. Courts in construing the Government of India Act ought not to presume that the English Parliament did not intend to confer upon the Indian Legislature a power which it possessed itself but had never thought it desirable to exercise, *viz.*, to tax the income of a non-resident accruing outside British India. The mere facts that an Act of the Indian Legislature has some extra-territorial operation is not enough to invalidate it; it is also clear that the power to impose income-tax is vested in the Indian Legislature. It must also have the power to determine who is to pay the tax and for that purpose, to lay down rules as to who is to be regarded as resident in, and what income is to be deemed to arise in, British India. There is nothing in the Government of India Act which lays it down that any legislation having extra territorial effect is invalid. The provisions of sec. 4-A (c) of the Income-tax Act (as amended in 1939) are not therefore *ultra vires* in whole or in part. 45 Bom.L.R. 929=1943 I.T.R. 559=A.I.R. 1944 Bom. 1=I.L.R. (1944) Bom. 43. See also 48 C.W.N. (F.R.) 73=(1944) F.L.J. 131=(1944) 1 M.L.J. 477=1944 F.C. 51. Power to affect prerogative rights of His Majesty—Decree or order of Privy Council—If affected by Madras Agriculturists' Relief Act.—It is a well-established principle that within the limits of subject and area assigned to a legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself. It is clearly competent for the Provincial Legislature to make laws affecting His Majesty's prerogative rights. The legislative authority conferred by secs. 99 and 100 of the Government of India Act of 1935 is subject only to "the provisions of this Act" and there is no provision in the Act which excepts generally the prerogative of the Crown. It is therefore within the competence of the legislatures of India to make laws derogating from the prerogative rights of the Crown except of course in so far as such prerogatives may be comprised in matters specifically excepted. The prerogative has no concern with the curtailment or modification of the rights of parties by a local law, such as Madras Act IV of 1938. 54 L.W. 107=1941 M.W.N. 741=1941 Mad. 817=(1941) 2 M.L.J. 125=I.L.R. (1942) Mad. 60. Where the legality of a legislation of a non-sovereign legislature having extra-territorial operation is questioned one must consider whether the particular legislation is authorised by the Constitution Act creating

that legislature and defining its powers. Though the Statute of Westminster is not applicable to India, the Constitution Act of 1935, has to be interpreted in the light of the discussions on this subject that had been taking place between 1926 and 1935. The way in which this matter is dealt with in sec. 99 of the Constitution Act is significant. Sub-sec. (2) of sec. 99 is worded not as a provision "conferring power to make laws", but as a provision which *assumes* that the preceding sub-section is capable of being read as including the power to make laws even in respect of matters specified in the five cases dealt with in sub-sec. (2). This is made clear both by the opening words of sub-sec. (2) and also by the tenor of the sub-section which only purports to obviate objection on the ground of extra-territorial operation. Hence the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative powers given to the Indian Legislature by the Constitution Act. 48 C.W.N. (F.R.) 73=(1944) F.L.J. 131=A.I.R. 1944 F.C. 51=(1944) 1 M.L.J. 477 (F.C.). See also 1944 Bom. 1. There is no general rule of international comity which renders taxation on non-residents in respect of income derived from property in the colony imposing the tax, incompetent. Nor is it incompetent by reason of the circumstance that the colony in question cannot pass extra-territorial legislation. A tax in this form is not extra-territorial so long as it does not affect to tax property not situate in the colony. (1945) F.L.J. 97=1945 M.W.N. 596=A.I.R. 1945 P.C. 85 (P.C.). Rules made under regarding 'establishments'—Seniority in service and officiating in particular posts confers as right to claim confirmation or appointment to such post. See I.L.R. (1943) All. 4=6 F.L.J. 14.

Per *Gwyer, C.J.*, and *Varadachariar, J.*—It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule has been evolved whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation with respect to matter in this list or in that. This rule of interpretation is equally applicable to the Indian Constitution Act, and may be accepted as a guide for the interpretation of the Government of India Act. 53 L.W. 109=45 C.W.N. (F.R.) 1=1941 F.C. 47=(1941) 1 M.L.J. 125. The provisions of the

(a) to British subjects and servants of the Crown in any part of India; or

(b) to British subjects who are domiciled in any part of India wherever they may be; or

(c) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(e) in the case of a law for the regulation or discipline of any naval military, or air force raised in British India to members of, and persons attached to, employed with or following, that force, wherever they may be.

100. (1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in

Subject-matter of Federal and Provincial laws.

Madras Agriculturists' Relief Act are not in valid even though they may affect the rights of parties under the Negotiable Instruments Act. 54 L.W. 577=(1941) 2 M.L.J. 808. East Indian Company Act (1773), sec. 36—Power to legislate—If confined to Calcutta—Sec. 36 empowered the Governor-General in Council to legislate not only for the settlement at Fort William but also for other factories and places subordinate or to be subordinate thereto. 20 Pat. 573=22 Pat.L.T. 863=1941 Pat. 306 (S.B.). Per *Gwyer, C.J.*—The power of a Provincial Legislature to legislate with respect to "works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province (List II entry No. 8) is restricted to works, lands and buildings situate in the Province itself. If, by reason of any of the provisions of sec. 172 or sec. 173, lands or buildings are vested in His Majesty for the purposes of a Province outside the territorial limits of the Province, the rights of the Provincial Government over them are analogous to those of a private owner. I.L.R. (1943) Kar. (F.C.) 10=47 C.W.N. (F.R.) 34=6 F.L.J. 18=A.I.R. 1943 F.C. 13=(1943) 2 M.L.J. 137.

SECS. 99 AND 226.—The plaintiff company incorporated in England and having its main office there and having no business premises in India held the bulk of the shares in eleven companies carrying on business in India, two called the "rupee companies" being incorporated in India and having their offices in India and the rest called the "sterling companies" incorporated in England and having their offices there. The sterling companies were controlled in London, where the Board of Directors and the share registers are situate and dividends are declared. The business in India, where all profits are made, was managed by local boards. The Indian Government levied income-tax and super-tax on the dividends paid to the plaintiff company by the "sterling companies" in England. The tax was paid under protest and a suit

was brought to declare that the assessment and demand of the tax were beyond the law-making powers of the Indian Legislature and were therefore void and had no legal effect and for consequential relief. *Held*, according to sec. 226, the bar is absolute, if the dispute concerns revenue taking the word "revenue" in its ordinary sense. The section is not limited to steps taken in the collection of revenue. It equally applies to the demand of assessment. (1944) 1 M.L.J. 477 (F.C.)=(1944) F.C. 51.

SEC. 100.—Indian Legislatures within their own spheres have plenary powers of legislation as large and of the same nature as those of Parliament itself and every intendment ought therefore to be made in favour of a legislature which is exercising the powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the by-laws of a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by arbitrary introduction of far-fetched and impertinent limitations. 21 Pat. 587=I.L.R. (1942) Kar. (F.C.) 21=46 C.W.N. (F.R.) 32=5 F.L.J. 17=A.I.R. 1942 F.C. 17=(1942) 2 M.L.J. 6 (F.C.). Sec. 100 and Art. 31, List II of the seventh Schedule, Government of India Act, give Provincial Legislatures power to legislate with respect to intoxicating liquors, that is to say, with respect to the production, manufacture, possession, etc., of such liquors. The power is not confined to merely the regulation or restriction of such manufacture, production or possession, etc. It is impossible to say that prohibiting possession of certain forms of intoxicating liquor in specified areas is anything more than legislation with respect to possession or transport of such intoxicating liquor in such areas. 21 Pat. 178=1942 P. W.N. 47=5 F.L.J. (H.C.) 34=A.I.R. 1942 Pat. 351. When taxes are imposed specifically on a number of items, only some

the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

of which are within the jurisdiction of the Legislature which imposes them, the validity of each impost can be dealt with by itself and there is no question of the one affecting the other and no scope for the application of the rule of pith and substance. I.L.R. (1942) Kar. (F.C.) 34=55 L.W. 765=46 C.W. N. (F.R.) 69=5 F.L.J. 27=A.I.R. 1942 F.C. 14=(1942) 2 M.L.J. 1 (F.C.). Per *Spens, C.J., and Varadachariar, J.*—The Federal Legislature has no power to make a law providing for the levy of "Estate Duty" of the nature and with the incidents of Estate Duty under the English Law, and the levy of such Estate Duty is not a matter included in any of the Lists in Sch. VII to the Constitution Act. The word "succession" used in Entry 56 of List I which speaks of "duties in respect of succession to property" is not capable of comprehending every kind of passing of property. The expression "in respect of" in the entry indicates that "succession" is the *subject-matter* of the taxation and not merely the *occasion*. Per *Zaffrulla Khan, J.*—The expression "Estate Duty" is not a term of art and carries no precise connotation. A law enacting that upon the death of a person there shall be levied a duty in respect of property passing upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term "succession" used in that entry. (1944) F.L.J. 215=A.I.R. 1944 F.C. 73=(1944) 2 M.L.J. 234. See also 1942 F.C. 14. See also (1945) 2 M.L.J. 225 (P.C.). Offence against Insurance law—Initiation of prosecution—Power of Provincial authorities. See (1944) F.L.J. 60=(1944) 1 M.L.J. 207. On this section, see also (1944) 2 M.L.J. 234 (Power of Federal Legislature to make laws for levy of Estate Duty); (1945) 1 M.L.J. 225 (P.C.) (Power of Provincial Legislature to pass General Sales Tax Act; 5 F.L.J. 27=(1942) (F.C.) 14 (Power of Provincial Legislature to impose tax or cess on salt); 1942 Comp. Cases 41 (Bihar Money Lenders Act, S.B.); 1942 P.W.N. 66 (Bihar Tenancy Act, sec. 37 not *ultra vires*); (1945) 1 M.L.J. 24.

SECS. 100 AND 107: SCOPE AND EFFECT OF.

—Though in one aspect and for one purpose a subject may be within the powers of the Federal Parliament, in another aspect and for another purpose it may fall within the powers of a Provincial Legislature. The Madras Agriculturists' Relief Act is one which relates to "*agriculture*" a subject reserved for the Provincial Legislature, item 20 of List II of Sch. VII of the Government of India Act. The Act relates to moneylending to agriculturists, and "*money-lending*" also is a subject reserved for Provincial Legislature, item 27 of List II of Sch. VII. The only effect of the Act, so far as Negotiable Instruments are concerned is to reduce liability where the maker or endorser is an agriculturist. The act being in substance within the powers of the Madras Legislature, the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity. The Madras Agriculturists' Relief Act is therefore *intra vires* the powers of the Provincial Legislature, and not *ultra vires* on the ground that its provisions are repugnant to the provisions of the Negotiable Instruments Act, the Usurious Loans Act and the Hindu Law as to debts. I.L.R. (1939) Mad 151=2 F.L.J. 39=49 L.W. 257=1939 Mad. 361=(1931) 1 M.L.J. 272 (F.B.). If a tax is covered by the Federal List (List I of Sch. VII), and not covered by the Provincial List (List II of the said Schedule), then the Provincial Legislature cannot impose such tax and it would be invalid. If a tax is covered by the Provincial List and not covered by the Federal List, then the validity of tax cannot be questioned. But if a tax falls within both the Lists, then such a tax will be *ultra vires* the Provincial Legislature by reason of the non-obstante clause in S. 100 (1) of the Act. But it is a fundamental assumption that the legislative power of the centre and the Provinces could not have been intended to be in conflict with one another, and the Court must therefore read them together and

interpret or modify the language in which one is expressed by the language of the other and arrive at a reasonable and practical construction of the language of the section so as to reconcile the respective powers they contain and give effect to all of them. It is only if such a reconciliation should prove impossible and only then will the non-obstante clause in S. 100 (1) operate and the Federal power prevail, for the clause ought to be regarded as a last resort. 49 L.W. 36=1939 F.C. 1=(1939) M.L.J. Supp. 1. See also 19 Pat. 974=21 Pat.L.T. 740=1940 Pat. 99; 20 Pat. 831=1941 Pat. 561. S. 4 (1) (a) of the Madras Prohibition Act is completely ultra vires so far as the possession of ganja or any other dangerous drug is concerned. The Provincial Legislature had no power to repeal the Abkari Acts in so far as dangerous drugs are concerned and those Acts and the rules made thereunder remain in force in relation to ganja, in view of S. 107 of the Government of India Act. I.L.R. (1941) Mad 687=54 L.W. 17=1941 Mad. 533=(1941) 2 M.L.J. 41 (F.B.). Under Cl. 31 of the Provincial Legislative List in the seventh schedule the Provincial Legislature had full power to legislate with regard to the production, manufacture, possession, transport and sale of intoxicating liquors, while Cl. 19 of the Federal List gave the Central Legislature power to legislate with regard to import and export across frontiers. S. 4 (1) (a) of the Prohibition Act prohibited inter alia the possession of intoxicating liquors. Since in the present case, which was merely concerned with the possession of arrack produced in the Madras Presidency there was no question of any import or export, the conviction was lawful as the Provincial Legislature had power to prohibit the possession of arrack. I.L.R. (1941) Mad. 701=53 L.W. 615=1941 Mad. 621=(1941) 1 M.L.J. 715. Obiter.—A right to legislate as to possession of intoxicating liquors must necessarily involve a right to prohibit possession. The Provincial Legislature has power so to limit possession, provided that in so doing it does not encroach upon the legislative powers of the Central Government. The Central Legislature is the authority to legislate in respect of import and export of intoxicants across the sea frontier of Bombay, under item 19 of List I of the 7th Schedule. The power of the Provincial Government to legislate as to possession is thus a qualified and not an absolute power; it is subject to the rights of the Central Government. I.L.R. (1940) Bom. 777=42 Bom. L.R. 791=1940 Bom. 307 (F.B.). S. 3 of the C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act of 1938 and all the provisions thereof levying "a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the

value of such sales" is not ultra vires the Legislature of the Central Provinces and Berar. It falls under Item 48 of List II in Sch. VII of the Act as "a tax on the sale of goods" and is not covered by Item 45 in List I of Sch. VII as a "duty of excise". 180 I.C. 161=43 C.W.N. (F.C.R.) 1=1939 F.C. 1=1939 M. L. J. (Supp.) 1. Part VI of the Bombay Finance Act of 1932, as amended in 1939, is not ultra vires the Provincial Government, and the Urban Immovable Property Tax imposed by that Act is a valid tax. It is a tax on lands and buildings, imposed on the owners qua owners, and assessed by a somewhat arbitrary but not in equitable standard, which is not dependent either on the income of the assessee or on the capital value of the properties. It is not a tax upon income. The tax falls within item 42 of the Provincial List. I.L.R. (1940) Bom. 58=42 Bom.L.R. 10=1940 Bom. 65 (F.B.). The Madras General Sales Tax Act is not ultra vires in so far as it purports to levy a tax on first sales, that is, sales by the manufacturer or producer. Under the Government of India Act, the Federal Legislature has an exclusive power (List I, entry No. 45) to impose duties of excise, and the Provincial Legislature an exclusive power (List II, entry No. 48) to impose taxes on the sale of goods, and this power extends to sales of every kind including first sales. The expression "duty of excise" is wide enough to include a tax on sales, but where power is expressly given to another authority to levy a tax on sales, "duty of excise" must be given a more restricted meaning than it might otherwise bear. A tax levied on the first sale of goods must in the nature of things be a tax on the sale by the manufacturer or producer, but it is levied upon him qua seller and not qua manufacturer or producer. If a taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise he may have to pay two taxes, but the two taxes are economically separate and distinct imposts. It is natural when considering the ambit of an express power in relation to an unspecified residuary power to give a broad interpretation to the former at the expense of the latter but where, as in the Government of India Act, there are two complementary powers each expressed in precise and definite terms there can be no reason for giving a broader interpretation to one power rather than to the other. The American and Australian decisions should not therefore be blindly adopted in India. 5 Fed.L.J. 61=A.I.R. 1942 (F.C.) 33=46 C.W.N. (F.B.) 38. [I.L.R. (1941) M. 874=1941 Mad. 913=(1941) 2 M.L.J. 607 Reversed.] The Bihar Money-Lenders Act of 1939 is not an enactment relating to the conduct of banking busi-

101. Nothing in this Act shall be construed as empowering the Federal Legislature to make laws for a Federated State other-

Extent of power to legislate for States.      wise than in accordance with the Instrument of Accession of that State and any limitation contained therein.

102. (1) Notwithstanding anything in the preceding sections of this

ness by a corporation, contemplated by Item 38 of List I of Schedule VII. It is enactment relating to money-lending falling under Item 21 of List II of that Schedule. Money-lending is only a part of the business of a bank and therefore it cannot be said that in enacting the Bihar Money-Lenders Act the Legislature trespassed upon item 38 of List I of Schedule VII, to the Government of India Act. S. 13 of the Bihar Money-Lenders Act does not legislate directly or indirectly with regard to the conduct of banking business and is not inapplicable to cases where the creditor is a bank. The mere fact that a decree under execution might in the ordinary course be obtained by a Bank cannot make the section an enactment relating to the conduct of banking business. 20 Pat. 831=22 Pat.L.T. 522=1941 Pat. 562. See also 19 Pat. 974=21 Pat.L.T. 740=1941 Pat. 99. S. 23-A (b) of the Bihar Tenancy Act as amended in 1938 deals with a provincial subject and cannot be held to be ultra vires or inoperative by reason of any actual or supposed repugnancy to an All-India Act, viz., S. 37 of the Contract Act. 199 I.C. 182=1942 P. W.N. 66=23 P.L.T. 143. Powers of local legislature to make laws—Limits—Old Act.—It is wrong to think that sub-S. (3) of S. 80-A of the Government of India Act (1919), means that if the local legislature of a province has obtained the previous sanction of the Governor-General, it can make laws of the kind mentioned in cls. (a) to (i) of the sub-section so as to affect rights and properties not only within the boundaries of the province, but also outside those boundaries. The effect of sub-S. (3) is that without the previous sanction of the Governor-General, or at any rate his subsequent assent as mentioned in the proviso to the sub-section, the local legislature of a province cannot validly make any such laws even for its own territories, and the previous sanction, or the subsequent assent, of the Governor-General in Council only makes such laws valid and effective within the territories of the province. I.L.R. (1938) All. 781=1938 A.L.J. 872=1938 All. 564. Order under S. 36, Madras District Municipalities Act—Power of Governor to issue—Governor and Provincial Government—Differentiation. See 1939 Mad. 940=(1939) 2 M.L.J. 801=50 L.W. 538. The U. P. Regularization of Remissions Act (1938) is not ultra vires. I.L.R. (1940) All. 455=1940 A.L.J. 274=1940 All. 272. S. 100—S. 100 and Art. 31, List II of the

seventh Schedule, Government of India Act give Provincial Legislatures power to legislate with respect to intoxicating liquors, that is to say, with respect to the production, manufacture, possession, etc., of such liquors. The power is not confined to merely the regulation or restriction of such manufacture, production or possession, etc. It is impossible to say that prohibiting possession of certain forms of intoxicating liquor in specified areas is anything more than legislation with respect to possession or transport of such intoxicating liquor in such areas. 197 I.C. 618=21 Pat. 178=1942 P. 351.

Sec. 101.—The provisions of S. 100 relate to the exercise of legislative powers in and for British India. In the case of the Indian States, however, dealt with by this section the powers of the Federal legislature do not extend to all the matters comprised in the list, but only to such of them as are specified by the Ruler in the Instrument of Accession "as matters with respect to which the Federal legislature may make laws for his State and subject to the limitation if any to which that power may be made subject" S. 6 (2). Explaining the basis of the section, Sir Samuel Hoare said: "The whole essence of federation is that the units surrender definite powers, but beyond that field the Federal legislature has no power over the units at all. That is exactly the position. The Federal legislature has power over the units to the extent of the federal field; and in the case of Indian Princes to the extent that they have surrendered their powers in the Instrument of Accession. That is altogether in keeping with the letter and spirit of every federal legislature in the world. It would be contrary to every theory of federation if the Federal Government had more extended powers". (Parl. Deb., Vol. 299, Col. 1932).

Sec. 102.—"Emergency" means something in existence which calls for immediate action. 44 Cr.L.J. 673=1943 Cal. 285.

The official report of the Proceedings of the House of Lords can be accepted as proof that the proclamation of emergency made by the Governor-General under sec. 102 has been approved by the House. 75 C.L.J. 90=(1942) F.L.J. (H.C.) 180=1942 Cal. 464.

State of Emergency—Governor-General—Spoke. Judge: Per Niyogi, J.—The



chapter, Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a "Proclamation of Emergency") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List:

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

Governor-General is the sole judge of whether a state of emergency exists and therefore it must be assumed that there was an emergency when he declared that there was. The Governor-General is not bound to give any reason for promulgating an Ordinance. It is sufficient for him to declare that an emergency has arisen to enable him to issue Ordinance. I.L.R. (1943) Nag. 73=6 F.L.J. (H.C.) 53=1943 N.L.J. 16=A.I.R. 1943 Nag. 36; 22 Pat. 565=1943 Pat. 348=24 Pat.L.T. 302.

When comes into operation: Per Niyogi, J.—Sec. 102 comes into play when the security of India is threatened. There may be war or internal disorders but the existence of either factor is neutral unless either one or the other becomes a menace to the security of India and gives rise to a grave emergency. As sec. 102 contemplates a threat to the security arising from either of the two factors in the absence of the other, the word "or" occurring between "war" and "internal disturbances" in sec. 102 cannot be read as "and" although it is conceivable that both factors may come into operation at one and the same time. I.L.R. (1943) Nag. 73=1943 N.L.J. 16=A.I.R. 1943 Nag. 36.

Niyogi and Digby, JJ.—The Civil Courts in India have inherent jurisdiction to enquire into the validity of any laws passed by the Indian Legislature or by the Provincial Legislature. The Legislatures in India are constituted under the Government of India Act, 1935, and their powers are circumscribed by the limits imposed by that Act. Their laws are therefore subject to scrutiny by the High Courts in a manner in which the laws passed by the British Parliament are not. The Governor-General has been invested with powers in certain specified circumstances to enact laws or to make and promulgate ordinances subject to certain conditions; but his legislative power is no greater than that of the Indian Legislature. The High Court therefore has authority to enquire into the validity of the Special Criminal Courts Ordinance. I.L.R. (1943) Nag. 73=1943 N.L.J. 16=1943 Nag. 36, see also 45 Bom.L.R. 323; 1943 Pat. 245. Pishin is within a Province of British India. I.L.

R. (1944) Kar. 293=1944 F.L.J. 244=A.I.R. 1944 Sind. 188.

Secs. 102 and 297.—S. 297, deals with Provincial Legislatures or Government and limits their power to legislate with regard to production, supply and distribution of commodities. The section does not refer to the Federal Legislature at all. When the Government of India acquires powers under S. 102 to legislate with regard to Provincial subjects its legislation on such matters is not subject to the restrictions laid down by S. 297. Since all Provinces are subject to the Federal Legislature, that Legislature has power to make legislation prohibiting or restricting import into or export from a Province. A Notification issued by a District Magistrate, to whom the Provincial Government has delegated its powers of prohibiting the removal of tur or turdal from any place within the limits of a district to any place outside that District is therefore properly issued and is not ultra vires. I.L.R. (1944) Bom. 429=46 Bom.L.R. 449=A.I.R. 1944 Bom. 247. The requisitioning of movable property although not specifically enumerated in the Provincial Legislative List is clearly included in more general subjects which find a place in that list. There is no limitation of the powers of the Provincial Government with respect to the subject included in the Provincial Legislative List except in so far as the power is controlled by some provision of the Government of the India Act. S. 297 does restrict the powers of Provincial Legislatures in regard to matters listed in items 27 and 29 in certain respects, but not in respect of the power to requisition goods within the Province. The power of the Provincial Legislature to make laws with respect to "trade and commerce" within the province and with respect to the "production, supply and distribution of goods" includes the power to requisition goods for public purposes. A Grains Purchase Officer can therefore requisition stocks of paddy and failure to comply with the order will be an offence. (1944) 2 M.L.J. 391=1945 Mad. 104. Powers of Governor-General to enact single law for all provinces—Special Criminal Courts (Repeal) Ordinance, 1943—If



(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long as the Federal law continues to have effect, be void.

(3) A Proclamation of Emergency—

(a) may be revoked by a subsequent Proclamation;

(b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament; and

(c) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

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103. If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the

Power of Federal Legislature to legislate for two or more Provinces by consent.

Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislature, it shall be

lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

104. (1) The Governor-General may by public notification empower either

*ultra vires.* 6 F.L.J. 187=A.I.R. 1944 F.C. 1 (C.C.).

Sec. 103.—The section is necessitated by the fact that under S. 99, the legislative powers of a province are confined to the limits of that province, and that if a body having jurisdiction within more than one province, e.g., like a Joint Public Service Commission for 2 or more provinces, was desired to be set up, there would be no power in the provinces to do so. With the disappearance of a central legislature with power to invade the provincial field at all points, there had necessarily to be devised some machinery for co-ordination of policy between the provinces in matters of common concern to them. As the Statutory Committee pointed out, there is urgent need for the establishment of institutions for research in the fields of Forestry, Agriculture, health, problems, all subjects in the Provincial list. This recommendation was endorsed by the Joint Parliamentary Committee and accordingly provision has been made for the creation of Interprovincial councils by Order in Council. This section would have to be utilised for providing the necessary legislation investing these councils with functions and powers. The presence of this section obviates the limitation set out in the judgment of Lord

Atkinson of City of Montreal v. Montreal Street Railway, Co., (1912) A.C. 333, where it is pointed out that inconvenience of provincial administration in a matter concerning more than one province does not clothe the Dominion Parliament with legislative power in that field.

Sec. 104: Residuary Power.—Explaining the principle adopted in framing the legislative lists and in enacting the machinery devised by this section in regard to the location of the residuary power Sir S. Hoare said: "We found that Indian opinion was very definitely divided between, speaking generally, the Hindus who wish to keep the predominant powers in the Centre, and the Moslems who wish to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with the greatest suspicion at the residuary field, the Hindus demanding that the residuary field should remain with the Centre and the Muslims equally strongly demanding that the residuary field should remain with the Provinces."

The feeling was very deep and very bitter on this issue. We tried year after year not only in the Joint Select Committee but also in the various Round Table Conferences to bridge the difference, but the only bridge that we could find between these two diamet-

Residual powers of the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under the section the Governor-General shall act in his discretion.

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trically opposite points of view was to have three lists, namely, the Federal List, the Provincial List and the Concurrent List, each as exhaustive as we could make it, so exhaustive as to leave little or nothing for the residuary field. I believe that we have succeeded in that attempt and that all that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Hon. Friend nor I can contemplate at this moment. We find that we have really exhausted the ordinary activities of Government in the three other fields. I agree with my Hon. Friend that it means complications. I believe that it also means the possibility of increased litigation."

The decision of the Governor-General that a subject is not covered by the enumerated matters in the three lists would not seem to be final, and the question could be challenged in the Courts. But having regard to the importance of the subject it is not expected that he would decide such matters without obtaining the advisory opinion of the Federal Court under S. 213. But his decision allocating the subject—if in fact it is a residue—to the Provincial or Federal Legislature is not open to question in the Courts. The section states that the Governor-General might assign the subject 'either to the Federal or the Provincial Legislature' which seems to raise a doubt as to whether he can assign such a residuary subject to the concurrent list. It is however submitted that he can assign it to any of the three lists.

**Sec. 104 and Seventh Schedule.**—Scope of the powers of legislation of the Indian Legislature—Comparison with the powers of the Imperial Parliament.

The Imperial Parliament is supreme and has powers to enact laws affecting the liberty of person and the rights of property enjoyed by the subject in any manner whatever. The Imperial Parliament has got the power to deprive a subject of his liberty of person and also of his rights of property in any manner whatever without assigning any whatsoever or without making any compensation for the same. On the other hand the powers granted to the Indian Legislature under the Constitution Act are circumscribed within the items in the lists of the seventh schedule to Act, though it powers to make laws with respect to the items in those lists are plenary within their

own sphere. In the exercise of such powers it does not act as an agent of or exercise any delegated authority from the Imperial Parliament. It exercises plenary powers, as full powers as the Parliament itself could exercise with respect to the items in those lists. Even though those lists may have been meant to be as exhaustive and comprehensive as human ingenuity could make them, they were meant to comprise all that could be thought of as within the ordinary activities of the Government. Even though the emergency like the present war could well have been within the contemplation of the framers of the Constitution Act, there is no doubt that such powers as may have to be exercised in such an emergency could not have been contemplated to have been included in the items in those lists. Hence the emergency powers sought to be given to the Government by the enactment of the provisions of Defence of India Act by the Central Legislature, even though that was done in pursuance of a proclamation issued by the Governor-General in that behalf could not have been at all contemplated by the framers of the Constitution Act when the lists of the seventh schedule came to be compiled by them. That is the real reason why the residual powers of legislation were vested in the Governor-General under the terms of S. 104 of the Act. In interpreting the Constitution Act, the canon of construction which warrants a large and liberal construction to be put upon the various provisions of the Constitution Act should be modified by the canon of construction which lays down that a strict construction should be put upon the provisions which go to curtail the liberties of the subject or impose burdens and obligations upon him. On this principle of construction, the items in the lists of the seventh schedule should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used therein in spite of the items contained in those lists being read as extending to all ancillary or subsidiary matters can fairly and reasonably be said to be comprehended in the same. 47 Bom.L.R. 1010=1945 F.L.J. 247.

Requisition is not included in acquisition but it is separate and distinct from acquisition. 'Acquisition' is used only in the sense of compulsory acquisition of land

107. (1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature

Inconsistency between Federal laws and Provincial, or State laws.

is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

which is enacted in the Land Acquisition Act I of 1894 or the compulsory purchase of land which is known to English Law. 'Requisition' is always understood to mean a dominion or control of the property and not the acquisition of the rights of ownership. Though a large and liberal interpretation requires to be given to the general topic or category of legislation 'land' described in item 21 of list II of the seventh schedule it is of necessity limited by the user of the expression "that is to say" which has to be interpreted as laying down restrictions on the generality of the topic or category of legislation which it goes to explain. Hence the amplification and explanation therein is really restrictive or limitative of the general topic "land" described in item No. 21. (Ibid.)

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U. P. Regularisation of Remissions Act falls without residual powers defined in S. 104 of this Act. I.L.R. (1940) All. 455 =1940 A.L.J. 274=1940 All. 272 (F.B.).

Sec. 107.—See also Notes under S. 100, supra.] Applicability and scope of section.—Per Iqbal Ahmad, J.—S. 107 affects the relations between the Federal legislature and the Provincial legislature where the laws passed by the two legislatures are among the subjects in the concurrent legislative list and are repugnant to each other. It has no application to repugnancy due to overlapping found between the Provincial List on the one hand and the Federal and concurrent lists on the other. I.L.R. (1940) All. 455=3 Fed.L.J. (H.C.) 83=1940 A.L.J. 274=1940 All. 272 (F.B.). S. 107 relates only to the concurrent list and has no application to subjects reserved exclusively to List I. The section, moreover, deals with repugnancy but not ultra vires. No assent of the Governor-General can validate a law which is void apart from any question of repugnancy and which it was never within the competence of the Provincial legislature to enact, a law which is therefore void ab initio. S. 107 (2) provides means for overcoming a repugnancy; it provides no means of validating a law which is completely ultra vires—ultra vires ab initio, and which therefore has no intrinsic force in it which can be validated. 19 Pat. 974=21 Pat.L.T. 740=1940 P.W.N. 719=1941 Pat. 99. Sub-ss. (1) and (2) of S. 107 must be read together and only that kind of provincial law is contemplated by sub-S. (1) as is covered by sub-S. (2) which clearly con-

templates only a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List. In order to see "with respect to" what matter the Legislature is exercising its legislative function, we are to look to the pith and substance of the entire enactment and not the matter for legislation in a particular provision served from the context. 1942 F.L.J. (H.C.) 189=46 C.W.N. 999=A.I.R. 1942 Cal. 587. The question of "pith and substance" does not arise when objection is taken not under S. 100 but under S. 107 (1) of the Act. I.L.R. (1942) Lah. 623=I.L.R. (1942) Kar. (F.C.) 40=5 Fed.L.J. 33=55 L.W. 484=46 C.W.N. (F.R.) 61=A.I.R. 1942 F.C. 27=78 C.L.J. 500. Legislation coming in pith and substance within one of the classes specially enumerated in the Central List is beyond the legislative competence of the Provincial Legislatures. In such a case it is immaterial whether the Central Legislature has or has not dealt with the subject by legislation, or to use other wellknown words, whether that legislative field has or has not been occupied by the legislation of the Central Assembly. Where the Central Legislature has been given exclusive legislative authority as to "all matters coming within the classes of subjects" enumerated it cannot be said that, unless and until the Central Assembly legislates on and such matter the Provinces are competent to legislate. 6 F.L.J. (P.C.) 1=A.I.R. 1943 P.C. 76. If a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in the Central List and is properly within one of the subjects enumerated in the Provincial List, then legislation by the Province is competent unless and until the Central Legislature chooses to occupy the field by legislation. 6 F.L.J. (P.C.) 1=A.I.R. 1943 P.C. 76. Repugnancy—Test.—If the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same fields is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law. 69 C.L.J. 573=43 C.W.N. 913=1939 Cal. 628. See also 19 Pat.L.T. 760; 1938 P.W.N. 913 (F.B.); 71 C.L.J. 369. "Repugnant" means "inconsistent with" or "contrary to". Such contrariety may be in quality, in matter or in respect of the

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

form prescribed. Foster's case, (11 Coke Rep. 56 B.). According to Higgins, J., repugnance must involve either directly or ultimately a contradictory proposition, probably contradictory duties or contradictory rights. (A.-G. for Queensland v. A.-G. for Common-wealth, 20 Com.L.R. 148 at p. 178). In other words there must be a direct collision between the provisions in the two enactments before they can be pronounced to be repugnant to each other. He further elucidated his proposition in these words in his dissenting judgment in Clyde Engineering Co. v. Coburn, (37 Com.L.R. 466). "Etymologically things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or provision in the one law conflicts directly with the command or power or provision in the other. Where two legislatures operate over the same territory and come into collision, it is necessary that one should prevail, but the necessity is confined to actual collision as when one legislature says "do" and the other says "don't". Repugnancy of provincial law to existing Indian law—Principles of construction. Per Sulaiman, J.—When the question is whether a provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. If the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless, of course,

the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be ultra vires in the former, while intra vires in the latter. A law which is ultra vires in part only may thereby become ultra vires in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable then the whole Act is invalid. 2 F. L.J. 183=43 C.W.N. (F.C.R.) 193=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45. See also 47 Bom.L.R. 294.

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939) is not void as repugnant to existing Indian law. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 68=20 Pat.L.T. 473=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45. See also 1943 N.L.J. 408 (C. P. & Berar Relief of Debt Act, 1939). S. 15 of Bihar Act IX of 1938 is not void under S. 107 of the Government of India Act of 1935, as being repugnant to S. 38; C. P. Code an existing Indian law. 1939 P.W.N. 530=20 Pat.L.T. 492=18 Pat. 694=1939 Pat. 570. Bihar Tenancy Act (as amended in 1937), S. 178-B—If conflicts with Permanent Regulation and if invalid. See 1942 P. W.N. 66. The expression "Federal law" in S. 107 (1) of the Government of India Act would not include a previously existing Indian law on a subject falling in List I. 192 I.C. 225=73 C.L.J. 1=53 L.W. 109=45 C.W.N. (F.R.) 1=1941 F.C. 47=(1941) 1 M.L.J. (Supp.) 1. If the subject-matter of a provincial enactment falls within the Provincial legislative list, the mere fact that it may also be affected by certain provisions in the concurrent legislative list would not attract the provisions of S. 107 of the Act regarding repugnancy. 43 P.L.R. 226=1941 Lah. 177 (F.B.).

## CHAPTER II.

## RESTRICTIONS ON LEGISLATIVE POWERS.

Sanction of Governor-General or Governor required for certain legislative proposals.

108. (1) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature, any Bill or amendment which—

(a) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; or

(b) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor; or

(c) affects matters as respects which the Governor-General is, by or under this Act, required to act in his discretion; or

(d) repeals, amends or affects any Act relating to any police force; or

(e) affects the procedure for criminal proceedings in which European British subjects are concerned; or

(f) subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein; or

(g) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.

(2) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, a Chamber of a Provincial Legislature any Bill or amendment which—

(a) repeals, amends, or is repugnant to any provisions of any Act of Parliament extending to British India; or

(b) repeals, amends or is repugnant to any Governor-General's Act, or any ordinance promulgated in his discretion by the Governor-General; or

Sec. 108.—Under the Government of India Act 1915, which consolidated earlier enactments on the point, the previous consent of the Governor-General was requisite to the introduction of legislation affecting religion, religious usages and rites. This restriction has been omitted here on the ground that legislation of this type should be introduced on the full and unfettered responsibility of Indian Ministers, and on the ground that in a matter of that sort it was undesirable that their responsibility should be shared by the Governor or Governor-General. See J.P. C. Report, para. 141.

The term "British India" in S. 108 (2) (a) means the whole of British India and does not refer to a part of British India. Therefore, Bengal Regulation, I of 1793, cannot be said to be an Act of Parliament extending to the whole of British India inasmuch as it applies only to Bengal, Bihar, Orissa and other settled estates in some of the provinces. 20 Pat. 573=22 P. L.T. 863=1941 Pat. 306 (S.B.). In the ordinary meaning of the expression an "Act of Parliament" is an Act passed by the House of Commons, the House of Lords and assented to by the King. Regulation I of 1793 was an enactment of the Governor-General in Council in India and was never before

Parliament in England. This Regulation together with the other Permanent Settlement Regulations were enacted pursuant to the provisions and directions contained in S. 39, Pitt's India Act of 1784. Regulation I of 1793 purports to be an enactment of the Governor-General in Council and was enacted by the Marquis of Cornwallis by virtue of the powers of legislation given to or assumed by the Governor-General in Council and that being so it cannot be said that the Permanent Settlement Regulation I of 1793, is in any sense an Act of Parliament. Consequently, the Bihar Agricultural Income-tax Act cannot be said to be invalid by reason of S. 108 (2) (a) on the ground that it is repugnant to the provisions of Regulation I of 1793. 20 Pat. 573=22 P.L.T. 863=1941 Pat. 306 (S.B.)=1941 P.W.N. 689.

Sec. 108 (2) (b)—"Governor-General's Act"—Bengal Permanent Settlement Regulation—The expression "Governor-General's Act," refers to Acts contemplated in S. 44 of this Act (i.e.), to Acts enacted by the Governor-General after the Government of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-

(c) affects matters as respects which the Governor-General is by or under this Act, required to act in his discretion; or

(d) affects the procedure for criminal proceedings in which European British subjects are concerned;

and unless the Governor of the Province in his discretion thinks fit to give his previous sanction, there shall not be introduced or moved any Bill or amendment which—

(i) repeals, amends or is repugnant to any Governor's Act, or any ordinance promulgated in his discretion by the Governor; or

(ii) repeals, amends or affects any Act relating to any police force.

(3) Nothing in this section affects the operation of any other provision in this Act which requires the previous sanction of the Governor-General or of a Governor to the introduction of any Bill or the moving of any amendment.

109. (1) Where under any provision of this Act the previous sanction or recommendation of the Governor-General or of a

Requirements as to sanctions and recommendations to be regarded as matters of procedure only.

Governor is required to the introduction or passing of a Bill or the moving of an amendment, the giving of the sanction or recommendation shall not be construed as precluding him from exercising subsequently in

regard to the Bill in question any powers conferred upon him by this Act with respect to the withholding of assent to, or the reservation of, Bills.

(2) No Act of the Federal Legislature or a Provincial Legislature, and no provision in any such Act, shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given—

(a) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty;

(b) where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General, or by His Majesty.

General in Council. Consequently, S. 108 (2) (b) can in no way render the Bihar Agricultural Income-tax Act invalid because it is repugnant to Regulation I of 1793. 20 Pat. 573=22 P.L.T. 863=1941 Pat. 306 (S. B.). S. 108 (2) (b) merely limits the power of Provincial legislatures to repeal or amend Governor-General's Acts or Ordinances enacted or promulgated under Ss. 42 to 44 of the Act. A Governor-General's Act or Ordinance is a very special form of legislation and cannot possibly include an Act of a Provincial legislative authority, which in the past required the assent of the Governor-General for its validity. 197 I. C. 618=21 P. 178=1942 P. 351. The Governor-General's Act to which S. 108 refers means an Act such as the Governor-General is empowered to enact under S. 44 of that Act. Before 1st April, 1937, all Acts required the assent of the Governor-General and the expression "Governor-General's Act" in S. 108 is not intended to include all such Acts. 21 Pat. 587=I.L.R. (1942) Kar. (F.C.) 21=46 C.W.N. (F.R.) 32=5 F.L.J. 17=A.I.R. 1942 (F.C.) 17=(1942) 2 M.L.J. 6 (F.C.). The expression "Act of Parliament" is used in S. 108 (2) (a) in the sense of enactments actually passed by Parliament and not of laws passed by a subordinate legislative

body under power conferred upon it by an Act of Parliament. The Bengal Permanent Settlement Regulation (I of 1793) is not, therefore, an "Act of Parliament" within the meaning of the section. I.L.R. (1942) Kar. (F.C.) 1=21 Pat. 521=46 C.W.N. (F.R.) 22=75 C.L.J. 123=5 F.L.J. 1=A.I.R. 1942 F.C. 8=(1942) 1 M.L.J. 607 (F.C.). S. 108 (2) (b), merely limits the power of Provincial Legislatures to repeal or amend Governor-General's Acts or Ordinances enacted or promulgated under Ss. 42 to 44 of the Act. A Governor-General's Act or Ordinance is a very special form of legislation and cannot possibly include an Act of a Provincial Legislative authority, which in the past required the assent of the Governor-General for its validity. 21 Pat. 178=5 F.L.J. (H.C.) 34=A.I.R. 1942 Pat. 351.

Sec. 109 (2): Assent of Governor.—Objection as to absence of previous sanction under S. 299 (3).—If an Act has received the assent of the Governor, its validity cannot be thereafter questioned on the ground that previous sanction to its introduction as required by sub-S. (3) of S. 299 of the Government of India Act was not obtained. I.L.R. (1940) All. 455=1940 A.L.J. 274=1940 All. 272 (F.B.):



Savings.

110. Nothing in this Act shall be taken—

(a) to affect the power of Parliament to legislate for British India, or any part thereof; or

(b) to empower the Federal Legislature, or any Provincial Legislature—

(i) to make any law affecting the Sovereign or the Royal Family, or the Succession to the Crown, or the sovereignty, or dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act; the Air Force Act, or the Naval Discipline Act, or the law of Prize or Prize Courts; or

(ii) except in so far as is expressly permitted by any subsequent provisions of this Act to make any law amending any provision of this Act, or any Order in Council made thereunder, or any rules made under this Act by the Secretary of State, or by the Governor-General or a Governor in his discretion, or in the exercise of his individual judgment; or

(iii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law derogating from any prerogative right of His Majesty to grant special leave to appeal from any Court.

## PART VII. CHAPTER III.

### PROPERTY CONTRACTS, LIABILITIES AND SUITS.

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175. (1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts:

**Sec. 175.**—The powers formerly vested in the Secretary of State in Council under S. 30 (of the Government of India Act, 1915) to enter into contracts relating to or otherwise deal with property vested in the Crown, and which were exercised by the authorities in India by virtue of a delegation from him, (see *Kasturi Reddi v. Secretary of State*, 26 M. 268) are now directly devolved on the Federal and Provincial Governments in respect of the property vested in such. The provisions are merely a reproduction of S. 30, and there is no difference except, (1) The source of the authority is traced to the Governments in India and (2) the form in which contracts, etc., would hereafter run.

**Government Contracts.**—Though it may be very desirable to have a formal deed with regard to all the agreements made by Government, it cannot be held as a matter of law, that an agreement evidenced by tenders and acceptance of tenders or an agreement evidenced by correspondence or other documents of informal nature though fully established by evidence, must fail and be said to offend the terms of S. 30 of the Government of India Act, 1918. It is a sufficient compliance with the terms of S. 30 if the agreement is expressed in writing,

and this writing may comprise a series of letters or a series of informal documents. 1941 A.L.J. 570=4 F.L.J. (H.C.) 361=1941 All. 377. The provisions of the Act, 1915, are mandatory and must be strictly complied with in order to constitute a valid contract which can be enforced against the Secretary of State. The contract must, under the law and the rules in force, be by a deed executed on behalf of the Secretary of State and in his name by the proper authority. 39 Bom.L.R. 807=1937 Bom. 449. There is no justification for holding that a contract in order that it may comply with S. 30 of the Government of India Act, 1915, must be by deed, i.e., under seal. There is no such provision in S. 30; the section does not require a formal document in the nature of an indenture or deed. The contract under S. 30 must, in order to be binding, be made on behalf and in the name, of the Secretary of State for India in Council by the local Government and executed by the proper officer authorised by the Governor-General in Council. A contract in the form of letters, complying with the provisions of S. 30 and signed by the proper officer, would be a contract complying with the terms of S. 30. But it must be plain that the correspondence is carried on on



Provided that any land or building used as an official residence of the Governor-General or a Governor shall not be sold, nor any change made in the purposes for which it is being used, except with the concurrence, in his discretion, of the Governor-General or the Governor, as the case may be.

(2) All property acquired for the purposes of the Federation or of a Province or of the exercise of the functions of the Crown in its relations with Indian States, as the case may be, shall vest in His Majesty for those purposes.

(3) Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

(4) Neither the Governor-General, nor the Governor of a Province, nor the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Act, or for the purposes of the Government of India Act or of any Act repealed thereby, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

176. (1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.

behalf of and in the name of the Secretary of State, and that the contract as finally concluded by correspondence is executed by a person authorised by resolution in that behalf. Where the correspondence does not show that, but only amounts to the fact that the Collector is prepared to recommend to Government to sanction a proposal, which if sanctioned would be made on behalf of and in the name of the Secretary of State in Council, there is no binding agreement under S. 30 which can be specifically enforced. 40 Bom.L.R. 19=174 I.C. 316=1938 Bom. 168. Under S. 30 (2) of the Government of India Act, 1919, contracts of mining leases have to be executed by the person and in the manner prescribed by the Government of India, and in order to be valid, a mining lease has to be executed by the Collector under the rules prescribed by the Governor-General in Council; until a formal lease has been executed there can be no enforceable contract against the Secretary of State for India in Council. 48 L.W. 194=1938 Mad. 749=(1938) 2 M.L.J. 141.

Sec. 176.—The Federation and the Provinces are endowed with juristic personality, with a right to sue and be sued. It must however be noted that the creation of these separate entities is only for the purpose of legal proceedings; neither the imparting of

a juristic personality, nor the Crown holding property "in right of the Province" and "in right of the Federation" affords any scope for the doctrine of the multiple personality of the Crown. The Crown is one and indivisible throughout the Empire, and in the words of Dr. Keith, "there is no essential deviation from this unity in the fact that the Crown appears in various aspects and that in these aspects there may be collision of interest and of rights". A Province may sue another Province, or a Province, the Federation and "to this extent there is distinction of aspects within the Crown." The King in each part of his dominions has a distinct personality for certain purposes, but the unity of personality can be given effect to whenever the aspect of personality is unimportant. (Cf. *Williams v. Howarth*, 1905 A.C. 551).

Crown bound by Legislation.—The Crown in right of the Federation is bound by a valid Provincial enactment assented to by the Governor as representing His Majesty. If the Crown is bound at all it is bound in all its aspects, and the question whether the Crown is bound is one of construction not of law.

Suits.—Suits between Provinces and between the Province and the Federation, are only a method of ascertaining the true

(2) Rules of Court may provide that, where the Federation, the Federal Railway Authority, or a province sue or are sued in the United Kingdom, service of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation. Authority or Provinces as may be specified in the rules.

179. (1) Any proceedings which, if this Act had not been passed might have been brought against the Secretary of State in Council may, in the case of any liability arising before the commencement of Part III of this Act or arising under any contract or statute made or passed before that date, be brought against the Federation or a Province, according to the subject-matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation or the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct.

meaning of the Constitution and does not affect the indivisibility of the Crown. This section reproduces with one material alteration the provisions of S. 32 of the Government of India Act, 1915, which conferred "the same right of suit against the Secretary of State as existed against the East India Company, if the Government of India Act, 1858, had not been passed." This provision was construed as affirmatively conferring a right of suit in all cases where the East India Company if it existed could have been sued and negatively as precluding an action in all cases where such a suit did not lie against the Company.

**Suit against Secretary of State—Maintainability—Test.**—Per Braund, J.—So far as suits against the Secretary of State in Council are concerned, in India, it is a complete fallacy to attempt to consider them from the point of view of the English Common law which does not recognize actions against the Crown on the principle either that "the Crown can do no wrong or that the King cannot be sued in his own Court. The principle applicable in India is wholly different; for, not only has the Crown submitted itself by statute (through its character as the successor of the East India Company) to certain 'remedies,' but it has by S. 65, Government of India Act, 1858, constituted a corporate defendant in the form of the Secretary of State in Council as its representative for the purpose of being sued in respect of those remedies. In the result, therefore, the East India Company, and, through the Company, the Secretary of State in Council, is, by virtue of S. 65, Government of India Act, 1858; and of S. 32 of the Act of 1919, in a wholly different position from the Crown as it stands under the English Common law. It is the 'character' of the suit, and not whether it would have succeeded, that is the test. If it is of that 'character' that it would have lain against the East India Company, then

by statute it lies against the Secretary of State for India in Council. 1937 Rang. L. R. 35=1937 Rang. 89 (S.B.). The Secretary of State is not liable for acts of the Courts or the consequences of those acts. A person has, therefore, no cause of action against the Secretary of State for wrongful seizure and sale of his property by a Magistrate for payment of a fine inflicted on another person. 167 I.C. 309=1936 A. W.R. 1277=1937 All. 158. Secretary of State not liable for tort of servant employed in government hospital. 49 L.W. 679=(1939) 1 M.L.J. 784.

Sec. 179.—This section is an application to the existing contracts of the Secretary of State in Council, of the familiar principle in the Law of Contracts, that the remedy of a party against the original promisor is not prejudiced or lost by reason of an assignment by the latter to which the other is not a consenting party. The option is therefore given to persons claiming by virtue of contracts, etc., prior to the commencement of Part III to sue either the Secretary of State the original contracting party—or the Federation or the Province according as the authority to whom the contract would relate under the provisions of this Act. In a suit instituted against the Secretary of State, the description of the defendant as "Government Punjab Province through Deputy Commissioner" does not in any manner affect the institution of the suit. Under the present Government of India Act all that is necessary to be mentioned is the "Province". The addition of the words "through Deputy Commissioner" does not cause any prejudice to the defendant. 192 I.C. 729=42 P.L.R. 550=1940 Lah. 451. Where in a suit against the Secretary of State, the latter is wrongly described as "Secretary of State for India in Council" this is a mere misdescription which can be amended at any time by omitting the words "for India in Council". 1939

The provisions of this sub-section shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned.

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of sub-section (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said sub-section (1).

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of this Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be.

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages, costs or expenses in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of sub-section (1) of the last preceding section.

(5) This section does not apply in relation to contracts or liabilities solely in connection with the affairs of Burma or Aden, other than liabilities which are by this Act made liabilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

## PART IX. THE JUDICATURE. CHAPTER I. THE FEDERAL COURT.

200. (1) There shall be a Federal Court consisting of a Chief Justice of

Lah. 583. No doubt under S. 179 (1) of the Government of India Act, an appeal should be lodged against the Secretary of State and not against the Secretary of State for India in Council. But the mere addition of the words "for India in Council" does not justify the dismissal of the appeal, as at the worst it could only be construed as a misdescription of the respondent. 41 P.L.R. 134=1939 Lah. 298. An appeal is merely a continuation of the proceedings within the meaning of sub-S. (2) of S. 179. Hence, if the original suit was pending at the commencement of Act of 1935, the Province cannot be impleaded as a respondent in appeal and the only respondent is therefore the Secretary of State within the meaning of sub-S. (2) of S. 179. 40 P.L.R. 927=178 I.C. 390=1938 Lah. 585. What

sub-S. (5) of S. 179 is concerned with is the person who is to be named as a defendant in suits of the description mentioned there, and not with any question of notice which has to be served before the suit can be maintained at all. S. 80 of the C.P. Code deals with that and its provisions have to be strictly complied with. Where a notice under S. 80 was sent to the Collector of Agra of a suit to recover an alleged excess charge collection from the plaintiff in respect of goods sent from Bombay to Agra it was held it was not a proper notice under S. 80 and that the suit should be dismissed on that ground alone. I.L.R. (1943) A. 223=206 I.C. 372=1943 F.L.J. 227=1943 A.L.J. 1=A.I.R. 1943 A. 158.

Sec. 200: Section explained.—The establishment of a Federal Court is an essential

Establishment and constitution of Federal Court. India and such number of other judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-five years:

Provided that—

(a) a judge may by resignation under his hand addressed to the Governor-General resign his office;

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(a) has been for at least five years a judge of a High Court in British India or in Federated State;

(b) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(c) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession:

Provided that—

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader; and

(ii) in relation to the Chief Justice of India, for the references in paragraphs (b) and (c) of this sub-section to ten years there shall be substituted references to fifteen years.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included.

element in a Federal Constitution. "It is at once the interpreter and guardian of the constitution and a tribunal for the determination of disputes between the constituent units of the Federation". (As to the jurisdiction of the Federal Court and the High Courts under the new Act, see articles in the Madras Law Journal, Vol. 69, December, 1935, Calcutta Weekly Notes, December, 1935, and January, 1936, Parts; Contemporary Law Review, November, 1935.)

Extracts from the Debates in Parliament (Solicitor-General.—Par. Deb. Vol. 300, No. 70, 134-135).—"It would be impossible to overstate the importance of the Federal Court in the development of the constitution. But when we are considering appointments to a Court, the first and chief

thing is not perhaps so much the minimum qualifications as the method of appointment. That is why it is proposed that the members of the Federal Court, including the Chief Justice, shall be appointed by His Majesty, which of course means on the advice of the Secretary of State and the Ministry in this country, who will be held responsible to this House for any advice they give. That in our view is really the important thing. Whatever qualifications you put in, unless the appointing authority takes the trouble to appoint the best men, then no minimum qualifications will avail at all. At the same time, we are impressed by what has been said as to the fact that this Federal Court will be dealing, almost exclusively with what may be called pure points of law, of great difficulty. \* \*"

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

201. The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

202. If the office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other Judges of the Court as the Governor-General may in his discretion appoint for the purpose. [See also 3 and 4 Geo. 6, Ch. 5, Sec. 5, *infra*.]

203. The Federal Court shall be a Court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint.

204. (1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other Court, have an original jurisdiction of jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to—

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concern some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that

Sec. 201.—As to salaries of Judges, see Order in Council.

Sec. 204.—The section refers to a dispute involving "any question (whether of law or fact) on which the existence or extent of a legal right depends."

Extracts from the Parliamentary Debates (Speech of the Solicitor-General).—"In drafting this clause we have followed the recommendation of the Joint Select Committee. We have passed clauses which specifically deal with the matter of suits

being brought against the Provinces or the Federation. But there are many cases to-day in India—and there will continue to be such cases when this becomes law—in which private individuals have rights against and can sue the Federation. It would be most oppressive and inconvenient if any litigant who had a claim against the Federation—and it might be quite a small claim—had to go up from the far end of India to the central place where the Federal Court will sit to prosecute his

State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.

205. (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

Appellate jurisdiction of Federal Court in appeals from High Courts in British India.

claim. It would be regarded as the greatest possible injustice in India, and indeed I think it would have manifold great inconveniences. It would seem quite unnecessary in what I may call ordinary cases. But, you may get cases where there is some question as to whether legislation is or is not ultra vires. We believe that the right and best procedure in that case is the procedure under the Bill. Let it go first to the local Court. Let it be sifted and dealt with there; and let it go from there to the Federal Court, which is after all, the final Court of appeal in some cases. \* \* \* As regards constitutional questions, the case "will be dealt with in the ordinary way, first by the local Court and if there is any doubt about it, and it seems a proper case for appeal, it will be taken on appeal to the Federal Court, which will have the advantage of having in this difficult matter the judgment of the first Court before it. For these reasons, we believe that the scheme of the Bill, under which original and exclusive jurisdiction is confined to disputes between units of the new constitution, is better than the scheme proposed by my Hon. and learned Friend". (Parl. Deb., Vol. 300, Part 70, 1st April, 1935, cols. 140-142.)

Per Sulaiman, J.—The term 'legal right' used in sec. 204 obviously means right recognised by law and capable of being enforced by the power of a State, but not necessarily in a Court of law. It is a right of a party recognised and protected by a rule of law, the violation of which would be a legal wrong done to his interest and respect for which is a legal duty, even though no action may actually lie. The mere fact that under the previous Act the Provincial Governments were subordinate administrations under the control of the Central Government and could only have made a representation to the Governor-General in Council or the Secretary of State, would not be sufficient in itself for holding that the former could not possibly possess any 'legal rights' at all against the Central Government, even in respect of rights conferred upon them by the provisions of the Act or the rules made

thereunder. If a 'legal right' existed under the old Act, sec. 204 of the new Act would not be inapplicable merely because the right related to an earlier period. 50 L.W. 209=2 Fed.L.J. 123=1939 F.C. 58=(1939) 2 M.L.J. (Supp.) 1. The United Provinces instituted in the Federal Court a suit against the Central Government represented by the Governor-General in Council for a declaration that sec. 106 (c) of the Cantonments Act (II of 1924) was ultra vires the then Indian Legislature, that all fines imposed and realised by Criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to the cantonment funds since 1924. Held, that the dispute with regard to the validity of sec. 106 (c) of the Cantonment Act involved a question on which the existence of a legal right depended, within the meaning of sec. 204 (1) of the Government of India Act, 1935, notwithstanding the fact that before the Act of 1935, the provinces could not have sued the Central Government in any Court of law, and the Federal Court had therefore jurisdiction to entertain the suit. (1939) 2 M.L.J. (Supp.) 1.

Sec. 205: "Substantial Question of Law".—[See notes under Civil Procedure Code, sec. 110, supra.] Sec. 205 deals with the appellate jurisdiction of the Federal Court in appeals from High Courts in British India. It is to be observed that an appeal will lie from any judgment, decree or final order of a High Court "if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder". [Cl. (1).] Appeals to the Privy Council are provided for by the Code of Civil Procedure, secs. 109-112.

Sec. 205 is explicit in its terms and what is required under it, so as to justify the grant of a certificate, is not merely a question affecting the interpretation of an order of an executive authority made under a statute of



the Legislature, but some question involving the powers of the Legislature itself under the Government of India Act in enacting a particular statute. The question as to whether a particular order or the act of a particular authority does or does not fall within a particular rule of the Defence of India Act is not a matter falling within the provision of sec. 205 of the Government of India Act. I.L.R. (1946) Kar. 65. Sec. 205, clearly contemplates that the certificate to appeal to the Federal Court should be granted at the time of the judgment and a duty is placed on the High Court to consider in every case whether or not a question of law as to the interpretation of the Act or any order in Council thereunder is involved and of its own motion to give or to withhold a certificate accordingly. Where no such question is involved and no argument is directed towards such a question, it is not the function of the High Court to give a certificate that no such question is involved. Where no question has been raised in that respect in arguments, it is not open to a party to apply for a certificate under the section long after the judgment on the ground that a question of the nature specified is involved. I.L.R. (1946) Kar. 65.

EXTRACTS FROM PARLIAMENTARY DEBATES (THE SOLICITOR-GENERAL).—"This Clause deals with the appellate jurisdiction of the Federal Court and provides that if in a case in the High Court it appears that a substantial question of law involving an interpretation either of this Act or any Order-in-Council made under it arises, there shall be a right of appeal to the Federal Court if the High Court certifies that such a question of law arises. The second part of the Clause says that a person can appeal on that ground once he has got his certificate. There may be other grounds in the case, and, if they are proper grounds for appeal, leave may be given."

\* \* The main purpose of the Clause is to ensure that appeals which involve questions of the interpretation of the Constitution shall go to a higher Court. Nothing in the Clause affects the right of appeal to the Privy Council in cases outside the clause. If cases fall within the clause, which involve matters of interpretation of the constitution, parties will have to go to the Federal Court. There is a further right of appeal from the Federal Court to the Privy Council in a later clause (Parl. Deb., 1st April, 1935, Vol. 300, part 70, p. 147). An application for a certificate under sec. 205 (on the ground that the question whether the legislature had power to requisition when the Land Acquisition Act, 1894, remained unrepealed, involved an interpretation of the Constitution Act, sec. 292) was rejected on the ground that no such question of interpretation was involved and even if it did involve such interpretation the question was not a substantial one. I.L.R. (1944) Mad. 826=57 L.W. 206=1944 F.L.J. 96=A.I.R. 1944 Mad. 288=(1944) 1 M.L.J. 263. It cannot be said that Ordinance 2 of 1942 was beyond the power of the Indian Legislature and the Governor-General's ordinance making authority, for the reason

that it affected the jurisdiction of the Federal Court in so far as it took away the appellate and revisional jurisdiction of the High Court. All that the Constitution Act declares about the jurisdiction of the Federal Court is that appeals shall lie to that Court from the decisions of the High Court, when certain points are involved therein. Such a provision does not admit of the interpretation that the jurisdiction of the High Court should never be affected by Indian legislation because the indirect effect thereof might be to affect the number, or classes of cases which might otherwise come up before the High Court and thus afford a possibility of their being carried on appeal to the Federal Court. Under the express terms of sec. 223, it is within the power of the Indian Legislature to alter the jurisdiction and powers of the High Court. 47 C.W.N. (F.R.) 41=I.L.R. (1943) Kar. (F. C.) 48=A.I.R. 1943 F.C. 36=(1943) 2 M.L.J. 207 (F.C.).

SEC. 205 (1): CONSTRUCTION—"JUDGMENT, DECREE OR FINAL ORDER"—MEANING—FEDERAL COURT—JURISDICTION IN CRIMINAL MATTERS.—Gwyer, C.J.—The Federal Court has jurisdiction in civil as well as in criminal matters. The words "judgment, decree or final order" ought to receive no narrow interpretation. 1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23. See also 6 Fed.L.J. 47=(1943) 2 M.L.J. 57 (F.C.). Sulaiman, J.—It may be assumed that the words "judgment or final order" in sec. 205 (1) of the Government of India Act apply to criminal cases as well, but an order of the High Court directing the re-hearing of a criminal appeal by the Sessions Court is not "judgment" within the meaning of the section. (1939) 2 M.L.J. (Supp.) 23. Varadachariar, J.—Sec. 205 of the Government of India Act, is not in terms limited to civil cases, and the word "judgment" is comprehensive enough to include a judgment pronounced in a criminal case. I. L.R. (1940) Lah. 400=50 L.W. 95=43 C. W.N. (F.C.R.) 50=2 Fed.L.J. 153=1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23. See also 20 Pat.L.T. 473=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45. See also I.L.R. (1943) 2 Cal. 1=(1943) 2 M.L.J. 207.

CERTIFICATE—WHEN TO BE GRANTED.—As the certificate under sec. 205 is a part of the judgment, it should be given at the time when the appeal is decided by the High Court. 1942 O.A. 533=1943 Oudh 45=1942 O.W. N. 654. See also 1946 N.L.J. 36; I.L.R. (1946) Kar. 65.

CERTIFICATE WHEN CAN BE GIVEN.—According to sec. 205 (1) a certificate can be given only when a substantial question of law as to the interpretation of the Government of India Act, 1915, or any order in council made thereunder is involved. 1940 A.W.R. (C.C.) 250=1940 O.W.N. 494=1940 Oudh 382=15 Luck. 740. Where the High Court refuses to interfere under sec. 115, C. P. Code and sec. 224 of the Government of India Act, with the order of a trial Court, refusing to decide the question of jurisdiction, as a preliminary issue it is not a fit case to be certified under the Government of India Act as no



question of interpretation of sec. 224 was involved. It is not the function of the High Court under sec. 224 to interfere with judicial orders of the Subordinate Courts. 1938 A.L.J. 911=1938 A.W.R. (H.C.) 624=1938 All. 639. See also 18 Luck. 657; 18 Luck. 672.

A certificate under sec. 205 can be given only when a substantial question of law as to the interpretation of the Government of India Act, 1935 or any order in council made thereunder is involved. It was held that the question whether the Defence of India Act (1939) and the rules made under it are *ultra vires* the present Indian Legislature had already been finally decided by the Federal Court in the negative and that hence such a question of law is not a ground for granting a certificate. 1942 A.W.R. (C.C.) 346 (1)=1942 O.A. 533=1942 O.W.N. 654=1943 Oudh 45.

No appeal lies to the Federal Court in the absence of the certificate prescribed in sec. 205, and the refusal of a High Court to grant a certificate cannot be questioned by the Federal Court, nor can the reasons which prompted the refusal be investigated by it. The jurisdiction of the Federal Court is limited by statute and cannot be extended by a High Court acting even perversely or maliciously in withholding the certificate. The Court cannot do indirectly what it cannot do directly. I.L.R. (1942) Lah. 712=I.L.R. (1941) Kar. (F.C.) 176=46 C.W.N. (F.R.) 7=75 C.L.J. 153=55 L.W. 3=4 F.L.J. 33=A.I.R. 1942 F. C. 1=(1942) 1 M.L.J. 74 (F.C.).

In an appeal under sec. 205, the Federal Court held that the plaintiff was entitled to a declaration that he had not been effectively dismissed from his office, and remanded the case to be tried on the merits. On remand the trial Court passed a decree for arrears of pay and gave certain directions as to payment of costs, Court-fee, etc. This decree was confirmed by the Judicial Commissioner's Court with some modifications in the plaintiff's favour. The plaintiff, being dissatisfied with the decree passed by the Judicial Commissioner's Court, filed an application under O. XLIII of the Federal Court Rules praying that in exercise of the inherent powers of the Federal Court the decree of the Judicial Commissioner's Court should be varied in certain particulars. Held that the appeal preferred under sec. 205 had been finally disposed of so far as the Federal Court was concerned and any complaint against the decree passed by the Judicial Commissioner's Court after the remand could be entertained by the Federal Court only on an independent appeal under sec. 205, and such an appeal must satisfy the requirements of that section. In the absence of that certificate under that section, the Federal Court had no jurisdiction to entertain the application. When the Federal Court is properly seized of an appeal on a certificate granted under sec. 205, it will also have jurisdiction to deal with other questions arising

in the case; and in dealing with an appeal properly before it, it may have certain inherent powers. But before these powers can be exercised there must be an appeal validly instituted before it. 1942 F.L.J. 99=A.I.R. 1942 F.C. 47=(1942) 2 M.L.J. 794=55 L.W. 205. Where there is no substantial question of law as to the interpretation of the Government of India Act or any orders in Council made thereunder involved, leave to appeal to Federal Court under sec. 205 (1) cannot be granted. 1943 O.W.N. 152=A.I.R. 1943 Oudh 314. Under sec. 205, a certificate can be granted only if the case involves a substantial question of law as to the interpretation of the Act. The High Court cannot evolve such question by importing into the case hypothetical considerations. The question whether there was or was not an emergency to justify the promulgation of an ordinance is not justiciable. 1946 N.L.J. 36. Sec. 205 (1), read with O. 17, r. 1 of the Federal Court Rules, indicates that the certificate under sec. 205 should be contemporaneous with the passing of the final order. The intention of the section manifestly is to leave the matter of granting or withholding a certificate entirely to the initiative of the High Court. It is on the giving of a certificate by the High Court that the Federal Court gets jurisdiction to entertain the appeal. So, that is a matter entirely between the High Court and the Federal Court and no third party has any right to invite the High Court to give or withhold a certificate. It follows that an application for a certificate sometime after the disposal of the case is beyond the scope of the section. 1946 N.L.J. 36. See also (1942) 1 M.L.J. 71. Under sec. 205, a certificate cannot be granted when the material question of law was neither raised in the case nor decided by the High Court. 1946 N.L.J. 36. Where a question involving the interpretation of the Government of India Act is not raised or decided in the proceedings in the High Court, no certificate under sec. 205 of the Act can be granted on an application made therefor subsequent to the disposal of the case or proceedings. It is not possible for the High Court of its own motion to give or withhold a certificate such as is referred to in the section. 6 F.L.J. (H.C.) 38=56 L.W. 236=A.I.R. 1943 Mad. 481=(1943) 1 M.L.J. 314. See also 1943 Oudh 41=1943 O.W.N. 709; 1946 N.L.J. 36. Where all that was contended was that the Ordinance in question was inconsistent with the Letters Patent and, no question of law as to the interpretation of any provision of the Constitution Act was raised, the case will not fall within the purview of sec. 205. 1944 A.L.J. 419=A.I.R. 1944 All. 257 (F.B.). Under the Government of India Act, the order of the single Judge who disposed of the case is the order of the High Court; he alone could grant the certificate and the order could not be varied by a bench of two judges in appeal. I.L.R. (1945) Mad. 623=(1944) F.L.J. 278=58 L.W. 87 (2)=A.I.R. 1945 Mad. 156=(1945) 1 M.L.J. 47. See also (1944) 1 M.L.J. 510.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

SEC. 205 (2): CONSTRUCTION—RIGHT OF APPEAL UNEER.—The wording of sub-sec. (2) of sec. 205, must be taken to indicate that the legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act. I.L.R. (1941 Bom. 401=4 F.L.J. (H.C.) 344=43 Bom.L.R. 496=1941 Bom. 245 (F.B.). If any case is properly heard by a single Judge of a High Court and if in that case is involved a substantial question of law as to the interpretation of the Constitution Act or any order in council made thereunder and if there is a judgment, decree, or final order given or made by that Judge, a certificate under sec. 205 (1) not only may but should be granted. Thereupon an appeal will be opened direct to the Federal Court subject to the provisions of sub-sec. 2 of sec. 205 and the Federal Court is entitled, if not bound, to entertain it. It is difficult to read out of sec. 205, or any other section of the Constitution Act, any power or discretion in the Federal Court to refuse to hear a case in which a certificate has been granted or put an appellant on terms that his right of appeal to the Divisional Bench should first be exercised and it is doubtful whether the Federal Court has any such power or discretion. I.L.R. (1944) Nag. 614=1944 A.L.J. 265=(1944) F.L.J. 178=A.I.R. 1944 F.C. 62=(1944) 1 M.L.J. 510 F.C. See also (1945) 1 M.L.J. 37.

"INVOLVES A SUBSTANTIAL QUESTION OF LAW, ETC"—MEANING OF.—It cannot be said that a case involves a substantial question of law as to the interpretation of the Act under when the actual decision does not determine any such question, but in certain events, such a question might arise in the Federal Court. The mere possibility of some such question of law arising in a remote contingency cannot be enough to justify the granting of a certificate. When a man has been acquitted by two Courts in criminal case, the High Court, before giving leave to appeal against his acquittal to a third Court, must find a clear indication in the statute that it is its duty to give such leave. I.L.R. (1941) Bom. 401=4 F.L.J. (H.C.) 344=43 Bom.L.R. 496=1941 Bom. 245 (F.B.). The test to be applied to see whether the question in a case involves a substantial question of law or not is not merely the importance of the question but its importance to the case itself. If the fate of the case depends upon a consideration of that point, it will be deemed to be 'involved'. If, on the other hand, there is only a remote contingency of its being taken into consideration, it will not answer that test. 1944 F.L.J. 261=A.I.R. 1944 All. 273 (F.B.). An order by a single Judge of the High Court dismissing a Civil Revision Petition is a final order, and when the Judge has passed a final judgment and certified that a substantial question of law

as to the interpretation of the Government of India Act is involved under sec. 205 (1) of the Act, an appeal to the Federal Court is competent and must be admitted. 52 L.W. 240=1940 M.W.N. 849=1940 Mad. 890=(1940) 2 M.L.J. 170. See also (1946) 1 M.L.J. 145. An order made by the High Court under sec. 433, Cr. P. Code, merely answering a question raised by a Presidency magistrate in a reference under sec. 432, Cr. P. Code, and expressing opinion on a point of law, is not a final order within the meaning of sec. 205 of the Government of India Act, against which a right of appeal to the Federal Court can be claimed. I.L.R. (1941) Bom. 401=4 F.L.J. (H.C.) 344=43 Bom.L.R. 496=1941 Bom. 245 (F.B.); I.L.R. (1939) 2 Cal. 411=69 C.L.J. 599=43 C.W.N. 950=1939 Cal. 529 (S.B.). The notification or order of the Foreign Political Department of the Government of India, No. 34-1, B, dated 14-1-1937, cannot be regarded as an order made under the Government of India Act 1935. The construction of the said order, cannot be said to be a substantial point of law as to the interpretation of the Act or of any order in Council made under the Act, within the meaning of sec. 205 (1) of the Act, so as to justify the grant of a certificate by the High Court, though the case, as such, might involve a difficult and substantial point of law in general. 1939 P.W.N. 858=21 Pat. L.T. 252=1940 Pat. 109. Per Sulaiman, J.—The word 'judgment' does not include every order. Similarly, decree must involve a determination of the rights of the parties. The order of the High Court dismissing the appeal from the lower Court's order refusing to fix the valuation or to specify a portion of the mortgaged property in the proclamation of sale is neither a judgment, decree nor a final order within the meaning of sec. 205 (1) of the Act, No appeal therefore lies to the Federal Court. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 193=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.

JURISDICTION OF FEDERAL COURT—CERTIFICATE OF HIGH COURT.—IF CONDITION PRECEDENT.—The certificate of the High Court that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder is a condition precedent to the exercise of jurisdiction by the Federal Court, although if the certificate has once been given, the case is at large and the applicant is not necessarily restricted in arguing his appeal to what may be called the constitutional issue. But until the certificate has been granted, the Federal Court cannot entertain the case at all. 1938 O.W.N. 1251=1938 F.C. 1.

CERTIFICATION—DUTY OF HIGH COURT—NATURE OF.—It is a well settled general rule that "an absolute enactment must be obeyed

or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." It is sufficient if the plain object of the directory provision is carried out. The duty imposed by sec. 205 on the High Court to consider in every case decided by it and to certify or withhold certification that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council passed under it is only directory as distinguished from being absolute or mandatory and arises only in a case where there is reasonable ground for thinking that the question of law as to interpretation mentioned in sec. 205 may be involved. I.L.R. 1940 Lah. 685=67 I.A. 464=(1941) 1 M.L.J. 130=52 L.W. 926=1940 P.C. 230 (P.C.)

**EFFECT OF THE ABSENCE OF CERTIFICATE.**—Sec. 205, imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order the giving or withholding of the certificate. On such determination, the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate should be recorded, not only for the information of the parties but also for the certification of the Judicial Committee of the Privy Council and the Federal Court as to their jurisdiction to entertain an appeal. 67 I.A. 64=I.L.R. (1940) 1 Cal. 286=1940 A.L.J. 60=51 L.W. 93=44 C.W.N. 317=42 Bom.L.R. 315=1940 P.C. 16=(1940) 1 M.L.J. 64 (P.C.). When the question is one of a discretion of the High Court, the Federal Court will not in appeal interfere with the way in which the discretion was exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law; and if there is no legal objection to the way in which discretion has or has not been exercised by the High Court, the Federal Court would not in appeal substitute its own discretion to that of the High Court. 3 F.L.J. 46=44 C.W.N. (F.R.) 21=72 C.L.J. 165=1940 F.C. 20=(1940) 1 M.L.J. (Supp.) 14. No appeal lies to the Federal Court in the absence of the certificate prescribed in sec. 205 of the Government of India Act, and the refusal of a High Court to grant a certificate cannot be questioned by the Federal Court, nor can the reasons which prompted the refusal be investigated by it. Even when the refusal of the certificate is alleged to be perverse and malicious and inspired by wicked or improper motives and assuming that the High Court has, by refusing to grant a certificate, deliberately deprived the Federal Court of a jurisdiction which Parliament has entrusted to it, and is therefore guilty of a contempt of the Federal Court, the Federal Court has no jurisdiction to interfere. The jurisdiction of the Federal Court is limited by statute and cannot be extended by a High Court acting even perversely or maliciously in withholding the certificate. The Court cannot do indirectly what it cannot do directly.

The Federal Court cannot assent to the proposition that proceedings by way of contempt can ever be the appropriate remedy against a High Court even if it has acted perversely or maliciously. 55 L.W. 3=4 F.L.J. 33=(1942) 1 M.L.J. 74 (F.C.). A certificate under sec. 205, is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate it is not for the Federal Court to enquire into the reasons for the refusal, against which no appeal lies to that Court. 185 I.C. 801=71 C.L.J. 108=44 C.W.N. (F.R.) 17=3 Fed.L.J. (P.I.) 12=1940 F.C. 4. Where the High Court has refused to grant a certificate under sec. 205 (1) the Federal Court has no inherent jurisdiction to grant special leave to appeal. The Federal Court being a statutory Court, its jurisdiction must be collected from the terms of the statute which created it and there is nothing in the statute which gives the Court power to entertain an application for special leave to appeal. 49 L.W. 570=20 Pat.L.T. 263=1939 P.W.N. 203=2 Fed.L.J. 121=1939 F.C. 42. Though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes, there is no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts. The concluding words of sec. 205 (1) which impose a duty on every High Court to consider in each case whether or not a substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder is involved, "and of its own motion to give or to withhold a certificate accordingly" may reasonably be construed as giving the High Court the last word in the matter, so far as this section is concerned; and as there is no statutory powers of revision or superintendence possessed by the Federal Court like those possessed by the High Court under sec. 224, Government of India Act or sec. 115, C. P. Code, the Federal Court cannot entertain in exercise of its inherent power, an application for revision of an order of a High Court refusing to grant a certificate under sec. 205 (1). 1938 O.W.N. 1251=1938 F.C. 1. A litigant who, apart from sec. 205, would have a right of appeal to the Privy Council, is not deprived of that right by the refusal of the High Court to grant a certificate. Sec. 205 (2) only applies where a certificate is given and has no application to a case where it has been refused. 1938 O.W.N. 1251=1938 F.C. 1. The object of sec. 205 is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word "direct" is used because sec. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council; sec. 205 does not provide for a case where no certificate is given,

206. (1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act, an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall

lie under any such Act unless—

however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law specified in sec. 205 could by any reasonable possibility arise. There is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The failure of the High Court to certify or withhold certification may be "blamable" but third parties have nothing to do with that. Where in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other. 67 I. A. 464=52 L.W. 926=(1941) 1 M. L. J. 130=1940 P.C. 230 (P.C.).

**HABEAS CORPUS APPLICATION.**—Where a detainee, whose application for a writ of *habeas corpus* is finally dismissed by the High Court, is subsequently released by the Government, an appeal preferred by him against the order of dismissal will not be entertained by the Federal Court. I. L. R. (1944) Kar. (F.C.) 2=57 L.W. 212 (2)=(1944) F.L.J. 12=A.I.R. 1944 F.C. 24 (1)=(1944) 1 M.L.J. 177 (F.C.). The condition of the law of *habeas corpus* in India, and the purpose and express words of sec. 205 afford a contrast to the condition of English law and the object and general terms of sec. 19 of the Judicature Act of 1873. Sec. 205, Government of India Act, 1935, relates to both civil and criminal jurisdiction of the High Court. The purpose of the provision is to confer a right of appeal in every case that involves a substantial question of law as to the interpretation of the Act or any order in council made thereunder. In the absence of an express exception of *habeas corpus* cases, and having in view the terms and purposes of sec. 205, Government of India Act, 1935, its terms cannot be limited by mere construction so as to exclude cases of *habeas corpus* applications under sec. 491, Cr. P. Code, on behalf of persons detained under r. 26 of the Defence of India Rules. Sec. 205 thus provides one of the exceptions referred to in sec. 404, Cr. P. Code. Hence in such cases an appeal from the High Court to the Federal Court would be competent when a certificate is granted, and it follows that an appeal to His Majesty in Council from an order made by the Federal Court in appeal would also be competent. 1945 F.L. J. 222=50 C.W.N. 25=1945 M.W.N. 546

=A.I.R. 1945 P.C. 156=(1945) 2 M.L.J. 325 (P.C.). See also (1944) 1 M.L.J. 155 (P.C.).

**CASE INVOLVING VALIDITY OF CERTAIN ACT—ACT SUBSEQUENTLY REPEALED AND RE-ENACTED—CERTIFICATE DOES NOT BECOME INFECTUOUS—JURISDICTION OF FEDERAL COURT TO HEAR OTHER GROUND EXISTING.**—72 C.L. J. 174=1940 F.C. 7=(1939) 1 M.L.J. 23. Held, (i) that the certificate did not become void and inoperative owing to the fact that, after the granting of the certificate, the Act of 1938, had been repealed and replaced by a new Act, and the appellant was, therefore, entitled to maintain the appeal; (ii) that, in the circumstances, the appellant could not be tied down to the grounds mentioned in his application to the High Court for admitting the appeal; in any event the Federal Court had ample power to grant leave for taking such a ground under sec. 205 (2) of the Constitution Act; (iii) that the appellant was entitled to the benefit of the Act of 1939 even though it was passed only after the decision of the High Court. 71 C.L.J. 557=44 C.W. N. (F.R.) 1=3 F.L.J. 27=1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1. The High Court has no power either under sec. 152, C. P. Code, or in the exercise of inherent powers, to vacate or alter a certificate which was correct at the time when it was made or given because of the happening of some subsequent event. 52 L.W. 127=44 C.W.N. (F.R.) 18=72 C.L.J. 174=3 F.L.J. 58=1940 F.C. 7=(1940) 1 M.L.J. (Supp.) 23.

**SEC. 206: ENLARGEMENT OF APPELLATE JURISDICTION.**—By sec. 206 of the Act power is given to the Federal Legislature, where the sanction of the Governor-General for the introduction of the measure has been obtained, to provide by Act that, in such civil cases as may be specified therein, an appeal shall lie to the Federal Court from a judgment, decree, or final order of a High Court in British India without any certificate. No appeal, however, is to lie under any such Act unless—(a) the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or (b) the Federal Court gives special leave to appeal. If the Federal Legislature thus enlarges the appellate jurisdiction of the Federal Court consequential provision may also be made for the abolition in whole or in part of direct appellate jurisdiction of the Federal Court to the Privy Council, either with or without special leave. The provision

(a) the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum, not less than fifteen thousand rupees, as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(b) the Federal Court gives special leave to appeal.

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding sub-section, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

207. (1) An appeal shall lie to the Federal Court from a High Court in a

for the enlargement of the appellate jurisdiction of the Federal Court takes the place of the proposal contained in the White Paper for the establishment of a separate Supreme Court to hear appeals from the Provincial High Courts. The Joint Select Committee were not for the adoption of this proposal. They said: "A Supreme Court of this kind, would be independent of, and, in no sense, subordinate to the Federal Court; but it would be impossible to avoid a certain overlapping of jurisdiction, owing to the difficulty of determining in particular cases whether or not a constitutional issue was raised by a case under appeal. This might involve the two Courts in undignified and very undesirable disputes". In the event of the appellate jurisdiction of the Federal Court being enlarged, the Joint Select Committee assumed that the Court would sit in two Chambers, the first dealing with federal cases and the second with appeals from the High Courts. Sec. 214 accordingly enacts that, if the Federal Legislature makes provision for enlarging the appellate jurisdiction of the Court, the rules shall provide for "the constitution of a special division of the Court for the purpose of deciding all cases which would have been within the jurisdiction of the Court even if its jurisdiction had not been so enlarged". (Sec. 214, *infra*.)

EXTRACTS FROM THE PARLIAMENTARY DEBATES (THE SOLICITOR-GENERAL).—"The right of appeal from one Court to another is not a privilege which the rich always particularly value. The amounts, which are only rough and ready, are a measure of the importance of the case. The figures are arbitrary, but the idea of an amount as a criterion for the right of appeal already exists in respect of appeals in India, and we think that these figures are the proper figures to put in the clause".\* \* If a case involves a large sum of money it is obviously a case of importance to litigants. It is also true to say that cases which involve only small sums of money are much better settled in one Court without two or more rights of appeal. That is in the interest of all. It is better to have justice promptly administered in one

Court rather than to be dragged from one Court to another. I do not think anybody need be shocked at the fact that a sum of money is in issue as a convenient, rough-and-ready test. If there is any case involving special circumstances, it would be one in which the Courts in the exercise of their discretion would allow an appeal under paragraph (b). With regard to sub-sec. (2), the Federal Legislature can give a right of appeal in certain classes of cases from the High Court to the Federal Court. Obviously, if you do that, you cannot have a double right of appeal. One party cannot be going to the Federal Court and also to the Privy Council in the same class of case. The right of appeal to the Privy Council is safeguarded to this extent, that "an appeal may be brought to His Majesty in Council from a decision of the Federal Court by leave of the Federal Court or of His Majesty in Council". (Sec. 208.) At present in certain classes of cases there is an appeal as of right from the High Court. That appeal would be to the Federal Court, and the further appeal from the Federal Court to the Privy Council would be by leave either of the Federal Court itself or of the Privy Council. (Parl. Deb., 1st April, 1935, Vol. 300, Part 70, pp. 149-151.)

Sec. 207.—Under this section an appeal will lie to the Federal Court from a High Court in a Federated State by way of special case to be stated for the opinion of the Federal Court on the ground that a question of law has been wrongly decided. Such question must be one which—

(i) concerns the interpretation of the Act or of an Order in Council made thereunder; or

(ii) concerns the extent of the legislative or executive authority vested in the Federation by virtue of the instrument of accession of that State; or

(iii) arises under an agreement made under Part VI of the Act [Part VI deals with administrative relations between Federation, Provinces and States] in relation to the Administration in that State of a law of the Federal Legislature.

Appellate jurisdiction of Federal Court in appeals from High Courts in Federated States.

Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation

by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature.

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.

Appeals to His Majesty in Council.

208. An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

(a) from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of any State, or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature, without leave; and

(b) in any other case, by leave of the Federal Court or of His Majesty in Council.

SEC. 208.—SEC. 110 preserves the prerogative right of the Crown to grant special leave to appeal from any Court. But the Select Committee said: "We may perhaps point out, that the jurisdiction of the Privy Council in relation to the States will be based upon the voluntary act of the Rulers themselves, i.e., their instrument of accession". "Their Lordships do not generally advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominions, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character". See also *Clerique v. Murray*, (1903) A.C. 521; 47 B. 724 (P. C.).

SEC. 208 (b): LEAVE TO APPEAL TO PRIVY COUNCIL—GRANTING OF—PRINCIPLE.—The Federal Court will not be disposed to grant leave to appeal to the Privy Council, save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved. Leave to appeal was refused in a case where the decision of the Court dealt only with the scaling down of decrees obtained before the Madras Agriculturists' Relief Act came into force, on the ground that the number of such decrees must necessarily be small and that there could be no addition to their number. 73 C.L.J. 429=54 L.W. 61=45 C.W.N. (F.R.) 96=4 F.L.J. 16=1941 F.C. 69=(1941) 2 M.L.J. 33. When dealing with an application for

leave to appeal to the Privy Council, the Federal Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined. The Federal Court held that it was unable to hold that there was room for such serious doubt on the point as to whether sec. 292 of the Constitution Act, deprived the Legislatures in India of the power to legislate with retrospective effect as to justify it, in holding that that was a substantial question on which leave to appeal to Privy Council was to be granted. The Court further held that it could not be said that any decision to be obtained from their Lordships of the Privy Council if this appeal was to be permitted to go to them, was likely to have a material bearing upon the future litigation. 73 C.L.J. 431=45 C.W.N. (F.R.) 90=1941 F.C. 70. Unless special circumstances are shown which would justify the grant of leave to appeal to the Privy Council, the Federal Court will not ordinarily grant such leave. 1939 O.L.R. 416=2 Fed.L.J. 206=1939 M.W.N. 616. See also 71 C.L.J. 390. Since the primary responsibility for determining constitutional cases lies upon the Federal Court, it ought not without grave reason grant under sec. 208 (b) leave to appeal to Privy Council against its decision. It will treat each case on its own merits and will grant leave sparingly and only in exceptional cases. Even if, therefore, a decision affects a large number of persons and substantial interests, and also involves important questions of law, this does not by itself justify the granting of leave. The Federal Court is the first Court sitting on Indian soil whose jurisdiction, although limited, extends to the whole



209. (1) The Federal Court shall, where it allows an appeal, remit the Form of judgment on case to the Court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against, and the Court from which the appeal was brought shall give effect to the decision of the Federal Court.

(2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court, it shall, as soon as the amount of the costs to be paid is ascertained, transmit its order for the payment of that sum to the Court from which the appeal was brought and that Court shall give effect to the order.

(3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly.

of British India. Its establishment marked a new stage in India's constitutional evolution; and the evolution of Indian political thought after its inception has served only to increase and emphasize the significance of its authority. It is not subordinate to any other Court; and this conception of its status was present in the minds of those who framed the Indian Constitution Act of 1935, when they gave to the Court itself the right to say whether it would permit any cases which came before it on appeal to be reviewed elsewhere. The ancient prerogative right of His Majesty to grant special leave to appeal, though it has now been made statutory by sec. 208 (b), does not affect this aspect of the matter. 55 L.W. 829=1942 F.L.J. 95=A.I.R. 1942 F.C. 48=(1942) 2 M.L.J. 797=47 C.W.N. (F.R.) 1. Where a litigation involves no only a question as to the interpretation of the Constitution Act, but broader questions which bear on a controversy which has long been agitated in the Courts in India, namely, the nature and extent of the rights secured to taluqdars by the Oudh Settlement and the extent of the immunity thereby secured to them from legislative interference and the decision of the question by the Privy Council affects pecuniary interests of a very large value and the number of people vitally interested in it is also very large and it is inevitable that the controversy must arise again and every time that the legislatures in India attempt to deal with the rights of landholder and tenant of the Indian Provinces, leave to appeal to the Privy Council should be granted. I.L.R. (1944) Kar. (F.C.) 3=1944 F.L.J. 10=57 L.W. 178=48 C.W.N. (F.R.) 65=A.I.R. 1944 F.C. 23=(1944) 1 M.L.J. 154 (F.C.). See also 22 Pat. 1 (F.C.). Where a detainee's application for *habeas corpus* is dismissed, but subsequently he is released by the Government on their own initiative in spite of the dismissal of the *habeas corpus* application it must be held that there is no longer any pending matter in which leave can be granted to appeal to His Majesty in Council. I.L.R. (1944) Kar. (F.C.) 1=(1944) F.L.J. 11=57 L.W. 212 (1)=A.I.R. 1944 F.C. 22=(1944) 1 M.L.J. 155

(F.C.).

SEC. 209: REMISSION OF CASE TO HIGH COURT—POWERS OF FEDERAL COURT.—The Federal Court in the exercise of its appellate jurisdiction can remit under secs. 205 and 209 (1) a case to the High Court with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order which recognizes the state of the law which comes into force while the appeal to Federal Court is pending, without discussing the law as it existed at the time when the High Court had seisin of the case. 2 F.L.J. 183=43 C.W.N. (F.C.R.) 193=1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45. The form of the order to be passed by the Federal Court in cases decided by it under sec. 209 (1) must necessarily vary according to the circumstances and requirements of each case. The use of the word "shall" in sec. 209 (1) cannot reasonably be construed to mean that in every case the Federal Court is under an obligation to declare the judgment, decree or order which is to be substituted for the judgment decree or order appealed against. It will not be practicable for the High Court in every case coming before it to make a declaration which can straightaway be embodied by the High Court whose order is under appeal, in an executable decree. The provisions of sec. 209 (1) are only directory, and the plain object of the section should be carried out in cases in which this could reasonably or conveniently be done and it could not have been intended to impose an obligation on the Court to do so even when this could not be done. To construe the concluding words of sec. 209 (1) as placing the High Court merely in the position of an executing Court is to put an unnecessarily narrow interpretation on the words used. It was no doubt intended that the Federal Court should make a declaration and not itself pass an executable decree. But it does not follow that the High Court had only the status of an executing Court in respect of all matters heard on appeal by the Federal Court. When the Federal Court frames its order in such terms as the circumstances of the case warrant and send the case.



Enforcement of decrees and orders of Federal Court and orders as to discovery etc.

210. (1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court.

(2) The Federal Court shall, as respects British India and the Federated States, have power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of Court, which any High Court in British India has power to make as respects the territory within its jurisdiction, and any such orders, and any orders of the Federal Court as to the costs of and incidental to any proceedings therein, shall be enforceable by all Courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest Court exercising civil or criminal jurisdiction, as the case may be, in that part.

(3) Nothing in this section—

(a) shall apply to any such order with respect to costs as is mentioned in sub-section (2) of the last preceding section; or

(b) shall, as regards a Federated State, apply in relation to any jurisdiction exercisable by the Federal Court by reason only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Federal Court.

211. Where in any case the Federal Court require a special case to be stated or re-stated by, or remit a case to, or order a

Letters of request to Federated States.

stay of execution in a case from, a High Court in a Federated State, or require the aid of the civil or judicial authorities in a Federated State, the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State, and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.

212. The law declared by the Federal Court and by any judgment of the

Law declared by Federal Court and Privy Council to be binding on all Courts.

Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts in British India, and, so far as respects the application and interpretation of this Act or any Order in

Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federal State.

back to the High Court, it is for the High Court to adopt the course it seems most convenient in the circumstances of the case in the light of the observations made by the Federal Court. 6 F.L.J. 73=48 C.W.N. (F.R.) 32=A.I.R. 1943 F.C. 72 (F.C.).

SECS. 210 AND 212.—Where the Federal Court allows an appeal it is to remit the case to the Court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against. The Court from which the appeal was brought is to give effect to the decision of the Federal Court. Under sec. 210 all authorities civil and judicial, throughout the Federation are to act in aid of the Federal Court. [cl. (1).] Sec. 212 provides that the law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on all Courts in British India. It is also to be binding in any Federated State so

far as respects the application and interpretation of this Act or any other Order in Council thereunder or any other matter with respect to which the Federal Legislature has power to make laws in relation to the State.

SEC. 210 (2): SCOPE AND EFFECT OF—JURISDICTION OF FEDERAL COURT IN CONTEMPT.—Sec. 210 (2) confers powers, not jurisdiction; and unless in any given case the Court has jurisdiction, it has no powers to exercise. The Federal Court as Court of record has all the powers belonging to such a Court including the power to punish for contempt of itself; and sec. 210 (2) does no more than give it the same machinery for making that power effective as the High Court themselves possess. 4 F.L.J. 33=55 L.W. 3=1942 M.W.N. 48=(1942) 1 M.L.J. 74 (F.C.)=I.L.R. (1942) Lah. 712.

SEC. 212: SECTION EXPLAINED.—What this section says first is "that the law declared by the Federal Court and by any judgment of the Privy Council shall so far

213. (1) If at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that Court for consideration, and the Court may, after such hearing as they think fit, report to the Governor-General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open Court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

as applicable be recognised as binding on and shall be followed by all Courts in British India". This is an obvious and necessary provision, because these are superior Courts and their decisions must be followed and recognised by lower Courts. So far as the Indian States are concerned it provides that any decision of the Federal Court and the Privy Council, "so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State".—In those cases the decision shall be recognised as binding and followed by the Courts of the Federated State. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 209, Speech of the Solicitor-General.)

SEC. 213: SECTION EXPLAINED.—"This section deals simply with the power of the Governor-General to refer any question of law, on which he thinks it desirable to obtain the opinion of the Federal Court, to that Court for a decision. There is an analogous power in a well-known section of the Privy Council Act." Parl. Deb., Vol. 300, No. 71, 2nd April, 1935 Cols. 213-214, speech of the Attorney-General. See sec. 4 of the Judicial Committee Act, 1833.) In certain circumstances "may" and "shall" are interchangeable expressions. "May" in this position means "shall" having regard to consideration that you cannot compel a court to answer a question, although no doubt they will regard it as their duty to answer it having regard to the powers that are conferred on them. (*Ibid.*) This advisory jurisdiction of the Federal Court is analogous to that possessed by the Privy Council under sec. 4 of the Judicial Committee Act, 1833, which provides that His Majesty may refer to the Committee for their opinion any matters whatsoever as His Majesty may think fit, and that the Committee shall thereupon hear and consider the same, and shall advise His Majesty thereon. Procedure under the Judicial Committee Act, 1833, differs from that under sec. 213 of this Act in one respect—dissenting judgments are not delivered in the Privy Council. In allowing expression of dissent the Federal Court follows the practice of the International Court at the Hague. As to the practice and desir-

ability of Courts giving opinions in advance of actual litigation between parties see "Judicial Precedents or a Study in Case-law" published by the M.L.J. Office, Chapter XVI, pp. 71-75.

SEC. 213: REFERENCE UNDER—ONUS—CASE, ANSWER AND REJOINDER—PROCEDURE.—Where a special reference under sec. 213 relates to an Act of a Provincial Legislature and the Advocate-General of India challenges its validity on behalf of the Governor-General of India, the onus is on him in the first instance to state the facts and arguments and authorities showing that the Act or any provisions thereof is or are *ultra vires* of the Provincial Legislature concerned. It would then be for the Advocate-General of that Province to file his case stating any further facts which may be considered necessary and meeting the arguments of the Advocate-General of India and citing the authorities upon which he proposes to rely at the hearing. The position would be reversed if a Province were challenging the validity of an Act of the Central Legislature. The question whether there should be any rejoinder by the party challenging the validity of the Act must be considered after the opposite party has filed his case. 1938 P.W. N° 609=1 Fed.L.J. R. 1.

Per Spens, C.J. and Vardachariar, J.—It is not for the Court to insist on the inexpediency of the advisory jurisdiction conferred under sec. 213 of the Act. The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection to the reference. It would no doubt make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under sec. 104 and a draft bill to be introduced to carry out the proposals. A perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section—and this is particularly so in cases of ambiguity. (1944) 2 M.L.J. 234=A.I.R. 1944 F.C. 73=1944 F.L.J. 215.

Per Zafrulla Khan, J.—Sec. 213 does not make it obligatory upon the Court to arrive at a determination of the questions referred to it. Though the procedure in regard to the

**214.** (1) The Federal Court may, from time to time, with the approval of the Governor-General in his discretion, make rules of

Rules of Court, etc.

Court for regulating generally the practice and procedure of the Court, including rules as to the persons practising before the Court, as to the time within which appeals to the Court are to be entered, as to the costs of and incidental to any proceedings in the Court, and as to the fees to be charged in respect of proceedings therein, and it particular may make rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay.

(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose, so however that no case shall be decided by less than three judges:

Provided that, if the Federal Legislature make such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Court, the rule shall provide for the constitution of a special division of the Court for the purpose of deciding all cases which would have been within the jurisdiction of the Court even if its jurisdiction had not been so enlarged.

(3) Subject to the provisions of any rules of Court, the Chief Justice of India shall determine what judges are to constitute any division of the Court and what judges are to sit for any purpose.

(4) No judgment shall be delivered by the Federal Court save in open Court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.

(5) All proceedings in the Federal Court shall be in the English language.

**215.** The Federal Legislature may make provision by Act for conferring

Ancillary powers of Federal Court.

upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Act.

reference to the Federal Court has, as far as possible, been approximated to a judicial hearing and determination of the questions referred, the advisory opinion is not in the nature of a judicial pronouncement appealable to His Majesty in Council. Nor is it binding upon the Governor-General, whether advisory opinion could be regarded as "law declared by the Federal Court," so as to be recognised as binding on Courts in British India appears to be open to serious doubt. Whenever the Federal Court is invited to render an opinion upon questions of law, the questions must be cast in a precise and exact form and the reference itself must contain all the material necessary to enable the Court to arrive at a satisfactory determination of the questions. 1944 F.C. 73=(1944) F.L.J. 215=(1944) 2 M.L.J. 234.

OPINION GIVEN UPON REFERENCE—BINDING NATURE.—Per *Spens, C.J.*—The opinion given by the Federal Court upon a reference under sec. 213 is not technically binding on the High Court nor is it binding on the Federal Court. Any such opinion can properly be reconsidered at any time by the Federal Court in any litigation coming before it and should be so reconsidered on the proper request of any party, however much respect

for the learned judges responsible for an opinion and a desire to secure continuity and certainty in the pronouncement of the Federal Court may make a member of the Federal Court hesitate to differ. I.L.B. (1945) Kar. (F.C.) 39=49 C.W.N. (F.B.) 27=1945 M.W.N. 57=(1945) F.L.J. 8=A.I.R. 1945 F.C. 25=(1945) 1 M.L.J. 108.

SEC. 215: SECTION EXPLAINED.—"This is a clause put in purely out of precaution, in case it should turn out that, in some very important and vital matter, some supplemental power is necessary for the purpose of enabling the Court more effectively to exercise its jurisdiction. Where you are dealing with such important matters as this, it is thought wise to put in an enabling clause to enable the Legislature, should the need arise, to fill up the gap. The Committee will see that the powers under the Clause are definitely limited and restricted. The powers are to be such as may appear necessary to enable the Court to exercise the jurisdiction conferred upon it by or under this Act. Necessarily there is no specific point in mind or the clause would have been made specific. The Legislature will have the power, should it be required, to confer upon the Court the powers necessary to enable it to perform the functions placed

**216.** (1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the revenues of the Federation, and any fees or other moneys taken by the Court shall form part of those revenues.

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

**217.** References in any provision of this Part of this Act to a High Court in a Federated State shall be construed as references to any Court which His Majesty may, after communication with the Ruler of the State, declare to be a High Court for the purposes of that provision.

**218.** Nothing in this chapter shall be construed as conferring, or empowering the Federal Legislature to confer, any right of appeal to the Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a Court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave.

## CHAPTER II.

### THE HIGH COURTS IN BRITISH INDIA.

**219.** (1) The following Courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore, and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North-West Frontier Province and in Sind, any other Court in British India constituted or reconstituted under this chapter as a High Court, and any other comparable Court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act:

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any Court or Courts mentioned in this sub-section, then as from the establishment of the

upon it under the Act." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, p. 236, Speech of the Solicitor-General.)

**Sco. 217.**—"Under this clause it will be for the Crown to say what Courts should be determined to be High Courts for the purposes of this part of the Act. Such decisions will be by the Crown after communication with the Ruler of a State, but the decision will rest with the Crown. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, p. 243).

**Sco. 218.**—This clause is only included with a view to making good the intention of the Government to maintain the right of appeal from the Court at Aden to the High Court at Bombay. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 243).

**Sco. 219.**—Prior to the passing of the new Act, the High Court at Calcutta was mainly under the jurisdiction of the Central Government. The other High Courts were under the jurisdiction of the Local Governments. The Joint Select Committee reported in fav-

our of bringing the Calcutta High Court into the same relationship with the Bengal Government as that obtaining between all other High Courts and their respective Provincial Governments; and the new Act makes provision accordingly.

**PROVISO.**—The Proviso is intended "to meet the possibility of what is now the Judicial Commissioner's Court in the Central Provinces and Berar being, as may well happen, converted into a High Court before this Bill becomes an Act. At present it is referred to as what is now, namely, the Judicial Commissioner's Court in the Central Provinces and Berar. It may well be that before the Bill becomes an Act it will have been turned into a High Court, and the amendment merely makes provision in case this happens before that date." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 244).

[N.B.—Now the High Court of Nagpur has been constituted by Letters Patent—See Nagpur Letters Patent, *infra*.]

new Court, this section shall have effect as if the new Court were mentioned therein in lieu of the Court or Courts so replaced.

(2) The provisions of this chapter shall apply to every High Court in British India. [See Amendment by 3 and 4, Geo. 6, Ch. 5, S. 6, *infra*.]

220. (1) Every High Court shall be a Court of record and shall consist of a Chief Justice and such other judges as His Majesty may from time to time deem it necessary to appoint:

Provided that the judges so appointed, together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter, shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that Court.

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years:

Provided that—

(a) a judge may by resignation under his hand addressed to the Governor resign his office;

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of a High Court unless he—

(a) is a barrister of England or Northern Ireland, of at least ten years standing, or a member of the faculty of Advocates in Scotland of at least ten years' standing; or

SEC. 220.—The former statutory requirement that not less than one-third of the Judges of every High Court must have been called to the English, Scottish or Irish Bar, and that not less than one-third must be members of the Indian Civil Service, is abrogated. "We are informed", said the Joint Select Committee in their Report, "that the rigidity of this rule has sometimes caused difficulty in the selection of Judges." They also said, that the Civil Service Judges are an important and valuable element in the judiciary, and that their presence adds greatly to the strength of the High Courts. Before the Act the Civil Service Judges were not eligible for permanent appointment as Chief Justice of a High Court. His Majesty's freedom of choice is no longer fettered in this respect, under the present Act. The Joint Select Committee said, "We need hardly add that our acceptance of the proposal to abrogate the statutory proportion so far as barristers are concerned implies no doubt as to the necessity of continuing in the interests of the maintenance of British legal traditions, to recruit a reasonable proportion of barristers or advocates from the United Kingdom as Judges of the High Courts." In India there is not the distinction in the lower ranks between the Executive and the subordinate judiciary, and it is quite inevitable whether you federalise the High Courts or keep them provincial as they

are now, that the subordinate judiciary will have to be provincial. I suggest that there is every objection against taking the higher ranks of the judicature and making them Federal while maintaining the lower ranks under provincial administration. All sorts of administrative difficulties will at once occur, and, apart from those, it seems to me that there will be a grave danger of the Provinces regarding the High Court as isolated and insulated from the Province itself, as something imposed by the Federation from outside, with the result that there will much more likelihood of friction between the Local Government on the one hand and the High Court on the other, and within the Province, to remain part of the administration, and the federalised High Court. The Joint Select Committee therefore recommended that these Courts should remain part of the Provincial Administration, accompanied by the safeguards that they are to be Crown appointments and that the expenses are to be not-votable charges on provincial budgets." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Cols. 249-254).

The High Court of Lahore is a Court of Record and therefore possesses the ordinary jurisdiction of a Court of Record to commit for contempt. I.L.R. (1942) Lah. 411=44 P.L.R. 206=A.I.R. 1942 Lah. 105 (F.B.).

(b) is a member of the Indian Civil Service of at least ten years' standing, who has for at least three years served as, or exercised the powers of, a district judge; or

(c) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge, or judge of a Small Cause Court; or

(d) has for at least ten years been a pleader of any High Court, or of two or more such Courts in succession:

Provided that a person shall not, unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a judge of a High Court.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which the person has held judicial office after he became a barrister, a member of the Faculty of Advocates, or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

221. The judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment.

222. (1) If the office of chief justice of a High Court becomes vacant, or if any such chief justice is by reason of absence, or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the chief justice has resumed his duties, as the case may be, be performed by such one of the other judges of the Court as the Governor-General may in his discretion think fit to appoint for the purpose.

SEC. 220 (4).—The oath prescribed by sec. 220 (4) is only necessary before entering upon the office as a Judge. Where a person appointed as an additional Judge of the High Court has continued as such without a break after taking the oath prescribed under cl. 3 of the Letters Patent, and he is made a permanent Judge of the High Court by a Royal warrant signed and issued before the commencement of the Act—the appointment to take effect after the Act in continuation of his appointment as additional Judge,—it cannot be said that he enters upon his office as a Judge afresh necessitating a fresh oath which is required only for a person who enters upon his office for the first time. The fact that the additional Judge did not take the oath afresh on being made a permanent Judge would not invalidate his appointment or make the High Court otherwise than validly constituted. 1937 A.L.J. 840=I.L.R. 1937 A. 880=1937 A. 588 (F.B.).

SEC. 222.—CL. 1 of sec. 222 of the Government of India Act expressly recognises and provides for the contingency of the Office of Chief Justice of a High Court remaining vacant for some time. CL. 2 of the Letters Patent (Patna) only determines the constitution of that High Court by declaring that it shall consist of a Chief Justice and a certain number of other Judges. In the case of a vacancy caused by death some time must necessarily elapse before a new appointment is made. It would be preposterous to hold that during the interval between the death and new appointment there is no properly constituted High Court. The vacancy in the Office implies that the office exists which is distinct from the case of an abolition of the office. Where the Chief Justice of the High Court dies during the vacation of the High Court, the Office of Chief Justice does not die with him. It still continues, though it remains vacant till filled up. The con-



(2) If the office of any other judge of a High Court becomes vacant, or if any such judge is appointed to act temporarily as a chief justice, or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that Court, and the persons so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of that Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties.

(3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court it appears to the Governor-General that the number of the judges of the Court, should be for the time being increased, the Governor-General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges, appoint persons duly qualified for appointment as judges to be additional judges of the Court for such period not exceeding two years as he may specify.

223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act, to the provisions of any Act of the appropriate legislature enacted by virtue of powers conferred on that legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division Courts, shall be the same as immediately before the commencement of Part III of this Act.

stitution of the Court remains unbroken and unchanged. So far as the jurisdiction of a vacation Bench of the High Court to hear and decide cases is concerned, that cannot be questioned, because the vacation Bench is not required to do any of the duties of the Chief Justice. The only effect of the vacancy in the office of Chief Justice, is that, so long as the vacancy continues, there would be no one to perform his duties until the Governor-General appoints some one of the other Judges to do the same under sec. 222 (1) of the Government of India Act. The death of the Chief Justice and the consequent vacancy in his office does not affect the jurisdiction of the Vacation Bench in the least or render it incompetent to pass orders in any case within its jurisdiction as provided by the law and the Rules of the High Court. 17 Pat. 574=19 Pat.L.T. 675=1938 P.W.N. 683=1938 Pat. 550.

Sub-sec. (2) of sec. 222 deals with conditions under which a temporary Judge can be appointed. But from that provision no intention can be imputed to the Legislature to the effect that a Judge on leave cannot think about a case which he had previously heard or utilized the period of his leave in preparing a judgment which he had reserved just before going on leave. On no principle can a judgment be declared invalid simply because it was composed by him while on leave. 47 C.W.N. 9=A.I.R. 1942 Cal. 498 (S.B.).

SNO. 223: EXTRACTS FROM PARLIAMENTARY DEBATES (ATTORNEY-GENERAL).—"The scheme of the Act provides that the Provin-

cial Legislatures shall have competence to legislate in respect of the jurisdiction of the High Court in any matters in connection with which they may pass legislation. It will be seen at once how important it is that if the Provincial Legislature is to have power to legislate upon any particular matter, it shall also have the power to legislate in respect of the necessary jurisdiction of the High Court as being connected with that matter. My Noble Friend has suggested some ways in which legislation might be passed by the Provincial Legislature derogating from the jurisdiction of the High Court. I am informed that, judging from present day and past experience, the tendency has been and should be in the future in exactly the opposite direction. The inclinations of the Legislatures has been to increase the jurisdiction of the High Court and not to diminish it or derogate from it. The reason that I would mention as the one which makes it impossible to accept the amendment of my honourable and learned Friend is that his amendment makes it impossible for the Provincial Legislature to derogate from the jurisdiction of the High Court. That would really mean that the Federal Legislature would have to come in and legislate in respect of jurisdiction to deal with that which had been made the subject of legislation in the Provincial Legislature, and you would get an inextricable tangle between the two, or you might easily get such a tangle. In spite of what I have said as to the probable tendencies being in the direction of increasing the



**224.** (1) Every High Court shall have superintendence over all Courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

- Administrative functions of High Courts.*
- (a) call for returns;
  - (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts;
  - (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts; and
  - (d) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of Courts:

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

jurisdiction of the High Court, rather than diminishing it, provision has been made in the Instrument of Instructions by which any legislation derogating from the powers of the High Court so as to endanger the position which the Court is by such Act designed to fill, is to be sent by the Governor for the consideration of the Governor-General. That would give the most ample safeguards against the possibilities suggested by my noble Friend. I hope that my honourable Friends will feel that the safeguard which will be inserted in the instrument of Instruction will prevent them from feeling any fears as to the jurisdiction of the High Court being tampered with by the Provincial Legislature." (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 294).

Under sec. 223, the only express direction given to the High Court as to the law to be administered is, a suit for dissolution of marriage between parties who married as Hindus but one of whom subsequently became a convert to Islam, is the direction to administer "justice and right". Sec. 18 of the Act of Settlement, 1781, cannot be invoked as making it obligatory for the Court to decide the case according to the law of the defendant. As it is inherently impossible to apply the English Law of Marriage, it is open to the High Court and it is also its duty to administer their personal law to the parties in the guise of "justice and right". The only question is, whether that law should be the Mahomedan Law of the converted spouse, or the Hindu Law of the other, or such a consideration of the interaction of both laws as will not commit a violation to the legal rights of either and as will be in conformity with justice and right. 49 C.W.N. 439.

Per Rowland, J.—The jurisdiction of the High Court can be taken away by an Ordinance of the Governor-General by virtue of sec. 311 (6). 47 C.W.N. (F.C.) 41=6 F.L.J. 79=I.L.R. (1943) Kar. (F.C.) 43=1943 F.C. 36=(1943) 2 M.L.J. 207 (F.C.).

It cannot be said that the use of the word "Legislature" in sec. 223 indicates that only

the Federal and Provincial Legislatures are being referred to. The word "Legislature" means an authority empowered to make laws. The Governor-General when he promulgates an Ordinance makes a law and is therefore in that capacity a Legislature. Therefore Governor-General has power to pass Ordinances affecting the jurisdiction of the High Court. 44 Cr.L.J. 673=A.I.R. 1944 Cal. 285 (S.B.).

SECS. 223 AND 224.—The High Court has no jurisdiction under the Government of India Act, 1935, to interfere with an order passed by a Deputy Collector in execution proceedings under the Bengal Rent Act. I.L.R. (1941) 2 Cal. 366=4 F.L.J. (H.C.) 405=1941 Cal. 230.

The Chief Justice of the Lahore High Court has power to nominate Special Benches for the disposal of contempt cases. I.L.R. (1942) Lah. 411=44 P.L.R. 206=A.I.R. 1942 Lah. 105 (F.B.).

SEC. 224.—This section reproduces the terms of sec. 107 of the old Act with two variations, one of which alone is of substance:

(1) The provision as to transfer of cases to itself under cl. (b) has been omitted for the reason stated by the Attorney-General:—"The Codes of Criminal and Civil Procedure already provide for this power in connection with the ordinary jurisdiction of the Courts, that is to say, the power to direct the transfer of a suit or appeal from one Court to another of equal or superior jurisdiction. It seems most undesirable to take one of the powers conferred upon the Courts by the Code, and introduce it into a section which deals only with administrative matters". (Parl. Deb., Vol. 302, Col. 994). The proviso which prescribes the previous approval of the Governor to the validity of the rule made by the High Court under this section, makes a departure from the previous law in the case of the High Court of Calcutta for which the previous approval of the Governor-General in Council was formerly prescribed; thus rendering all the High Courts uniform in respect of this matter.

**SCOPE OF—POWERS OF HIGH COURT NOW AFFECTED.**—Sec. 224 only means that no powers of interference are conferred on High Courts by it except that of superintending subordinate Courts in matters of practice and procedure not regulated specifically by law. It does not take away any powers High Courts may have under other provisions of law. It does not change the law in respect of the powers that may be exercised by the High Courts under secs. 439 and 561-A, Cr. P. Code. 1942 O.W.N. 496=1942 A.W.R. (C.C.) 315=6 F.L.J. (H.C.) 53=1943 Oudh 184.

CL. (2).—This deprives the High Courts of the revisional powers which they have been exercising over Courts subject to their appellate jurisdiction ever since the constitution of the High Courts in 1861, originally under sec. 15 of the High Courts Act of 1861 and later under sec. 107 of the Government of India Act, 1915. The revisional powers of the High Courts would therefore hereafter be confined to those cases where the Indian enactments confer such a power. The term "inferior Court" is not defined by the Act, and in the context it can presumably mean "Courts inferior to the High Court which the subject to the appellate jurisdiction of the High Court" within the opening words of this section. It is submitted that the sub-section does not affect the powers of the High Court to issue writs of *certiorari* and prohibition in respect of the proceedings and determination of tribunals which are not "inferior Courts", e.g., in those cases where jurisdiction is conferred on *persona designata* to determine judicially the rights of parties, or in cases of quasi-judicial tribunals. (See also notes under sec. 220, *supra*. Parl. Deb., and Joint Par. Com. Report.) See I.L.R. (1942) Lah. 483.

**APPLICABILITY.**—Although sec. 224 contains in effect a reproduction of the terms of sec. 107 of the previous Government of India Act, it also contains a proviso which makes it clear that sec. 224 has no application of itself to legal proceedings at all. I.L.R. (1938) 1 Cal. 256=1938 Cal. 23. Sec. 224 does not empower the High Court to interfere with a conviction and sentence passed in a criminal trial, apart from the appellate or revisional powers which it possesses under the Cr. P. Code. I.L.R. (1944) Nag. 728=1944 F.L.J. 190=1944 N.L.J. 280=A.I.R. 1944 Nag. 286. R. 704 of the Calcutta High Court Civil Rules and Orders, in so far as it authorises the levy of a free of rupee one on affidavits and its payment by means of a court-fee stamp, is legal. The levy of such a fee is authorised under the powers conferred by sec. 224 (b) of the Act. 50 C.W.N. 177=A.I.R. 1946 Cal. 110.

**POWER OF SUPERINTENDENCE—SCOPE AND EXTENT OF.**—The power of superintendence of Magisterial Courts conferred on the Chief Court of Sind by law includes necessarily the power to guide, advise and encourage Magistrates in the faithful discharge of their judicial duties. I.L.R. (1941) Kar. 3=1940 Sind 239 (F.B.).

**SEC. 224 (1) AND (2): CONSTRUCTION AND SCOPE—POWERS OF HIGH COURT EXISTING BEFORE ACT—IF TAKEN AWAY OR AFFECTED.**—Sub-sec. (2) of sec. 224 of the Government of India Act cannot have been intended to curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact sec. 223 preserves those powers. All that sec. 224 (2) means is that the High Courts cannot so interpret sub-sec. (1) of that section as to usurp the powers which they did not possess before. Sec. 224 deals with the administrative functions of the High Court and it does not affect the powers conferred upon the High Courts by the Letters Patent and the Charter Act, powers co-extensive with those of the Court of the King's Bench in England, including the power to issue writs of *certiorari* in respect of proceedings of Subordinate Courts, tribunals or officers acting judicially. 41 Bom.L.R. 984=1939 Bom. 471. The word "judgment" as used in sec. 224 of the Government of India Act is used in the English sense and embraces an order in the same way as the word "judgments" used in the Letters Patent include not only judgments as understood by the C.P. Code, in India, but also all final orders. 1940 N.L.J. 93.

**REVISION—INHERENT POWERS OF HIGH COURT.**—Outside the statutory provisions, e.g., sec. 224, Government of India Act and sec. 115, C. P. Code, no High Court has any inherent powers of revision over the Subordinate Courts within its jurisdiction, such for example as the Court of King's Bench in England has for centuries exercised over Courts inferior to itself. 1934 O.W.N. 273=A.I.R. 1938 F.O. I. See also *supra*. W. 273 (Revision of order under sec. 26, Legal Practitioners' Act). Sec. 224 (2) limits the High Court's power to question judgments of inferior Courts to those given under the ordinary law. Hence High Court cannot entertain a revision from an interlocutory order which is not a decided case. 40 P.L.R. 775=1938 Lah. 442.

**POWER OF NAGPUR HIGH COURT TO ISSUE WRIT OF CERTIORARI.**—The High Courts in India other than the chartered High Courts have not the power to issue the prerogative writ of *certiorari* either under the Letters Patent or the Government of India Act. Sec. 224 (2) of the Government of India Act denies the Nagpur High Court jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. This would preclude that Court from issuing a writ of *certiorari* in respect of the acts of any public authority even though they are judicial as opposed to merely administrative acts. I.L.R. (1941) Nag. 397=1941 Nag. 282. An order passed by a Village Headman under sec. 10 of Regulation XI of 1916 is not subject to appeal or revision. Sec. 224 (2) of the Government of India Act of 1935 excludes the High Court's jurisdiction in such cases. 1940 Mad. 183=50 L.W. 799=1939 M.W.N. 1223. The superintendence given to the High Court

**225.** (1) If, on an application made in accordance with the provisions of this section, a High Court is satisfied that a case pending in an inferior Court, being a case which the High

Transfer of certain cases to High Court for trial.

Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power.

(2) An application for the purposes of this section shall not be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province.

**226.** (1) Until otherwise provided by Act of the appropriate legislature, no High Court shall have any original jurisdiction in

Jurisdiction in revenue matters.

any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according

to the usage and practice of the country or the law for the time being in force.

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial legislature without the previous sanction of the Governor-General in his discretion or, as the case may be, of the Governor in his discretion.

Proceedings in High Courts to be in English.

**227.** All proceedings in every High Court shall be in the English language.

under sec. 224 (1) cannot be construed as giving to the High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. Neither sec. 224 nor sec. 439, Cr. P. Code, will enable the High Court to expunge passages or remarks made by the trial Court against a witness in a judgment of acquittal at the instance of the witness concerned when the judgment is not under appeal or revision. 194 I.C. 248=1941 P.W. N. 534=1941 Pat. 544. The combined effect of secs. 224 (1) (a) and 231 (2) is that so far as the Punjab is concerned, rules framed and tables settled by the Lahore High Court, come into force on the date when they are approved by the Governor of the Punjab, but, in Delhi, they receive their validity on the date on which they are approved by the Governor-General. 1941 Lah. 450.

SECS. 225-227.—Under sec. 225 if, on application, a High Court is satisfied that a case pending in an inferior Court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of invalidity of any Federal or Provincial Act, it is to exercise that power. [Sec. 225, cl. (1).] An application for this purpose is not to be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province. The purpose of this section was to minimise the inconvenience caused by the possibility of an Act being challenged as *ultra vires*. Until otherwise provided by Act of the appropriate Legislature no High Court will have any original jurisdiction in any matter concerning the revenue or concerning any Act ordered or done in its collection. [Sec. 226, cl. (1).] As in the case of the Federal Court, all proceedings in every High

Court will be in the English language (sec. 227).

SEC. 226.—(Cf. sec. 106, Old Government of India Act, 1915). See 50 M. 449=53 M. L.J. 335; 45 M.L.J. 592 (P.C.). Sub-sec. (1) of sec. 226 draws a distinction between a "matter concerning the revenue" and a "matter concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force". It treats them as separate things. According to sec. 226 (1) any matter concerning the revenue is placed without any qualification outside the Original Jurisdiction of the High Court; but only such matters concerning the "collection" of the revenue are placed beyond the jurisdiction of a High Court as are "ordered or done according to the usage or practice of the country or the law for the time being in force". It is, therefore, a condition precedent to the ousting of the jurisdiction of a High Court in a case concerning any act ordered or done merely in the collection of revenue (as opposed to an act or order concerning the revenue itself) that the act or order should be one done or ordered in accordance with the usage and practice of the country or the law for the time being in force. Before sec. 226 comes into play at all in relation to an act ordered or done in the collection of the revenue, it has necessarily first to be determined whether the act or order in question is one which was ordered or done "according to . . . the law for the time being in force". The law for the time being in force concerning any particular matter, whether it be the collection of the revenue or anything else, is a comprehensive expression which includes, not one particular statute but the whole body of law, whether in one or more statutes or outside a statute altogether, which for the time being governs the particular matter. Sec. 226

(1) does not preclude a High Court in a matter concerning any act ordered or done in the collection of the revenue, as opposed to an act or order concerning the revenue itself, from inquiring whether that act has been ordered or done according to the law for the time being in force, in the sense of being in the exercise, or purported exercise, of a method of recovery which the law applicable to the circumstances allows. The assessment of a company to income-tax was actually made after the company had been ordered to be compulsorily wound up though the assessment was based on the profits made prior thereto. I.L.R. (1945) All. 352=1945 A.L.J. 368=1945 I.T.R. 480=1945 Comp. C. 153=A.I.R. 1945 All. 354=1945 F.L.J. 193. Sec. 226 (1)—Interpretation—Exclusion of jurisdiction of High Court—Principle governing. See (1946) F.L.J. 29=(1946) 1 M.L.J. 415 (F.C.). The question whether the Urban Immovable Property Tax imposed by the Bombay Finance Act of 1932 as amended in 1939, Part VI, can be raised by the municipal authorities in the manner provided is a matter concerning the revenue, and therefore the jurisdiction of the High Court to determine the question is barred by sec. 226. I.L.R. (1940) Bom. 58=3 F.L.J. (H.C.) 25=42 Bom.L.R. 10=1940 Bom. 65 (F.B.). Under sec. 226 (1) the High Court has no original jurisdiction to entertain a suit challenging the legality of an order for confiscation of smuggled goods passed under the Sea Customs Act as the seizure and confiscation of the goods is an act ordered or done in the collection of revenue. No irregularity of procedure and no error in the conclusions arrived at can *per se* exclude the application of this section, when there is no allegation that the Officer of Customs directed the confiscation of the goods *mala fide*, or in the exercise of powers conferred on him by Sea Customs Act in circumstances to which he knew the provisions of the Act were not applicable. 3 Fed.L.J. (H.C.) 50=I.L.R. (1939) 1 Cal. 257=42 C.W.N. 445=1939 Cal. 763. See also I.L.R. (1939) 2 Cal. 541=1940 Cal. 174. The adjudication of the penalty under the Sea Customs Act is an adjudication of a matter concerning the revenue and its collection is an act ordered in the collection of revenue according to the usage and practice of the country or the law for the time being in force within the meaning of sec. 226 (1). The High Court has therefore no jurisdiction to entertain a suit to recover back the penalty. 42 Bom.L.R. 532=1940 Bom. 29. "Concerning the revenue, etc."—Application to the High Court to direct Income-tax Officer to forbear from assessing applicant—Competency. See 42 Bom.L.R. 414. Even assuming that it is correct to say that the motive of Government in instituting and maintaining the Court of Wards was to safeguard estates from mismanagement and consequent inability to pay revenue, that is no justification for saying that an order of the Court of Wards declaring a female, a disqualified proprietor is a matter 'concern-

ing revenue or an act done in collection thereof' within the meaning of sec. 226 (1) of the Government of India Act. I.L.R. (1938) 1 Cal. 476=42 C.W.N. 230=1938 Cal. 385. It is not open to the High Court, in view of sec. 226, to issue a writ of *certiorari* to challenge the validity of an income-tax assessment purporting to be made under the Income-tax Acts. I.L.R. (1943) Bom. 152=6 F.L.J. 28=45 Bom.L.R. 31=A.I.R. 1943 Bom. 77. As to suit to recover money paid as income-tax as result of assessment and demand under provision of law contended to be invalid, see (1944) Fed.L.J. 131. *Derbyshire, C.J., and Mitter, J. (Lodge, J., dissenting)*.—The word "revenue" in sec. 226, must be taken to mean what is revenue according to law, i.e., "legal revenue" and not illegal exactions. A suit to recover money paid as a result of the assessment and demand for income-tax, which is demanded under an invalid provision of law is not a suit "concerning revenue" within the meaning of sec. 226. It is not money paid under the law but an illegal exaction. It is money paid as the result of a demand made without legal authority and is money illegally obtained and held to the use of the plaintiff (who paid it), and there is therefore no bar under sec. 226 to the High Court exercising original jurisdiction concerning it in the suit for recovery of the same. The suit does not concern revenue in the sense used in sec. 226, i.e., legal revenue. 6 F.L.J. (H.C.) 133=1943 Comp. C. 265=I.L.R. (1944) 1 Cal. 34. The expression "the revenue" in sec. 106 (2) of the Government of India Act (1915) does apply to the stamp duty payable under the Indian Stamp Act and such stamp duty does fall within the terms of the section. Where the contention is that the stamp authorities are not entitled to charge any particular stamp duty, it must be a "matter concerning the revenue" within the meaning of sec. 106 (2), and any act ordered to be done in the collection of the revenue would likewise be a matter concerning the revenue. An act done by the revenue authorities for the purpose of collecting the revenue which they consider to be properly leviable in accordance with law is an act done in accordance with law and can never give rise to any cause of action against the officers of the Secretary of State. The High Court has no jurisdiction to entertain a suit in such a matter by reason of the bar imposed by sec. 106 (2), and the public have no remedy against what may turn out to be a wrong and arbitrary decision of the stamp authorities with regard to the payment of duty chargeable in respect of any particular document, save and except the somewhat doubtful remedy provided by sec. 56 of the Stamp Act. I.L.R. (1939) Bom. 320=2 Fed. L.J. (Pt. II) 60=41 Bom.L.R. 297=1939 Bom. 215. The jurisdiction, powers and authority of the High Court as conferred by sec. 106 of the Government of India Act, 1915-1919 can be affected either by His Majesty by further Letters Patent or by the

**228.** (1) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court and the salaries and allowances of the judges of the Court shall be charged upon the revenues of the Province, and any fees or other moneys taken by the Court shall form part of those revenues.

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any estimates of expenditure laid by him before the legislature.

**229.** (1) His Majesty, if the Chamber or Chambers of the legislature of any Province present an address in that behalf to the Governor of the Province for submission to His Majesty, may by letters patent constitute a High Court for that Province or any part thereof or reconstitute in like manner any existing High Court for that Province or for any part thereof, or, where there are two High Courts in that Province, amalgamate those Courts.

(2) Where any Court is reconstituted, or two Courts are amalgamated, as aforesaid, the letters patent shall provide for the continuance in their respective offices of the existing judges, officers and servants of the Court or Courts, and for the carrying on before the reconstituted Court or the new Court of all pending matters, and may contain such other provisions as may appear to His Majesty to be necessary by reason of the reconstitution or amalgamation.

**230.** (1) His Majesty in Council may, if satisfied that an agreement in that behalf has been made between the Governments concerned, extend the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province, and the High Court shall thereupon have the same jurisdiction in relation to that area as it has relation to any other area in relation to which it exercises jurisdiction.

(2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province.

(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat, nothing in this Act shall be construed—

(a) as empowering the legislature of the Province in which the Court has its principal seat to increase, restrict or abolish that jurisdiction; or

(b) as preventing the legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdic-

Indian Legislature. The Provincial Legislature even with previous sanction of the Governor-General cannot by reason of sec. 80-A (4) of the Act affect, curtail or extend the jurisdiction and powers of the High Court, and if it passes such a piece of legislation, it would be *ultra vires*. I.L.R. (1939) 2 Cal. 93=43 C.W.N. 613=1939 Cal. 435 (S.B.).

Sec. 228.—See Joint Parl. Com. Rep., para. 335.

Sec. 230.—This clause reproduces substantially sec. 109 of the existing Act. It provides that where the High Court exercises

jurisdiction in relation to an area outside the Province in which it has its principal seat, then the Bill shall not be interpreted as empowering the legislature of the Province to increase or restrict the jurisdiction of the Court or prevent the legislature from having power to make laws for that area. The legislature having power to make laws for the area can pass laws in regard to the jurisdiction of the Court. (Parl. Deb., Vol. 300, No. 71, 2nd April, 1935, Col. 297. Speech of the Attorney-General.)

tion of the Court in relation to that area as it would be competent to pass if the principal seat of the Court were in that area.

**231. (1)** Any judge appointed before the commencement of Part III of

*Saving and definitions.*

this Act to any High Court shall continue in office and shall be deemed to have been appointed under

this Part of this Act, but shall not by virtue of this Act, be required to relinquish his office at any earlier age than he would have been required so to do, if this Act had not been passed.

(2) Where a High Court exercises jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of a Province, references in this chapter to the Governor in relation to the judges and expenses of a High Court and references to the revenues of the Province shall be construed as references to the Governor and the revenues of the Province in which the Court has its principal seat, and the reference to the approval by the Governor of rules, forms and tables for subordinate Courts shall be construed as a reference to the approval thereof by the Governor of the Province in which the subordinate Court is situate, or, if it is situate in an \* \* \* area not forming part of a Province, by the Governor-General.

## PART X.

### CHAPTER II.

#### CIVIL SERVICES.

##### *General Provisions.*

**240. (1)** Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India holds office during His Majesty's pleasure.

*Sec. 240: Tenure of Office of Civil Servants.*—This section reproduces in substance the provisions of sec. 96-B of the Government of India Act, 1919. The slight variations in the language of the opening words of this section compared with the old section serve to emphasise that the tenure of all civil services is at pleasure, if ever it was open to doubt. The use of the words "subject to the provisions of this Act and the rules made thereunder" before specifying the tenure gave rise to the argument in *Venkata Rao v. Secretary of State*, (1937) 1 M.L.J. 529=64 I.A. 55, that the Statute gave servants of the Crown a right enforceable by action to hold office in accordance with the rules and that they could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. Their Lordships of the Judicial Committee negatived this contention observing: "Sec. 96-B in express terms states that office is held at pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument, for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance". (See *Venkata Rao v. Secretary of State*, (1937) 1 M.L.J. 529 (535)=64 I.A. 55). The omission of those words from the section makes it clear that the tenure is an

unqualified one at pleasure. The emphasis provided for in the opening words relates to the office of Judges of the High Courts and the Federal Court, and of the Auditor-General of India and the Auditor-General of Home Accounts whose tenure of office is during good behaviour and who are removable only on the ground of misbehaviour or infirmity of mind or body if the Judicial Committee of the Privy Council on reference being made to them by His Majesty report that the official ought on any such ground to be removed. It is a fundamental principle, based on public policy, that the Crown should have the unfettered discretion to remove a public servant at pleasure, and even a contract to engage him for a fixed term, if there be no statute law authorising it, would not be available to him, such a contract being void as against public policy. This power to dismiss at will can only be controlled by a statute but cannot be abridged or controlled by rules or regulations of service even if those rules or regulations are framed under powers given by a statute. Consequently, the dismissal or discharge of a civil servant in violation of the Fundamentals Rules would not entitle him to an appeal to the Civil Court but would leave him to appeal only to the administrative authorities. 42 C.W.N. 1186=68 C.L.J. 320=1938 Cal. 759. See also 46 L.W. 242=1937 Mad. 777. A servant of the Crown in India holds his appointment at the pleasure of the



Crown and is liable to dismissal at the will and pleasure of the Crown, notwithstanding a contract to the contrary, unless the Crown has deprived itself of its prerogative in some way expressly recognised by law, nor can an action for wrongful dismissal be entertained even though a special contract be proved. A refusal to employ a person to whom employment has been offered does not stand on a different footing, because the power to dismiss an employee at pleasure involves the power to refuse to employ a person accepting an offer of employment. 39 Bom.L.R. 807=1937 Bom. 449. The words 'subject to the rules' appearing in sec. 96-B of Government of India Act, are not superfluous and ineffective. The section contains a statutory and solemn assurance that the tenure of office held by servants of the Crown though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. Redress therefore in such cases is not obtainable from the Courts by action. It is so even where there has been serious and complete failure to adhere to important and fundamental rules, as for instance in the case of a person who has been dismissed from service without any investigation into the charge. The remedy of the person aggrieved does not lie by a suit in Court but by way of appeal of official kind. 64 I.A. 55=I.L.R. (1937) Mad. 532=1937 P.C. 31=(1937) 1 M.L.J. 529 (P.C.). See also 1937 Rang.L.R. 35=1937 Rang. 89 (S.B.); 165 I.C. 834=1936 O.W.N. 1140=1937 Oudh 209. Although by virtue of sec. 96-B, a statutory right is created between the Crown and the servant, it is not to be implied that any provisions in Statute 23 of 1871, repugnant to the terms of the Statute creating such right are repealed or rendered inapplicable to such a case. Statute of 1919 does not confer right of action to enforce the rules made thereunder. I.L.R. (1937) Mad. 517=64 I.A. 40=41 C.W.N. 545=1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.). In a case in which after Government officials, duly competent and duly authorised in that behalf, arrived honestly at one decision, their successors in office after the decision has been acted upon and is in effective operation, cannot purport to enter upon a reconsideration of the matter and to arrive at another and totally different decision. Where a Sub-Inspector of Police was granted an invalid pension by a competent authority and thus duly ceased to be in service, and the officer succeeding the authority, which had granted the pension, reconsidered the matter and ordered his removal from the service. *Held*, that the servant had suffered a wrong and therefore had every right to complain of the stoppage of pension as a breach of rules relating to pensions. 64 I.A. 40=I.L.R. (1937) Mad. 517=1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.). R. 55 of the Civil Services (Classification, Control and Appeal) Rules, which provides for the case of a departmental inquiry into charges against a Government servant who is subject to the rule, contains a safeguard to the effect that

none of the graver penalties—dismissal, removal or reduction—which the authority concerned is empowered to inflict can be imposed upon the person charged unless he has been given an adequate opportunity of defending himself. But the rule does not state that the authority concerned shall itself hold the inquiry. The authority is competent under the rule to depute some subordinate officer to hold the inquiry. The purpose of the rule is to enable a Government servant to defend himself when his conduct is the subject of a charge which is to be departmentally investigated. And so long as the conditions of the rule are followed, there is nothing prejudicial to the Government servant in the circumstance that the inquiry is held not by the authority itself which imposes the punishment but by some subordinate officer deputed by that authority for the purpose. 1937 M.W.N. 821=46 L.W. 531=1937 Mad. 735=(1937) 2 M.L.J. 189. See also 1937 Oudh 209; 44 C.W.N. 79=71 C.L.J. 95. In so far as the provisions of R. 55 of the Civil Services Rules are not inconsistent with anything contained in sec. 240, Government of India Act, 1935, the enquiry, should be in substantial compliance with the provisions of R. 55. So long as the servant knows all the charges against him, and the enquiry into these charges has been held in such a manner that he has reasonable opportunity to defend himself and has not been prejudiced or misled in the matter of his defence, the enquiry is competent. A.I.R. 1944 Lah. 240. The stipulation or proviso as to dismissal in sec. 96-B is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. This statutory safeguard should be observed with the utmost care and a deprivation of pension based upon a dismissal purporting to be made by an official, who is prohibited by statute from making it, rests upon an illegal and improper foundation. 64 I.A. 40=I.L.R. (1937) Mad. 517=39 Bom.L.R. 688=41 C.W.N. 545=45 L.W. 139=1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.). The Provincial Government can make enquiry into the conduct of an officer serving in the Province even though he belongs to the Indian Civil Service. 1944 Lah. 240. Where a civil servant was placed on suspension till a criminal case against him was finally decided and on his conviction by the Magistrate was dismissed from service but on his acquittal in appeal, the order of dismissal from service was cancelled and he was discharged from service, a month's pay being given in lieu of notice, the said payment does not amount to reinstatement, and he cannot, therefore, under R. 54, Part III of the Fundamental Rules, claim full pay for the whole period of suspension. 42 C.W.N. 1186=68 C.L.J. 320=1938 Cal. 759. See also 218 I.C. 11; 4 F.L.J. (H.C.) 400. A suit for damages for wrongful dismissal by a Government servant is not maintainable owing to the provisions of sec. 240 of the Government of India Act. The statute does not confer on a Government servant a right enforceable by action in a Court of law



(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

to hold his office according to the rules framed by the Government for members of his service and to have it terminated only in accordance with those rules. Where the plaintiff, a clerk in a subordinate Court of justice, was dismissed from service and he thereupon brought a suit against the Government for damages for wrongful dismissal. *Held*, that the duties carried out by the plaintiff and by his superior officers were part of the machinery for carrying on the administration of justice in exercise of sovereign powers and therefore the suit was not maintainable. 4 F.L.J. (H.C.) 400. Although a Government servant who has been dismissed is not entitled to any relief by way of damages for wrongful dismissal, the Court is not precluded from granting him a decree in respect of arrears of salary as the arrears of salary are not damages. 1945 N.L.J. 216=1945 Nag. 190 =I.L.R. (1945) Nag. 469. The general rule which is expressly recognised by sec. 240 of the Act, and which exists independently of statute, is that Government servants hold office during His Majesty's pleasure, which means in effect at the pleasure of Government. That implies the power to dismiss and includes also the power to require a Government servant to retire at any time on pension. This rule does not apply in the case of employees of local bodies, and in the case of the discharge or dismissal of an employee of a local body a cause of action for damages for wrongful dismissal would arise when there has been a breach of any provision, whether contained in a statute or a rule made under the statute, which may fairly be regarded as forming one of the conditions of service and affecting the tenure of office of the employee. But the result of sec. 8 (2) of the Bombay Primary Education Act is that a local authority which has taken over and employed a primary school teacher employed under the Educational Department of the Government has all the powers of the Government including the power to terminate the service of an employee at pleasure, subject only to the recognised statutory exceptions. Where the chairman of a School Board acting under the powers delegated by and with the sanction of the local authority compulsorily retires an employee before the latter reaches the age of fifty-five, the latter has no right of action for damages against the School Board. I.L.R. (1943) Bom. 411=45 Bom.L.R. 480=A.I.R. 1943 Bom. 268. *See also* 200 I.C. 414. A servant of the Crown who is dismissed from service has no cause of action against the Crown, although the dismissal is by an authority subordinate to the one who appointed him and is, therefore, made in contravention of the very terms of the Government of India Act. A mere declaration by the Civil Court that the dismissal is illegal and that the servant is fit to be reinstated to his post will not serve any useful purpose. Because he was illegally dismissed, it does not necessarily follow that he was a good officer or that he might not

have been legally dismissed and justifiably dismissed on proper grounds and after a proper enquiry. 44 C.W.N. 79=71 C.L.J. 95. But *see* (1942) 1 M.L.J. 77. It cannot be said that since sec. 240 of the Act of 1935 had re-enacted with amendments sec. 96-B of the earlier Act (on which the appellant's cause of action was based) the Act of 1935 must *pro tanto* be regarded as retrospective, so that a Court which had founded its judgment on the provisions of sec. 96-B must in law be deemed to have been interpreting the provisions of sec. 240 of the Act of 1935, 1938 O.W.N. 1251=1938 F.C. 1. The field of action of a Province would include control over officers serving in the Province. Therefore the Provincial Government can make enquiry into the conduct of an officer serving in the Province even though he belongs to the Indian Civil Service. A.I.R. 1944 Lah. 240.

SECS. 240 (2) AND 243: DISMISSAL OF SUB-INSPECTOR OF POLICE BY AUTHORITY SUBORDINATE TO THAT WHICH APPOINTED HIM—SUIT TO DECLARE DISMISSAL VOID.—A Sub-Inspector of Police appointed by I. G. of Police was dismissed by the Deputy I. G. of Police. After an unsuccessful appeal against such dismissal to the I. G. and the Provincial Government the dismissed officer filed a suit to declare his dismissal void on the ground among others that his dismissal by authority subordinate to that which appointed him was opposed to sec. 240 (2) of the Government of India Act. On a preliminary issue it was held that the plaintiff had no remedy by civil action and it was upheld by the appellate Court. On appeal to the Federal Court, it was held that sub-sec. (2) of sec. 240 contained a statutory prohibition to the effect that no officer-holder shall be dismissed from service by any authority subordinate to that by which he was appointed, and that the section had been enacted in unqualified terms and the protection thus afforded could not be qualified or taken away by statutory rules. *Held further*, that the plaintiff was entitled to invoke the aid of sec. 240 (2) and that sec. 243 had not the effect of depriving him of the benefit of sub-sec. (2) of sec. 240. It was also held that the dismissal by the I. G. of the appeal against the order of dismissal by the Deputy I. G. was not equivalent to a dismissal from office by the I. G. Under the circumstances their Lordships thought it best to say, that the plaintiff was at least entitled to a declaration that the order of dismissal passed against him was void and inoperative and that the Courts below were not justified in dismissing the suit as wholly unsustainable. (1942) 1 M.L.J. 77=A.I.R. 1942 F.C. 3=46 C.W.N. (F.R.) 1=I.L.R. (1942) Lah. 962. But *see* 44 C.W.N. 79=71 C.L.J. 895, *supra*.

A foot constable appointed in 1922 was promoted as Assistant Sub-Inspector in 1933 and as Sub-Inspector in 1936, in which post he was confirmed in 1937. In 1941 he was dismissed from service by the Deputy Inspec-

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

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tor-General of Police after an enquiry both by an Inspector of Police and by a Superintendent of Police. On a contention that there was no legal dismissal and that no reasonable opportunity was given to him to show cause against his proposed dismissal. *Held*, that the Sub-Inspector was duly appointed to and confirmed in his post as Sub-Inspector by the Dy. I. G. of Police who could in the circumstances legally dismiss him. He has therefore no cause of action under sec. 240 (1) and (2). As an enquiry was carried out both by an Inspector and a Superintendent of Police before it was proposed to dismiss him, he had been given a reasonable opportunity of showing cause against his proposed dismissal. 214 I.C. 171=17 R.F.C. 19=48 C.W.N. (F.R.) 119=1944 A.W.R. (F.C.) 23=1944 O.A. (F.C.) 23=1944 M.W.N. 472=1944 A.L.J. 270=(1944) F.L.J. 160=A.I.R. 1944 F.C. 72=(1944) 1 M.L.J. 500 (F.C.). A decision that a particular officer does not deserve inclusion in the selection grade does not amount to the withholding of an 'increment or promotion' or in other words to the imposition of a penalty. The Government are not bound to select for inclusion in the 'selection grade' under the U. P. Civil (Judicial) Service Rules the seniormost officer in the grade immediately below the 'selection grade,' or, for the matter of that, any other officer in the service. The decision of the question as to such inclusion rests entirely within the absolute discretion of the authority that has to select. No one has a right to be selected. A.I.R. 1943 All. 56. A member of the Provincial Judicial Service cannot, claim appointment to, or confirmation in the post of Sessions and Subordinate Judge or the post of District Judge as a matter of right, merely because he has attained to a certain position in the order of seniority in the Provincial Judicial Service or because he has been called upon to officiate in one or both of those

posts. 1942 A.W.R. (H.C.) 363=A.I.R. 1943 All. 56.

A person occupying any civil post under the Crown in India holds office during the pleasure of His Majesty and although according to rules he has a right of appeal if any injustice is done to him, and the Executive is expected to give him redress, he cannot bring a suit in order to question the finding of the superior authority in the matter. A suit for declaration is however competent when a person was dismissed from service by an officer subordinate in rank to the authority who has appointed him. 1943 Pesh. 90. When an action is brought under sub-sec. (8) of sec. 240 a declaration that the dismissal is void and inoperative cannot be given. The only relief which the Court can grant is a decree for damages for wrongful dismissal. 1946 F.L.J. 16=1946 M.W.N. 224=(1946) 1 M.L.J. 267.

**REASONABLE OPPORTUNITY — JUDGE OF.—**A Court of law alone and not the enquiry officer can say whether a servant has in fact been given a reasonable opportunity or not. The jurisdiction of the Courts can be ousted only if, as in the case of some recent emergency legislation, for high reasons of State power is expressly vested in an individual to decide how and when to do an act. A.I.R. 1944 Lah. 240.

**AUTHORITY OF SECRETARY OF STATE TO REMOVE PERSON FROM I.C.S.—**Sec. 240 contains provisions for the benefit of the members of a public service. The intention of Parliament is to protect the members of those services against arbitrary action by Government swayed by political majorities or even political bias. These provisions are a limitation on the power of the Crown to dismiss at pleasure and sub-sec. (4) deliberately curtails the common law right of the Crown. The Secretary of State has therefore no authority to remove a person from the I.C.S., if the en-

quiries are illegal or *ultra vires*. A.I.R. 1944 Lah. 240.

The Secretary of State as the appointing authority has authority to remove a person from the Indian Civil Service. The power to dismiss is not restricted to His Majesty under the Royal Sign Manual. But it is incumbent on the Secretary of State for India to hold an inquiry before removing the person from service. A.I.R. 1944 Lah. 240.

**DEFECTS IN PROCEDURE—CUMULATIVE EFFECT HAMPERING OF DEFENCE.**—A defect in procedure will not help the servant even if the enquiry be not in strict conformity with the Civil Service Rules. If however the cumulative effect of the various defects is the hampering the defence the enquiry would be bad. A.I.R. 1944 Lah. 240. The provisions of sec. 240, regarding notice and an opportunity to show cause are mandatory but in view of the proviso to that section, they do not apply to a case where a person is dismissed on the ground of conduct which has led to his conviction on a criminal charge. (1946) 1 M.L.J. 253. A failure to observe the rules by the Government will not give any jurisdiction to a Civil Court to entertain a suit for damages by a dismissed Government servant. In this connection it must be remembered that there is a distinction between a failure to comply with the terms of a statute and a failure merely to comply with the rules. 1946 A.L.W. 159 = 1946 O.W.N. (H.C.) 151. Where a Sub-Inspector was appointed by the Inspector-General, his dismissal by a Disciplinary Board which was subordinate to the Inspector-General is clearly bad and inoperative. A.I.R. 1943 Oudh. 368 = 19 Luck. 163. As to necessity for formal decision in agreement with Government see I.L.R. (1941) All. 741 = 197 II C. 390.

**FURTHER ENQUIRY—LEGALITY.**—As a matter of law, a further enquiry in continuation of a prior enquiry can be ordered. A.I.R. 1944 Lah. 240.

L, who was a member of the Indian Civil Service was informed that the Punjab Government had decided to hold a departmental enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) rules into his conduct, and the copies of the charges framed against him were also enclosed. He was asked to furnish a written statement of his defence, which he did. An officer, S, was appointed to hold the departmental enquiry who after making an enquiry submitted his report to the Government. This report was not disclosed to L in spite of his repeated requests for a copy of it. The Government informed L that S who had held the preliminary enquiry was unable to complete it and that its completion had been entrusted to another officer, B. B informed L of this and asked the latter to arrange to meet him on a later date when all the available materials would be gone into. L took up the position that the enquiry against him was over and that if it was said to be incomplete, he might be given a copy of the report of S and the order of the Government thereon. The Government refus-

ed to give either and persisted in that attitude to the very end. Then L met B and after protesting that he was not being given adequate opportunity of defending himself as provided by Rule 55 of the Civil Service Regulation, stated what he had to say in his defence. B made his report which was sent on to the Federal Public Service Commission together with some findings and recommendations of the Punjab Government thereon for their consideration. The Punjab Government was later informed that the commission concurred in the views of that Government that L was unfit to be retained in the I.C.S. and that he be removed from service. L's removal from the I.C.S. was notified in the Gazette and he was informed of his removal and given a copy of the letter from the Federal Public Service Commission. After carrying on some correspondence with the Government in seeking to get redress, L finally filed a suit for a declaration that the order of his removal from the I.C.S. was not passed in due course of law and was wrongful, illegal and *ultra vires* of the Government. Held (Varadachariar, J. dissenting), that L was wrongfully dismissed from the Indian Civil Service. 49 O.W.N. (F.R.) 68 = A.I.R. (1945) F.C. 47 = 80 C.L.J. 48 = (1945) 2 M.L.J. 270 (F.C.).

Per Spens, C.J., (Zafulla Khan, J., concurring)—The power of the Secretary of State to dismiss, after the coming into operation of the Constitution Act of 1935, members of the Indian Civil Service, who were appointed by the Secretary of State in Council prior to the commencement of Part III of the Act, is implied in the Constitution Act and is not otherwise an exercise of the power of dismissal from one of His Majesty's services by the principal Secretary of State concerned in the proper constitutional manner in which the power of the crown should be exercised. The general rule of law is that except as otherwise provided by statute, servants of the crown hold their appointments at the pleasure of the crown. Where in the case of any particular servants of the crown, statutory limitations or qualifications on the right of dismissal are found in statutes in which the general rule is not expressly enacted but left to have operation, if at all, only by implication, it is possible for Courts to hold that those limitations and qualifications are mandatory and effective and breach of them gives rise to a cause of action. On the other hand, where such limitations and qualifications are found only in rules made under a statute, which whilst expressly enacting that servants of the crown hold office during His Majesty's pleasure also provides that such tenure is subject to the provisions of the rules made thereunder, none the less, breach of the provisions of such rule may afford no cause of action at all. Again it may also well be that any limitation or qualification on the power of the crown to dismiss its servants at will attempted to be imposed by contract or agreement between some authority purporting to contract on behalf of the Crown and that contract is not legally en-

Judges of the Federal Court and High Courts.

253. (1) The provisions of this chapter shall not apply to the judges of the Federal Court or of any High Court:

Provided that—

(a) for the purposes of this section a member of any of the civil services of the Crown in India who is acting temporarily as a judge of a High Court shall not be deemed to be a judge of that Court;

(b) nothing in this section shall be construed as preventing the Orders in Council relating to the salaries, leave and pensions of judges of the Federal Court, or of any High Court, from applying to such of those judges as were, before they were appointed judges, members of a civil service of the Crown in India, such of the rules relating to that service as may appear to His Majesty to be properly applicable in relation to them;

(c) nothing in this section shall be construed as excluding the office of judge of the Federal Court or of a High Court from the operation of the provisions of this chapter with respect to the eligibility for civil office of persons who are not British subjects.

(2) Any pension which under the rule in force immediately before the commencement of Part III of this Act was payable to or in respect of any person who, having been a judge of a High Court within the meaning of this Act or of the High Court at Rangoon, retired before the commencement of the said Part III, shall, notwithstanding anything in this Act or the Government of Burma Act, 1935, continue to be payable in accordance with those rules and shall be charged on the revenues of the Federation.

(3) Any liability of the Federation or of any Province to or in respect of any person who is, at the commencement of Part III of this Act, a judge of a High Court within the meaning of this Act, or to or in respect of any such person as is mentioned in sub-section (2) of this section, being a liability to pay a pension granted to or in respect of any such person or any other liability of such a nature as to have been enforceable in legal proceedings against the Secretary of State in Council if this Act had not been passed, shall, notwithstanding anything in this Act or the Government of Burma Act, 1935, be deemed, for the purposes of the provisions of Part VII of this Act relating to legal proceedings, to be a liability arising under a statute passed before the commencement of Part III of this Act.

254. (1) Appointments of persons to be, and the posting and promotion of, district judges in any Province shall be made by the Governor of the Province, exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a district judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section, the expression "district judge" includes additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, sessions judge, additional sessions judge, and assistant sessions judge.

forceable and will give to the servant no cause of action if in fact he be dismissed in breach of any such agreement. There is no reason to confine the construction of the opening words of sec. 240 of the Constitution Act "Except as expressly provided by this Act" to

provisions of the Act outside sec. 240 itself. The words are apt enough to include a limitation or qualification on what follows in sub-sec. (1) by provisions found. 49 C.W.N. (F.R.) 63=A.I.R. 1945 F.C. 47=(1945) F.L.J. 129=(1945) 2 M.L.J. 270.

255. (1) The Governor of each Province shall, after consultation with the Subordinate civil judicial service. Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.

In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district judge.

(2) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province, make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of district judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder.

256. No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person Subordinate criminal magistracy. save after consultation with the district magistrate which he is of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be.

#### *Special Provisions as to Political Department.*

257. (1) Subject to the provisions of this section, the provisions of this

Sec. 256.—The provision in sec. 256 requiring consultation is directory only. An appointment made without the requisite consultation is not void or without jurisdiction. A.I.R. 1945 Cal. 488.

Per *Ormond, J.*—On the wording of S. 256 it refers to consultation with an officer in the district from which the subordinate criminal Magistrate is coming. Of course in that event it might be found that the section had no application in the appointment of an honorary Magistrate or of a person to be a Magistrate who at the time when the recommendation was being made was not working anywhere. A.I.R. 1945 Cal. 488. When it is proposed to grant magisterial powers or enhanced magisterial powers to a person, the proper authority to be consulted in pursuance of the direction contained in sec. 256 is the District Magistrate of the District, in which the person concerned is working at the time when the recommendation is made, or the chief Presidency Magistrate if the person

concerned is at the time working under him. The services of a Magistrate ~~are borrowed~~ from another province, and ~~are not~~ being placed at the disposal of the ~~Basal~~ Government, ~~as an appointed~~ Additional Presidency Magistrate at Calcutta. On a contention that his appointment was made without consulting the Chief Presidency Magistrate Calcutta, and was therefore ineffective and inoperative. *Held*, that in the circumstances the consultation should have been made with the District Magistrate of the District in which the Magistrate concerned was working in his own province when the question of his appointment came under consideration. *Held*, further, that the direction laid down in sec. 256 was directory and not mandatory, and non-compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative. I.L.B. (1945) Kar. (F.C.) 98=49 C.W.N. (F.R.) 62=(1945) F.L.J. 108=A.I.R. 1945 (F.C.) 67=(1946) 1 M.L.J. 155.

Officers of political department.

tions with Indian States.

Part of this Act shall not apply in relation to persons wholly or mainly employed in connection with the exercise of the functions of the Crown in its rela-

(2) Notwithstanding anything in the preceding sub-section, all persons so employed immediately before the commencement of Part III of this Act shall hold their offices or posts subject to the like conditions of service as to remuneration, pensions or otherwise as theretofore or not less favourable conditions, and in relation to those persons anything which might, but for the passing of this Act, have been done by or in relation to the Secretary of State in Council shall be done by or in relation to the Secretary of State, acting with the concurrence of his advisers.

(3) Nothing in this section shall be construed as affecting the application to such persons of the rule of law that, except as otherwise provided by statute, every person employed under the Crown holds office during His Majesty's pleasure.

## CHAPTER V.

### GENERAL.

270. (1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be

Indemnity for past acts.

done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion.

**SEC. 270: INDEMNITY FOR THE PAST.**—This section carries out the recommendations of the Joint Parliamentary Committee in Para. 283 of their Report. They stated: "The White Paper proposes that there shall be a full indemnity against civil and criminal proceedings in respect of all acts before the commencement of the Constitution Act done in good faith and done or purported to be done in the execution of duty. In view of threats which have been made in certain quarters, especially against the Police, we think that it is justifiable to give this measure of protection to men who have done no more than their duty in very difficult and trying circumstances." Explaining the section, it was stated in Parliament: "The section deals with past acts. It does not take the exact form of an indemnity, but it is an indemnity of a kind. As far as the future is concerned, obviously it would not be right to give what would appear to be in any sense an indemnity in advance. There are no doubt special circumstances which make it desirable to have something in the nature of an indemnity. In regard to the future, as I have indicated, ob-

viously it would be very undesirable, and indeed wrong, to appear to be casting a cloak in advance irrespective of the type of charge that might be made." (*Par. Deb. Vol. Col. 877.*) In regard to the future protection is afforded by the next section, sec. 271.

**SEC. 270 (1): APPLICABILITY—CONDITIONS:**—In order to attract the provisions of sec. 270 (1) it is not sufficient merely to establish that the person proceeded against was a public servant. It must be further established that the act complained of was an official act. The section has no application where the act complained of was manifestly not done in the execution of the duties. 1946 N.L.J. 78. Sec. 270 applies only in respect of acts done before the relevant date defined in sub-sec. (3). Since Part III of the Act, came into force in 1937, the section cannot obviously apply to acts done or offences committed in July, 1944. 1945 P.W.N. 127; 1944 Nag. 337. As the prohibition contained in sec. 270 (1) is against the institution of proceedings itself, the applicability of the section must be judged at the earliest stage of institution. Where the complaint against a station-master



was that he refused to issue tickets to the complainant on the ground that it was too late and behaved in an uncivil manner and showed furious temper and that on the complainant's representing such things the accused called out his coolies and ordered them to beat the complainant and that they and the accused also assaulted the complainant and his brother: *Held*, that it could not be held on the allegations in the complaint that the acts complained of can be regarded even as one "purporting to be done" by the accused in execution of his duty within the meaning of sec. 270 (1) of the Act. 1945 P.W.N. 512=(1945) F.L.J. 239. Sec. 270 (1) does apply to prosecutions of officers of the Central Services instituted during the transitional period under the Defence of India Rules, R. 81. 1944 F.L.J. 44=A.I.R. 1944 Lah. 51 (F.B.).

**SECS. 270 AND 271: PROTECTION AFFORDED TO PUBLIC SERVANT—NATURE AND EXTENT OF.**—Sec. 270 cannot be divorced from sec. 271 and the other provisions of the Act, and that being so, the criminal proceedings contemplated in that section are proceedings in the ordinary criminal Courts and not in Courts-martial convened under either the English Army Act or the Indian Army Act. The section is, therefore, not applicable to Courts-martial held under the Army Act in respect of British officer attached to the Indian Army, and the consent of the Governor-General is not necessary for his prosecution. 47 P. L. R. 423 (F.B.). Sec. 270 (1) applies not only to criminal proceedings, but also to the institution of civil proceedings. In the institution of criminal proceedings, the protection of public interest is the main object, and it may well be left to the Local Government to determine the question of the expediency of a prosecution from that point of view. But when a citizen seeks civil remedy against a public servant, the Legislature must be presumed to have been very cautious in depriving the aggrieved citizens of redress in a Court of law, and any restrictions on such a remedy imposed in the interest of the public servant should not be lightly extended so as to unduly restrict the remedy of the citizen. 50 L.W. 95=48 O.W.N. (F.O.R.) 50=2 Fed.L.J. 153=1939 F.C. 43=(1939) 2 M. L.J. (Supp.) 23. Sec. 270 is very wide in its terms and prohibits the initiation of proceedings in respect of the acts described therein against all servants of the Crown, employed in connexion with the affairs of the Province, whether they are "Gazetted Officers" or not. 184 I.C. 680=1939 Lah. 479.

*Per Niyogi and Sen, JJ.*—If, a Crown servant acts in his official capacity under the orders of his superior officer honestly thinking that it is his duty to obey him, he will be purporting to act in the execution of his duty even if his act is not justified or authorised by law, and he will be protected by sec. 270 (1) of the Act. I.L.R. (1944) Nag. 650=1944 F.L.J. 250=A.I.R. 1944 Nag.

337.

*Per Niyogi and Digby, JJ.*—Sec. 270 (1) accords protection to servants of the Crown employed in connection with the affairs of the Government of India against proceedings instituted after that section came into force on the 1st April, 1937, in respect of acts done or purported to be done in execution of duty before the relevant date, although the relevant date has not been fixed by His Majesty under sec. 320 (1) of the Act. I.L.R. 1944 Nag. 650=A.I.R. 1944 Nag. 337. See also 1945 P.W.N. 127. The State could not be held liable for the improper conduct of public servants unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it. (1944) 1 M.L.J. 399=48 C.W.N. (F.B.) 85=57 L. W. 410. It is quite obvious from a perusal of the various sections of Part X of the Government of India Act that crown servants include the subordinate as well as the superior civil services and there is no warrant for holding that the chapter in general and sec. 270 in particular apply only to the case of the superior civil services. A member of the Bombay Subordinate Medical Services is a servant of the crown and doing duty as such within the meaning of sec. 270, and therefore the consent of the Governor is necessary for his prosecution in respect of an act done by him in the execution of his duty as a servant of the crown. I.L.R. (1938) Bom. 770=40 Bom. L.R. 825=1938 Bom. 419. The words "in the execution of his duty" are not necessarily confined to a legal duty. Civil servants who are Medical Officers are obviously bound to obey the rule in the Medical Code made for the guidance of such officers and it is their duty to obey them. I.L.R. (1938) Bom. 770=40 Bom. L.R. 825=1938 Bom. 419. When the acts of the official trustee complained of are done during the course of administration of the trust as an ordinary trustee under sec. 27 (1) (a) of the Official Trustee's Act, the trust cannot be said to be done in the execution of his duty as a servant of the Crown and hence the consent of the Governor is not necessary in respect of a suit against such a trustee for breaches in respect of a private trust. 1940 Rang. L.R. 273=1940 Rang. 207. See also 49 C.W.N. (F.B.) 55=(1945) F.L.J. 44.

A plea of want of the requisite consent under sec. 270, is unsustainable in the case of a trial under the Criminal Law (Amendment) Ordinance, 1943, since the Governor-General has himself made and promulgated the Ordinance, for the express purpose of setting up tribunals for the trial of persons mentioned in the 1st Schedule thereto. 23 Pat. 457=1944 Pat. 378.

**"NO PROCEEDINGS CIVIL OR CRIMINAL"**—IF INCLUDE COURT MARTIAL PROCEEDINGS GENERALLY.—While it may be proper in certain



contexts to include Court Martial proceedings in the phrase criminal proceedings, the ordinary primary meaning of the phrase "Civil or Criminal proceedings" is civil or criminal proceedings capable of being instituted under the ordinary law of the land and it cannot be held to include proceedings under military law unless there be a context which so indicates. There is no such context in sec. 270 or elsewhere in the Constitution Act. On the other hand, there are indications in the context against giving the phrase any meaning other than its ordinary primary meaning. There is nothing to be found in the wording of sec. 270 to make a difference between Court Martial proceedings based on acts which constitute purely military offences under the Army Act and in respect of which no charge under the ordinary criminal law could be based, and Court Martial proceedings based on acts in respect of which either military offences under the Army Act could be charged or ordinary criminal proceedings could be taken. I.L.R. (1945) Kar. (F.C.) 3=(1944) F.L.J. 265=58 L.W. 274=49 C.W.N. (F.B.) 23=1945 M.W.N. 110=79 C.L.J. 81=47 Bom. L.R. 981=A.I.R. 1945 F.C. 21=(1945) 1 M.L.J. 31; see also 47 P.L.R. 423.

"PURPORTING TO BE DONE"—MEANING OF.—TEST TO FIND OUT.—The words "purporting to be done" in sec. 270 (1), must be given their full meaning. Clearly, used in their context, they mean something more than "done". There must be something in the nature of the act complained of that attaches it to the official capacity of the person doing it. I.L.R. (1941) Kar. 328=4 F.L.J. (H.C.) 388=1941 Sind 204. Per *Rowland, J. (Obiter)*.—If an act done by public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have. The applicability of the statute [sec. 270 (1)] depends on what the act purports to be and is not affected by any allegations that the apparent state of things is not the real one. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character, and what applies to the attribution of malice or corrupt motive in the mind of a single officer applies no less where the same malice is attributed to him jointly with others. The taking of cognizance of an offence on complaint by a sub-divisional officer, whether done in good or bad faith, is clearly an official act of that officer, purporting to be done in the execution of his duty as a Magistrate. It is an act which he cannot do in any other capacity and one without which there can be no institution of a criminal proceeding and it can form no foundation for a suit against him. 20 Pat. 417=(1941) P.W.N. 225=1941 Pat. 385.

CHARGE UNDER SECS. 409 AND 477-A, I.P.

CODE, AGAINST PUBLIC SERVANT—CONSENT OF GOVERNOR.—The consent of the Governor would be *prima facie* necessary in respect of the latter charge. The question whether or not the particular act complained of is one "purporting to be done in execution of his duty" as a public servant is substantially one of fact, to be determined with reference to the act complained of and to the attendant circumstances. 1939 P.W.N. 429=50 L.W. 95=43 C.W.N. (F.C.B.) 50=I.L.R. (1940) Lah. 400=(1939) 2 M.L.J. (Supp.) 23. See also 1941 Sind 204. The offence under sec. 408 or sec. 409, I. P. C., is not one in respect of which the protection of sec. 270 of the Government of India Act can be claimed. 49 C.W.N. (F.B.) 55=(1945) F.L.J. 44 (F.C.). 79 C.L.J. 275=(1945) 1 M.L.J. 371 (F.C.). See also 1942 A.M.L.J. 73. (Theft of Government property). To attract the provision of sec. 270 (1) it is not sufficient merely to establish that the person proceeded against was a public servant, or taking advantage of his position as a public servant, he did certain acts; it must be established that the act complained of was an official act. The act of receiving illegal gratification could not be an act done or purporting to be done in the execution of duty, and the conviction of a station master by a special tribunal of an offence under sec. 161, I.P.C. is not bad for want of consent of the Governor-General under sec. 270 (1). 23 Pat. 517=48 C.W.N. (F.B.) 109=1944 A.L.J. 258=(1944) F.L.J. 167=A.I.R. 1944 F.C. 66=(1944) 1 M.L.J. 503 (F.C.). Sec. 270 (1) applies to prosecutions of officers of the central services instituted during the transitional period under the Defence of India Rules, R. 81. (1944) F.L.J. 44=46 P.L.R. 130=1944 Lah. 51 (F.B.). Charge of cheating against Deputy Inspector of Schools—Inducing District Educational Council by false information to admit school to aid—Prosecution—Sanction of Governor is necessary. 191 I.C. 51=1940 M.W.N. 534=1940 Mad. 813. Postman misappropriating amount of money by forging thumb impression of payee and returning form to Post Office—Charge under secs. 409, 467 and 471, I.P. Code—Sanction of Governor-General is necessary. 1941 M. 38=52 L.W. 516=1940 M.W.N. 1116=(1940) 2 M.L.J. 564. S. 270 of the Government of India Act is intended to protect public servants for acts committed before the relevant date in respect of which proceedings may be started against them. The motive with which the acts are done is immaterial. What has to be looked at is that the offence must be in respect of an act done or purported to be done in execution of a duty, i.e., in the discharge of an official duty. Plaintiff brought a suit claiming damages against two defendants who were Income-tax Officers, the 1st defendant being the superior officer of the 2nd

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this Part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall, in so far as they are not recoverable from the persons instituting the proceedings, be charged, in the case of persons employed in connection with the functions of the Governor-General in Council or the affairs of Burma, on the revenues of the Federation, and in the case of persons employed in connection with the affairs of a Province, on the revenues of that Province.

(3) For the purposes of this section—

the expression "the relevant date" means, in relation to acts done by persons employed about the affairs of a Province or about the affairs of Burma, the commencement of Part III of this Act and, in relation to acts done by persons employed about the affairs of the Federation, the date of the establishment of the Federation;

references to persons employed in connection with the functions of the Governor-General in Council include references to persons employed in connection with the affairs of any Chief Commissioner's Province;

a person shall be deemed to have been employed about the affairs of a Province if he was employed about the affairs of the Province as constituted at the date when the act complained of occurred or is alleged to have occurred.

defendant, alleging that the 2nd defendant purporting to act under the orders of the 1st defendant trespassed into the plaintiff's premises and took away all the plaintiff's account books wrongfully against his will and consent. The defendants raised a preliminary point that the suit was not maintainable without the consent of the Governor-General under sec. 270 of the Government of India Act. *Held*, that the acts alleged against the defendants were so closely connected with their position as Income-tax Officers as to make it impossible to say that they were not the kind of acts which are contemplated under the section, and sec. 270 of the Government of India Act operated as a bar to suit in the absence of the consent of the Governor-General. 1942 I. T.R. 413=55 L.W. 687=1942 F.L.J. (H.C.) 151=(1942) 2 M.L.J. 523=1943 Mad. 167.

A suit for damages for wrongful arrest alleged to have been made by police officers (servants of the Crown) falls within the ambit of sec. 270 (2) of the Act, and the onus of proving want of *bona fides* in making the arrest would lie on the plaintiff and it is not for the defendants to prove *bona fides*. 55 L.W. 611' (1)=1942 F.L.J. (H.C.) 185=(1942) 2 M.L.J. 417. Where the charges against certain servants of the Crown not only stated that the alleged criminal acts were done by them while they were engaged in the execution of their duties as such servants but they also shewed that their official capacity was involved in the acts complained of as amounting to a

crime. *Held*, that the consent prescribed in sec. 270, was required for initiating proceedings against them. 184 I.C. 680=1939 Lah. 479. Under the rules framed by the Governor of the Punjab it is not necessary that orders passed by the Governor must be signed by a particular secretary. Hence a signature by the Home Secretary on a consent under sec. 270 is in order and the transmission of the consent by him is valid. 184 I.C. 680=1939 Lah. 479. Where the consent is stated to have been granted by the Governor of a Province and there is no indication that in doing so the Governor was acting with his Ministers, it must be presumed that he granted it in his discretion." 184 I.C. 680=1939 Lah. 479. Under sec. 270, the consent of a Governor is a condition precedent to the institution of the proceedings, and the necessity for such consent cannot be made to depend upon the case, which the accused or the defendant may put forward after the proceedings have been instituted, but must be determined with reference to the nature of the allegations made against the public servant in the suit or criminal proceeding. 43 C.W.N. (F.C.R.) 50=2 Fed.L.J. 153=1939 F.C. 43 =I.L.R. (1940) Lah. 400=(1939) 2 M.L.J. (Supp.) 23. In cases to which sec. 270 of the Constitution Act applies, the words of the section require that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained. 49 C.W.N. (F.R.) 55=(1945) F.L.J. 44 (F.C.).

**271.** (1) No Bill or amendment to abolish or restrict the protection afforded to certain servants of the Crown in India by section one hundred and ninety-seven of the Indian Code of Criminal Procedure, or by section eighty to eighty-two of the Indian Code of Civil Procedure, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

=1945 F.C. 24=(1945) 1 M.L.J. 571. The provisions of sub-sec. (1), sec. 270 are mandatory, and admit of no reservation or exception. They contain a positive prohibition against the institution of civil and criminal proceedings against the persons described in the section in respect of the acts mentioned, without such consent. In other words, the Government's consent is an essential pre-requisite to the competency of the Court to entertain the proceedings. It is the very foundation of the Court's jurisdiction, and its absence renders the entire proceedings void *ab initio*. Such an illegality cannot be cured under sec. 537, Cr.P.Code, even when no prejudice has been shown to have been caused. Where therefore the institution of proceedings is illegal for want of consent, but those proceedings are transferred to another Court which begins with the case *afresh*, subsequent production of consent even though it is before the commencement of the trial *de novo*, cannot validate what was invalid at its inception. 184 I.C. 680=1939 Lah. 479=I.L.R. (1940) Lah. 102=42 P. L.R. 51.

Per *Jes. J.*—If an objection is raised at an early stage before any evidence is led that the prosecution against the Crown servant is not maintainable for want of requisite consent under sec. 270 (1) of the Government of India Act, it has to be decided on the allegations in the charge sheet. But where the objection is taken in appeal after the trial has been concluded and judgment has been delivered by the trial Court, it is open to the appellate Court to decide the question on the findings arrived at by the trial Court. I.L.R. (1944) Nag. 650=1944 F.L.J. 250=1944 Nag. 337.

**ACTS OF PUBLIC SERVANT DONE AFTER APRIL, 1937.**—As part III of the Government of India Act came into force only in April, 1937, the act referred to in sec. 270 (1) of the Government of India Act, is an act done prior to April, 1937. Hence sec. 270 (1) can have no application to the acts of a public servant after April, 1937. 1940 O.W.N. 494=1940 Oudh 382=15 Luck. 740. [See also Notes under sec. 271 *infra*.]

**APPLICABILITY.—WRONGFUL RESTRAINT OR CONFINEMENT.—WHAT AMOUNTS TO A POLICE SUB-INSPECTOR AND CONSTABLES PREVENTING PASSENGERS FROM BOARDING TRAIN UNDER INSTRUCTIONS FROM SUPERIOR OFFICER**

**UNDER MISAPPREHENSION—ACTS DONE 'BONA FIDE' IN DISCHARGE OF STATUTORY DUTY—LIABILITY FOR DAMAGES—CONSENT OF GOVERNOR FOR SUIT—NECESSITY—PROVINCIAL GOVERNMENT—LIABILITY FOR ACTS OF SERVANTS.**—Government cannot be held liable for damages either when an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be in excess of his authority unless in the latter case the act is either done by the Government's express orders or is subsequently ratified and adopted by it. Nor can any action be maintained against the Government for a tort committed by its servants if in passing the order in the performance of which the tort is committed the Government was discharging its Governmental functions as a sovereign. I.L.R. (1942) Mad. 696=1942 Mad. 539=(1942) 2 M.L.J. 14.

**SUB-SEC. (1).**—This applies to cases where in respect of acts done prior to the "relevant date" no proceedings had been started in Court against the official. The consent of the Governor or the Governor-General as the case may be "acting in his discretion" is constituted a condition precedent to the institution of the proceedings.

**SUB-SEC. (2).**—This deals with cases which had been already instituted and are pending in Court on the "relevant date". The Court is directed to dismiss the proceedings unless it is satisfied that the acts complained of were not done in good faith. The Joint Parliamentary Committee recommended that the certificate by the Governor or Governor-General as the case may be that the act was done in good faith, should be conclusive and binding on the Court; this has not been accepted and the matter has been left to the Courts to decide.

**SEC 271: PROTECTION OF PUBLIC SERVANTS.**—Speaking on this section the *Solicitor-General* said:—"In order to re-assure these officials, Indians just as much as British, who are anxious that there shall be no doubt that there is proper protection against vexatious and unjustifiable criminal proceedings, we propose to give the Governor or the Governor-General the last word. But it is most undesirable and entirely against the best interests of the services of India, or officials in any country where British ideas prevail, that you should give, or tend to give the impression that they are hedged off and

(2) The powers conferred upon a Local Government by the said section one hundred and ninety-seven with respect to the sanctioning of prosecutions and the determination of the Court before which, the person by whom and the manner in which, a public servant is to be tried, shall be exercisable only—

(a) in the case of a person employed in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, by the Governor of that Province exercising his individual judgment:

Provided that nothing in this sub-section shall be construed as restricting the power of the Federal or a Provincial Legislature to amend the said section by a Bill or amendment introduced or moved with such previous sanction as is mentioned in sub-section (1) of this section.

(3) Where a civil suit is instituted against a public officer, within the meaning of that expression as used in the Indian Code of Civil Procedure, in respect of any act purporting to be done by him in his official capacity, the whole or any part of the costs incurred by him and of any damages or costs ordered to be paid by him shall, if the Governor-General exercising his individual judgment so directs in the case of a person employed in connection with the affairs of the Federation, or if the Governor exercising his individual judgment so directs in the case of a person employed in connection with the affairs of a Province, be defrayed out of and charged on the revenues of the Federation or of the Province, as the case may be.

free to do as they like, and that no one can get at them. On the other hand, it is equally necessary, particularly in a country like India, that where there is a danger of their being harassed by vexatious or maliciously-motivated proceedings, they should be given fair and proper protection. After all, it not only causes mental anxiety, and so on, to a Magistrate; but is bad for the administration of law and justice if a Magistrate, because some person thinks he has a grievance, should be put into the dock and have to justify his action. "At present there is nothing to prevent a person issuing a writ or whatever may be the proper technical term in India, against an official for damages for some civil wrong which he alleges has been committed. I do not think it would be right as a permanent part of the Constitution, as it were, to impose a barrier, even though it be a discretionary barrier, between a member of the public and the official whom he is saying has invaded his private rights. After all, civil actions would extend to such cases as motor accidents; and they would extend no doubt to unjustified assaults. I suppose it might be possible to conceive a libel in which words might have been written or uttered in the course of carrying out official duties." "It is a great principle, and we do not wish to invade it, that if an ordinary member of the public has a wrong committed against him, be it by an official or a non-official person, he has the right to issue his writ and claim his re-

dress in the Courts. We think it would be undesirable to put up, or even to attempt to put up, as a permanent part of the Constitution, a barrier in cases where persons are concerned. But it seems to us that what really affects an official who has a civil claim made against him is the question of costs and the question of any damages that he may have to pay." (*Par. Deb.*, Vol. 300, Cols. 879 et seq.)

PROTECTION OF CROWN SERVANTS.—Sec. 124 of the Government of Burma Act purports to be a general indemnity to all servants of the Crown for acts committed in the execution of their duty as such before the commencement of the Act. The protection given by this section is in addition to the existing protection given by sec. 197 of the Cr. P. Code, 1938 Rang. L.R. 116=1938 Rang. 139. There is nothing in the Government of India Act of 1935, which imposes a legal obligation upon the Governor of a Province to consult his minister before sanctioning under sec. 196, Cr. P. Code, a prosecution for an offence under sec. 124-A, I.P. Code. There is no provision in the Act, which requires the Governor to consult his Ministers before performing executive acts. The instrument of instructions implies that he should consult his ministers, but he is not legally required to do so. In the case of a sanction for prosecution under sec. 196, Cr.P. Code, Governor is certainly not required to exercise his individual judgment; but that does not mean that in exercising his

## CHAPTER XII.

## MISCELLANEOUS AND GENERAL.

*Provisions as to certain legal matters.*

292. Notwithstanding the repeal by this Act of the Government of India

Existing law of India to  
continue in force.

Act, but subject to the other provisions of this Act,  
all the law in force in British India immediately  
before the commencement of Part III of this Act shall  
continue in force in British India until altered or repealed or amended by a  
competent Legislature or other competent authority.

individual judgment he is acting unlawfully and that his action can be called in question in a Court of law. 48 L.W. 170=1938 Mad. 758=(1938) 2 M.L.J. 416. If any question arises whether any matter (a) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (b) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment then the decision of the Governor in his discretion is final. 193 I.C. 91=1941 Rang. 5.

Sno. 292.—In theory all Colonial Legislatures are subordinate law-making bodies and legislation under the powers conferred on them are comparable with the articles and by-laws of Corporations and statutory bodies, which is the ratio for the application of the doctrine of *ultra vires* to their legislative enactments. The rule of construction applicable to by-laws is that when a statute is repealed it must be considered as if it had never existed, and that all by-laws and rules made under a repealed statute cease to operate with the repeal of the main enactment unless there is any saving provision in the repealing enactment. As was observed by Lord Reading, C. J. in *Widdowson v. Widdowson*, (1916) 1 K.B. 688 at 690:—“Does the repeal of an Act which enables a corporation to make by-laws have the effect of repealing by-laws already made under the power while it existed, or whether the by-laws remain in force notwithstanding the repeal of the statute under which they were made?” Citing the passage from *Sutton v. Sutton*, [9 B. & C. 750 (752)]. “It has long been established that when an Act of Parliament is repealed it must be considered (except as to transactions passed and closed) as if it had never existed.” His Lordship proceeded, “To that passage it is only necessary to make one qualification in that since that case Lord Brougham’s Act, and the Interpretation Act, 1889, have been passed. It would follow that any bye-law made under a repealed statute ceases to have any validity unless the repealing Act, contains some provision preserving the validity of the bye-law notwithstanding the repeal.” In the words of *Samuelson, J.*, “When a statute is repealed any bye-law made thereunder ceases to be operative unless there is saving clause in the new statute preserving the old bye-law”. Hence the necessity for this saving clause. The

section merely continues the existing law. It does not validate any law and such invalidity as existed is still open to attack.

SCOPE AND EFFECT.—Sec. 292 of the Government of India Act is more than a mere preserving section. It enjoins that all the law in force in British India immediately before the commencement of Part III shall continue to remain in force until altered or repealed or amended. This provision amounts to a direction that the alteration, repeal or amendment of any law in force at the time of the commencement of Part III cannot be with a retrospective effect. I.L.R. (1940) All. 455 =1940 All. 272 (F.B.). There is nothing in sec. 292 to suggest that there was any intention to curtail the power of the Indian Legislature or other competent authority to decide in what manner a new law should operate as against the existing rights. All that S. 292 provides is that the existing law shall remain in force until it is repealed and not that the rights which have accrued under that law shall continue to be exercised even after the date of the repeal. S. 292 can obviously have no application to a case where pending appeal the question of the applicability of S. 84-A of the new Bihar Tenancy Act arises after the old law has been changed and the new section has come into operation. If the Legislature can make new laws and unmake old laws, it can also create new rights as well as take away rights already accrued. 1941 P.W.N. 216 =22 Pat.L.T. 356=1941 Pat. 413.

SCOPE OF SECTION.—IT PROHIBITS RETROSPECTIVE LEGISLATION.—Per *Gwyer, C.J.*—The purposes of S. 292 was to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorised its enactment; and it is a safeguard usually inserted by draftsman in similar circumstances. Within their own sphere the powers of the Indian legislatures are as large and ample as those of Parliament itself; and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. There is nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor is there any explanation why Parliament should have desired to do so. (1941) 1 M. L. J. (Supp.) 65. Per *Sulaiman, J.*—Although the main object of enacting S. 292 was to preserve the enforceability of the then existing laws, the

293. His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces:

Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.

In this section the expression "law" does not include an Act of Parliament, but includes any ordinance, order, bye-law, rule or regulation having in British India the force of law.

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295. (1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province:

language of the section is more emphatic than would have been ordinarily necessary. There is nothing in S. 292 which debars Central or a Provincial Legislature which has altered, repealed or amended previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed. (1941) 1 M.L.J. (Supp.) 65. Per *Varadachariar, J.*—A provision like S. 292 is usually inserted in similar Acts to indicate that the repeal of the Parent Act shall not be deemed to have repealed all the laws passed under that Act. That being the reason, it is not necessary or proper to lay undue stress on the word "until" used in S. 292 and hold that the policy of this provision is different from that underlying similar provisions in other constitution Acts. There is no justification for drawing a distinction between the statement that the previous law shall continue in force *subject to* repeal or amendment by later legislation and the statement that it shall continue in force *until* repealed or amended by later legislation. That Parliament might have had some reason or motive for denying to the Indian Legislature the power of retrospective legislation with reference to pre-existing law seems to rest on mere speculation and is not a fair inference from the language used in the section. 45 C.W.N. (F.R.) 27=1941 F.C. 16=(1941) 1 M.L.J. (Supp.) 65.

SEC. 293.—The amendments made by the Adaptation Order cannot be challenged as *ultra vires*, as they derive their authority from Parliament but the Acts as amended or adapted, may be altered by the

legislature which under Part V is competent to legislate in regard to the subject-matter of the Law. The 'competent legislature or competent authority' is not determined by the Orders in Council, but must be sought on the proper interpretation of Part V, read with Sch. VII of the Act.

SCOPE AND EFFECT.—All that S. 295 enacts is a power given to His Majesty in Council to adapt Acts already in force to bring them into accord with the provisions of the Government of India Act and what is contemplated is formal consequential amendment arising in the Act due to the passing of the Government of India Act. S. 293 does not mean that if His Majesty has made any Act the subject of an adaptation order, then that Act *ipso facto* becomes valid, even though its provisions conflict with the provisions of the Government of India Act. 43 P.L.R. 198=1941 Lah. 182 (F.B.).

SEC. 295: POWER OF PARDON.—This section deals in general with the power of pardon. Under S. 401, Criminal Procedure Code, the authorities heretofore vested with such powers were the Local Governments and the Governor-General in Council and they had concurrent powers in all cases. Besides this statutory power, S. 401 saved the right of His Majesty to exercise the prerogative of pardon and to delegate that power to the Governor-General in Council. It was thought to be inconsistent with Provincial autonomy to vest a power in the Federal executive at the centre to interfere with convictions of Courts over whom the control, vested in the Provincial Government



Provided that nothing in this sub-section affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a Court-martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

Prohibition of certain restrictions on internal trade.

297. (1) No Provincial Legislature or Government shall—

(a) by virtue of the entry in the Provincial Legislative List relating to

and Legislature, was complete. An exception has, however, been made in the case of sentences of death, and the Governor-General in his discretion has been authorised to exercise the powers formerly vested in the Governor-General in Council under S. 401 in respect of such sentences. Subject to this exception, the powers of the Governor-General in Council under S. 401 are taken away.

SEC. 297: FREEDOM OF INTER-PROVINCIAL TRADE.—The purpose and scope of the provisions of this section were thus explained in Parliament: "It would indeed be a serious situation if we were to allow, to develop within India in future serious restrictions on trade and so upset many of the arrangements that have been made in other directions. This is a subject which has demanded considerable care and attention on the part of the Government, and the Government have finally drafted this clause for the purpose of achieving as far as possible, free trade within India. The object of paragraph (a) is to stop a Provincial Legislature, by its power to legislate on terms in the Provincial Legislative List, from checking the distribution of trade in India. Therefore the clause draws particular attention to the items in the Provincial Legislative List which might empower the Province so to legislate as to check the free circulation of trade. These items are: in particular, Sec. 26 (now 27)—Trade and commerce within the Province; markets and fairs; and so forth. I take these two as typical examples of the attempt which the proposed clause makes to prevent a Provincial legislature legislating in such a way as to stop the free circulation of trade. "It leaves it possible still for the Provinces to take measures, for instance, under items 30 and 40 of the Provincial legislative list to deal with such a question as duties of Excise on liquor. Item 40 of the Provincial legislative list gives powers to impose duties of Excise. These duties of Excise are vital to the welfare of the Provinces. I believe that in the Province of Madras from three to four crores of revenue accrue by this power of putting duties of Excise on liquor and so forth; and in a Province like the United Provinces two crores accrue to the Provincial revenues from this source. It is not thought that by allowing this power to the Provinces it will lead to any contravention of the principle of free trade. In the same way, we must assure the Provincial Governments to legislate

on such questions as health, the movement of diseased cattle and so forth, and if our Clause were drawn in a different way with reference to the items on the legislative list this would be impossible. It is to achieve the object of free trade, and not unduly to restrict the Provinces with regard to Excise or health questions that we have drawn our clause in this manner." (Parl. Deb., Vol. 300, Col. 1406).

SEC. 297 (1) (a): APPLICABILITY.—Sec. 297 (1) (a), only refers to legislation with respect to entry No. 27 and entry No. 29 in the Provincial Legislative List. It has no application in respect to anything in entry No. 31. 21 Pat. 587=I.L.R. (1942) Kar. (F.C.) 21=46 C.W.N. (F.R.) 32=5 F.L.J. 17=A.I.R. 1942 F.C. 17=(1942) 2 M.L.J. 6 (F.C.). It cannot be held that the Defence of India Act (1939), in so far as it purports to invest a Provincial Government with power to authorise certain officers to fix the prices of commodities, is invalid as contravening the provisions of the Constitution Act. The fixing of the price at which a particular commodity may be sold in a Province does not fall within the prohibition contained in sec. 297 (1) (a). Sub-secs. (4) and (5) of sec. 2 of the Defence of India Act cannot be held to be *ultra vires* the Central Legislature on the ground that they in effect repeal sec. 297 (1) (a) of the Government of India Act. It is by virtue of the power conferred under sec. 102 (1) of the Government of India Act that the Central Legislature enacted the Defence of India Act. The Provincial Government, in exercising the power to control prices, is acting not by virtue of the entries in the Provincial Legislative List, but by virtue of the power conferred by the Defence of India Act, and after the issue of the proclamation by the Governor-General the Central Legislature has full authority to legislate with regard to any matter contained in the Provincial Legislative List. There is no bar in the Constitution Act which would prevent the Central Legislature from delegating to the Provincial Legislature the power to deal with matters referred to in sec. 297 (1) (a). Sec. 297 is not amended by sec. 2 (2) (xx) of the Defence of India Act. 23 Pat. 135=1944 F.L.J. 183=A.I.R. 1944 Pat. 205. Scope of the restrictions under sec. 297 (1)—Powers of Central Legislature to legislate on the proclamation of emergency not controlled by the restrictions in section 297 (1)—Validity of the U. P. Food Grains and Oil Seeds (Movement) Control Order, 1945 A.W.R. (H.C.) 281.

Per. Subraman, J.—An intention to



trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description;

(b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

298. (1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carry-

Persons not to be subjected to disability by reason of race, religion, etc.

discriminate is not essential to invalidate a legislation under sec. 297 (1) and (2), but it is sufficient if the provisions of the enactment result in discrimination. (1939) 1 M.L.J. (Supp.) 1. *Quære*.—Whether the word "locality" in sec. 297 (1) (b) should not be confined to localities in India, having regard to the marginal note to the section, and whether the section deals with products of foreign countries. Jayakar, J., *Quære*.—Whether sec. 297 (1) (b) does not posit a power to levy a tax on two sets of goods. 43 C.W.N. (F.C.R.) 1=49 L.W. 36 =1939 F.C. 1=(1939) 1 M.L.J. (Supp.) 1. The law which is open to objection under sec. 297 (1), of the Constitution Act is a law made by Provincial Legislature, which, by virtue of the entry relating to trade and commerce or by virtue of the entry relating to production, supply and distribution of commodities. And if a law is made substantially by virtue of the entry relating to agriculture, or of entry relating to development of industry, it is not open to objection under this section. Further the law contemplated by this section is a law which prohibits or restricts entry into or export from the province of goods directly and a law which does not deal directly and in substance with prohibition or restriction of export or import of goods but which deals with other needs of the province and provides for them, though incidentally, the effect of the provision is that in some measure, export or import is restricted, such a law is not within the meaning of the section. It follows from the above that the prohibition or restriction contemplated by the section is a prohibition or restriction on the act of export or import and so long as the goods remain the property of the province and are a stock of the province and before they have become the subject of interprovincial or foreign trade the province has every right to expropriate goods or to put any restriction upon them which it considers necessary for the needs of the province. All measures of price control collective marketing and expropriation of goods do not *per se* and as a

matter of course interfere with free trade clauses in a constitution, and the interference contemplated by the constitution is a direct interference and not an indirect interference. 200 I.C. 526=1942 A.L.J. 156=1942 A.L.J. 112. Sec. 297 does not deal with intoxicating liquors or narcotic drugs. It merely limits the power of the Provincial Legislature to legislate with respect to trade and commerce within the province, which is one of the items in Art. 27, List II, VII Schedule of the Act and with respect to the production, supply and distribution of commodities which is one of the matters included in Art. 29, List III, Seventh Schedule of the Act. All that sec. 297 (1) means is that though the Provincial Legislature has power to legislate with respect to trade and commerce within the province and with respect to production, supply and distribution of commodities, it has no power to legislate or take any executive action prohibiting or restricting the entry into, or export from, the province of goods of any class or description. It is to be observed that intoxicating liquors and narcotic drugs appear in a different article and are not included in the general terms "trade or commerce" or "production, supply and distribution of commodities". 197 I.C. 618=21 P. 178=1942 P. 351=5 F.L.J. (H.C.) 34.

DECLARATION OF FUNDAMENTAL RIGHTS.—Sir S. Hoare thus explained the origin of this section:—"The Indian delegates were anxious to have some declaration of fundamental rights. The request that they pressed upon the Joint Select Committee and the various Round Table Conferences was that somewhere or other the effective words in Queen Victoria's Proclamation should be repeated. These are the words substantially from Queen Victoria's Proclamation. They have become consecrated by long usage in the minds of Indians and the wise course is to retain the words." (Parl. Deb., Vol. 300, Cols. 1048-1049.)

SEC. 298: SCOPE AND EFFECT OF—CONTRAVENTION OF—PROPER TEST.—Sub-sec. (1) of sec. 298 confers a personal right on every subject of His Majesty domiciled in India,

ing on any occupation, trade, business or profession in British India.

(2) Nothing in this section shall affect the operation of any law which—

(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or

(b) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities.

Compulsory acquisition of land, etc.

299. (1) No person shall be deprived of his property in British India save by authority of law.

and the general legislative powers conferred respectively on the Federal Legislature and the Provincial Legislature by sub-sec. (1) of sec. 99 are subject, *inter alia* to the provisions of sec. 298. It is not correct to say that in applying the terms of sub-sec. (1) of sec. 298, it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which the Act is based. It is not a question of whether the impugned Act is based only on one or more of the grounds specified in sec. 298 (1) but whether its operation may result in a prohibition only on these grounds. Hence the proper test as to whether there is a contravention of the sub-sec. (1) of sec. 298 is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of sub-sec. (1). 73 I.A. 59 = 50 C.W.N. 426 = (1946) F.L.J. 41 = A.I.R. 1946 P.C. 66 = (1946) 1 M.L.J. 426 (P.C.). See also 1943 Lah. 233; 5 Fed.L.J. 73.

SEC. 298 (2) (a): "AGRICULTURAL LAND".—MEANING OF.—Per Dalip Singh, J.—The words "agricultural land" in sec. 298 (2) (a) must, in the absence of any indication to the contrary in the Act, be taken in their natural meaning. Agricultural land is obviously land which is either actually used for purposes of agriculture or for purposes subservient to agriculture, that is, it may include buildings necessary to carry out the process of agriculture but by no stretch of language can it be held to include pastoral land or other rights in land which are included in the definition of land in the Punjab Alienation of Land Act. 43 P.L.R. 198 = 1941 Lah. 182 (F.B.).

SEC. 298 (2) (b): PUNJAB PRE-EMPTION ACT.—The Punjab Pre-emption Act does not fall within the purview of sec. 298 (2) (b) of the Government of India Act, as it cannot be said to be merely a recognition of

the existence of the right of pre-emption according to the customary law of the Province. I.L.R. (1943) Lah. 461 = 45 P.L.R. 263 = A.I.R. 1943 Lah. 233; 1944 A.L.J. 272 = (1944) F.L.J. 162 = 48 C.W.N. (F.B.) 130 = (1944) 1 M.L.J. 502 (F.C.). Powers of Legislature to enact laws relating to religious institutions. See (1945) 1 M.L.J. 372.

SEC. 299: COMPULSORY ACQUISITION OF LAND.—The Joint Parliamentary Committee thus expressed themselves: "We think that some general provision should be inserted in the Constitution Act, safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction; and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation". (J.P.C. Rep., para. 869). Cf. Para. XIII (o) of the Instrument of Instructions to the Governor-General and Para. XVII (o) of the Instructions to the Governor of Madras. Although the Gov-

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.

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306. (1) No proceedings whatsoever shall lie in, and no process whatsoever

Protection of Governor  
General, Governor or Secretary  
of State.

shall issue from, any Court in India against the Governor-General, against the Governor of a Province, or against the Secretary of State, whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any Court

error's previous sanction under sec. 299 (3) was not obtained before enacting the Bihar Agricultural Income-tax Act, the Governor having assented to the bill, having regard to the provisions of sec. 109 (2) (a), the Bihar Act cannot be said to be invalid by reason of sec. 299 (3). 20 Pat. 573=22 P.L.T. 863=1941 Pat. 306=1941 P.W.N. 689 (S.B.).

"UNDERTAKING"—HOTEL BUSINESS.—The word "undertaking" in sec. 299 of the Government of India Act is, broadly speaking, synonymous with the word "business". The business of carrying on a hotel, therefore, is an undertaking within the meaning of the section. 49 O.W.N. 583=5 F.L.J. 112.

SEC. 299 (5): "LAND"—MEANING OF.—Parliament meant to include in the definition of "land" all the various and varying definitions of "immovable property" which have been given to that expression in India both by Acts of the Legislature as well as by Judicial decisions. I.L.R. (1944) Nag. 180=A.I.R. 1944 Nag. 201. Rights in or over immovable property—Nature of. See (1945) P.L.J. 247. The right to collect takoli must be movable property—Nature of. (1945) F.ble property" within the meaning of sec. 299 (2) (5). But an omission on the part of Government, or even a promise, to refrain from collecting the full demand which it is entitled to make, does not create an interest in or over immovable property. I.L.R. (1944) Nag. 180=A.I.R. 1944 Nag. 201. A Governor who has received an advice from a

Minister to resume possession of a part of land would be doing nothing unconstitutional if he declined to accept the advice. 6 Fed.L.J. 55=I.L.R. (1943) Kar. (P.C.) 39=A.I.R. 1943 P.C. 29=(1943) 2 M.L.J. 114. Provincial legislation in regard to remission of rent is not invalid as against a grantee of village with release from obligation to pay land revenue, on the ground that its effect is to reduce the income of the grantee from the village by reason of such remission of rents of tenants. I.L.R. (1944) AL 233=1944 P.L.J. 196=1944 A.L.R. 233=A.I.R. 1944 AL 187.

SEC. 306.—The English common law rule that the King can do no wrong and cannot be sued but the King's officers and servants are amenable to the jurisdiction of the King's Court, is now firmly established in India. The Governor-General and Governors have been, in the eye of the law, placed in the position of the King but the Government servants have no immunity. Therefore, the fact that direct proceedings cannot be taken against either the Governor-General or Governor of a province for setting aside any illegal order made by either of them is no longer any ground for extending any protection to the servants of the Crown acting under such order or for refusing any relief to the subject aggrieved by the execution of such order. 48 O.W.N. 766. This is an enlargement of the protection formerly afforded to the Governor and Governor-General by sec. 110 of the Govern-

ing on any person who has been the Governor-General, the Governor (2) Vice, or the Secretary of State in respect of anything done or omitted done by any of them during his term of office in performance or performance of the duties thereof:

mortg provided that nothing in this section shall be construed as restricting the pers en right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act.

(2) The provisions of the preceding sub-section shall apply in relation to His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States as they apply in relation to the Governor-general.

land, of India Act, 1919. They were under Act not subject to the Original Jurisdiction of the High Court in respect of acts order- and done in their public capacity; they were respect liable to the High Court's original the Pal jurisdiction for treason or felony. sec. 9 were subject to Courts in the mofussil. sions of present section is all comprehensive and in app, the Governor-General, the Governor 298, it Secretary of State from all "process" the scop per—including even a summons to ap- pugned, witness. It extends to all Courts in which Civil and Criminal and applies not of wh to their public acts but even to acts on a private capacity; e.g., even a suit for 298, it every of a debt will not lie. *Of. Hill v. in 1841* 3 Moo. P. C. 465, where a suit th. *Agge*, (1841) 3 Moo. P. C. 465, where a suit th. was held to lie for a debt against the Colo- nial Governor of Trinidad. There is how- ever power reserved to His Majesty in Coun- cil to relax the provisions of this section and permit proceedings to be taken. The liabi- lity of these officials to be proceeded against in England, for their personal acts, so far these proceedings could be initiated in the English Courts is not affected. Moreover, *Chap. XI* of the Government of India Act is repeated these officials could be puni- shed for criminal acts in India, by the Court of King's Bench under the Governor's Act, 1699, as amended by later Acts. The ex- emption from jurisdiction formerly afforded by sec. 110 extended to Executive Councillors and ministers—but the protection in their case has not been re-enacted by this Act. It was on the ground of this personal exemption that it was held that no *certiorari* could be brought against the Act of the Ministry. (*Venkata- ratnam v. Secretary of State for India*, 53 Mad. 979=60 M.L.J. 25). Sec. 306 which protects a Governor, is no bar to the issuing of an injunction against a Provincial Gov- ernment. I.L.R. (1943) Lah. 617=6 F.L.J. (H.C.) 40=A.L.R. 1943 Lah. 41 (F.B.). See also 47 Bom.L.R. 500. A suit filed against the Governor of a province instead of against the province as required by sec. 79, C. P. Code, is hit by sec. 306 of the Government of India Act. That being so, the Court cannot entertain any application in such a suit. The facts that the Governor appeared in the suit, resisted the interlocutory application and also made a substantive application for stay of the suit do not entitle the defendant from relying

on sec. 306. I.L.R. (1944) 1 Cal. 181=1945 Cal. 44. Sec. 87 of the Government of India Act protects a President of a Provincial Legislature from proceedings in Court only when he acts in accordance with powers conferred upon him. It does not protect him if he acts in defiance of the provisions of the Act and the rules made thereunder or if he exercises some power which he does not possess. Where the President of the Bengal Legisla- tive Council, in announcing his opinion as to the result of a motion put to the House, declares by a slip of the tongue that the "Ayes have it", when he thinks that the "Noes have it", and then corrects the verbal mistake com- mitted by him, he only complies with stand- ing order No. 8 made by him under the Ben- gal Legislative Council Procedure Rules. Even if, in so doing, he does not act strictly in accordance with the Rules and standing orders, it would merely mean that there is a lacuna in the Rules, and the Court should not interfere with him when the matter is ab- solutely trumpety and it is not satisfied with the *bona fides* of those who challenge his ac- tion. 1945 F.L.J. 155=49 C.W.N. 405. Order of Provincial Government under sec. 36, Madras District Municipalities Act, and issued in name of Governor under sec. 59, Government of India Act, revising prior order—Application for writ of *certiorari* is not maintainable. 50 L.W. 538=1939 Mad. 940 =I.L.R. (1940) Mad. 204=(1939) 2 M.L. J. 801. Where the Hindu Religious Endow- ments Board has abused its powers in noti- fying a temple under Chap. VI-A of the Madras Hindu Religious Endowments Act, the High Court has power to quash the Board's orders on which the notification is based, and if the basis of the notification is illegal, the notification is illegal. Even if the notification in such circumstances remained a lawful noti- fication, the Court would still be in a position to take effective action. The provisions of sec. 306, read with sec. 109 of the Govern- ment of India Act, 1935, do not make the notification under the Madras Hindu Reli- gious Endowments Act an act of the Governor which cannot be challenged in Courts. Where on the facts it is found that the Board's ac- tion in notifying a temple was arbitrary and an abuse of its powers, the order of the Com- mittee of the Board and that of the full Board on appeal under sec. 65-A of the Mad-

## CHAPTER XIII.

## TRANSITIONAL PROVISIONS.

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**316.** The powers conferred by the provisions of this Act for the time being in force on the Federal Legislature shall be exercisable by the Indian Legislature, and accordingly references in those provisions to the Federal Legislature and Federal Laws shall be construed as references to the Indian Legislature and laws of the Indian Legislature, and references in those provisions to Federal taxes shall be construed as references to taxes imposed by laws of the Indian Legislature:

Provided that nothing in this section shall empower the Indian Legislature to impose limits on the power of the Governor-General in Council to borrow money.

**317. (1)** The provisions of the Government of India Act set out, with amendments consequential on the provisions of this Act, in the Ninth Schedule to this Act (being certain of the provisions of that Act relating to the Governor-General, the Commander-in-Chief, the Governor-General's Executive Council and the Indian Legislature and provisions supplemental to those provisions) shall, subject to those amendments, continue to have effect notwithstanding the repeal of that Act by this Act:

Provided that nothing in the said provisions shall affect the provisions of the last but one preceding section.

ras Hindu Religious Endowments Act should be quashed. I.L.R. (1941) Mad. 807=1941 Mad. 878=(1941) 2 M.L.J. 175.

POWER OF GOVERNOR-GENERAL IN COUNCIL TO PUT EX-RULER OF INDIAN STATE UNDER RESTRAINT UNDER BRITISH ENDOWMENTS ACT, 1818.—Once a ruler has been deposed and happens to be in British India in the capacity of an ordinary individual, a preventive detention in British India for reasons of State connected with the discharge of the functions of the Crown in its relations with the Indian States can be brought about by the Governor-General in Council, not in the exercise of the functions of the Crown in its relations with Indian States but under the executive authority conferred on him under Government of India Act, 1935. The Governor-General in Council can pass an order placing the ex-Ruler under personal restraint under Regulation 3 of 1818 with the concurrence of the Crown representative. 47 P.L.B. 265=1945 Lah. 274 (F.B.). Per *Niyogi, J.*—Even if a grave emergency is declared to exist in India it is competent to make an Ordinance for British India only. I.L.R. (1943) Nag. 73=6 F.L.J. (M.C.) 53=1943 N.L.J. 16=A.I.R. 1943 Nag. 86.

SEC. 316.—Speaking of this section *St. Samuel Hoare* said: "The word 'Powers' means the powers in the Federal and Provincial lists; simply the Legislative powers conferred by the two lists. The setting up of provincial autonomy would in itself considerably restrict the field of the activity of the Central Legislature. The Central Legislature at the present time can legislate over the whole field of Indian Government. In the transitional period it will not be able to

legislate over the very wide field of Provincial legislation.

"In the concurrent list again the legislative field of the Centre is being considerably restricted. At the present time it has no power over the whole field. In future it will not have power over the provincial list. The Central Legislature so far from having greater powers than it has now will have smaller powers in the transitional period.

"There can be no question of the executive at the Centre becoming responsible to the Central Legislature during the transitional period. The executive at the Centre during the transitional period will remain the Governor-General in Council, just as it is now, and there can be question whatever that during the transitional period, a Government will be set up at the Centre responsible to the Central Legislature". (Parl. Deb., Vol. 300, Col. 1119).

SEC. 317.—As till now no federal legislation has yet been brought into force as part of the Law of India, under the provision of sec. 317 and Sch. 9 of the Government of India Act, 1935, the law in regard to the Indian Legislature contained in the Government of India Act, 1919, has all along continued to be the law of British India. It appears that the provisions made in sec. 317 and Sch. 9 is intended to continue the validity of the functions of the Indian Legislature. So the Hindu Women's Right to Property Act is a validly passed Act. 1939 A.L.J. 375=I.L.R. (1939) All. 912=1939 All. 706. See also 1941 Sind 114. Sec. 317 and Sch. 9—Effect of. See (1946) 1 M.L.J. 145.

ing of (2) In the said provisions, the expression "this Act" means the said provisions.

(3) The substitution in the said provisions of references to the Secretary of State for references to the Secretary of State in Council shall not render inoperative anything done thereunder by the Secretary of State in Council before the commencement of Part III of this Act.

318. (1) Notwithstanding that the Federation has not yet been established, the Federal Court and the Federal Public Service Commission and the Federal Railway Authority shall come into existence and be known by those names, and shall perform in relation to British India the like functions as they are by or under this Act, to perform in relation to the Federation when established.

(2) Nothing in this section affects any power of His Majesty in Council to fix a date later than the commencement of Part III of this Act for the coming into operation, either generally or for particular purposes, of any of the provisions of this Act relating to the Federal Court, the Federal Public Service Commission or the Federal Railway Authority.

#### SEVENTH SCHEDULE.

[Ss. 100 & 104.]

#### LEGISLATIVE LISTS.

##### LIST I.

##### *Federal Legislative List.*

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment; central intelligence bureau; preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

#### SCH. VII: LISTS AND ITEMS THEREIN—

CONSIDERATION—RULES AS TO.—Per *Gwyer, C.J.*—The subjects dealt with in the three Legislative Lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the provincial list in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad general import. None of the items in the list is to be read in a narrow or restricted sense and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. Per *Sulaiman, J.*—The lists even if taken together may not prove to be exhaustive. It is quite possible to conceive of cases which are not comprised in any of the lists. But they are so comprehensive that apart from personal laws it would be only extremely rare cases which would not be covered by them at all. 45 C. W.N. (F.R.) 27=72 C.L.J. 550=1941 A.L.J. 170=53 L.W. 397=1941 F.C. 16=(1941) 1 M.L.J. (Supp.) 65. See also 1940 All. 272 (F.B.); 53 L.W. 109=73 C.L.J. 1=1941 F.C. 47=(1941) 1 M.L.J. (Supp.) 1. Per *Iqbal Ahmad, J.*—The U. P. Regularisation

of Remissions Act is not with respect to the jurisdiction and powers of Courts within the meaning of entry 2 of the Provincial list. It is also outside the scope of the legislative powers defined in entry 21 of the Provincial list. It is outside the scope of the three Legislative lists and therefore falls within the residual powers of legislation defined in sec. 104 of the Government of India Act. Per *Bajpai, J.*—The U. P. Regularisation of Remissions Act comes within entry 2 read with 21 of the List II of Sch. VII of the Government of India Act. Per *Ismail, J.*—The U. P. Regularisation of Remissions Act falls within entry 2 and entry 21 of List II and not within entry 4 and entry 15 of List III. I.L.R. (1940) All. 455=1940 A.L.J. 274=1940 All. 272 (F.B.).

LEGISLATURES—SOVEREIGN AND SUBORDINATE—POWERS OF—DIFFERENCE BETWEEN.—Per *Sen, J.*—There is a fundamental difference between a sovereign and a subordinate Legislature. No Court can question the validity of a law made by a sovereign Legislature like Parliament in as much it has unfettered legislative powers. Bodies or persons given legislative powers by a Parliament are in a different position—they are subordinate or non-sovereign legislatures and, as such their Acts may be adjudicated upon by Courts



which, in a proper case, may declare them to be *ultra vires*. A subordinate or non-sovereign legislature has denude limits upon its law-making powers. It can legislate only within the ambit of the powers which are conferred upon it by the enactment which creates it. Any law which it passes outside this ambit is *ultra vires*. It follows from this that a non-sovereign legislature which has made a law which is *ultra vires* of itself cannot by a subsequent Act declare such law or any part thereof to be *intra vires*. To permit this would be to permit a legislature with powers limited by some other authority to enlarge its powers by its own act without reference to the authority creating it. Now if this cannot be done directly, obviously it cannot be done indirectly by means of drafting or other devices. 45 Cr.L.J. 37=47 C.W.N. 757=A.I.R. 1943 Cal. 489 (S.B.)=79 C.L.J. 281.

PROVINCIAL AND CENTRAL ACTS—CONFLICT BETWEEN—RULE OF SEVERABILITY—WHEN ARISES.—The question of the severability of the invalid provisions of a Provincial Act from the valid provisions will be material only if the Act is in some measure held to be *ultra vires* the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being *intra vires* the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. It is the doctrine of repugnancy and not the doctrine of *ultra vires* that has to be applied in this class of cases. I.L.R. (1944) Kar. (F.C.) 46=6 F.L.J. 221=48 C.W.N. (F.R.) 36=A.I.R. 1944 F.C. 18=57 L.W. 213=(1944) 1 M.L.J. 178=79 C.L.J. 220.

FUNCTIONS OF LEGISLATURE—DELEGATION TO EXECUTIVE—VALIDITY.—Per *Munir, J.*—In the case of a constitution of the British model the legislative power of the Legislature involves, as part of its content, the power to confer law-making powers upon authorities other than the Legislature itself and an increase in the extent of such power cannot of itself invalidate the grant unless the grant amounts to an abdication of the functions of the Legislature. This is not only for the reason that the Legislature in that system is supreme but also for the reason that the executive in a constitution of that kind is responsible to the Legislature both of whom co-operate with each other, and the Legislature is always competent to withdraw the grant if the executive acts in opposition to its wishes or the wishes of the electors. The question of the constitutionality or unconstitutionality of a law has to be determined not by the principle of the maxim *delegatus non potest delegare* but by the consideration whether the Legislature in performing its functions of law-making has laid down the principle of the legislation and left merely the filling up of details to the executive or whether by empowering the executive to make the rules, the Legislature has delegated to the executive the power to lay down the principles of legislation itself. If in the statute the

Legislature has laid down a principle or a policy but left it to the executive to carry out that principle or policy subject to well-defined restrictions the enactment would be constitutional, but if the Legislature has left it to the executive to lay down the principle or policy and thus given to it absolute and unrestricted discretion to legislate in the form of the power to make rules, the enactment would be unconstitutional. 1944 F.L.J. 72=A.I.R. 1944 Lah. 33 (F.B.).

PERSONAL LIBERTY—INVASION OF—RIGHT OF AFFECTED PERSON.—Per *Niyogi, J.*—The fact that there is no express provision anywhere in the Government of India Act, 1935, affecting the personal liberty of the subject does not mean that that liberty can be invaded otherwise than by the authority of law. A person who is threatened with legal proceedings which are calculated to affect his person or property has an absolute right to be heard in his defence. It is a right which is implied by natural justice which prevails during peace time as well as during times of war. The Criminal Law of India is so framed as to respect such rights. In India as in England the law gives equal protection to every man. No man is above the law and no man is punishable or can be lawfully made to suffer in body or goods except for the distinct breach of law established in the ordinary legal manner before the ordinary Courts. There is thus unquestionably the rule of law in India in the sense in which Dicey interprets that expression in his well-known Law of the Constitution. I.L.R. (1943) Nag. 78=6 F.L.J. (H.C.) 53=1943 N.L.J. 16=A.I.R. 1943 Nag. 86.

RIGHTS OF LIBERTY AND PROPERTY—MODIFICATION OR SUSPENSION—PROPER AUTHORITY.—The rights to liberty and property are the most fundamental rights known to the constitution and the most highly prized, but they yield place to the safety of the realm. To modify the rights of the subject or even to suspend or take them away altogether, the Legislature is supreme. But it is the Legislature which is supreme, not the executive, and so, before the executive can claim the power to override those rights, it must show that the Legislature has empowered it to do so and under the constitution the Legislature can only act in particular ways. All empowering must therefore be done properly and formally; deliberately, in the manner laid down by the constitution. The executive cannot suddenly step in and claim the right to wield absolute and arbitrary power—not even in war time. Such fundamental rights, safeguarded under the constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of the utmost vigour, cannot be swept away by implication or removed by some sweeping generality. The removal must be express and unmistakable; and this applies whatever Government be in power, and whether the country is at peace or at war. I.L.R. (1943) Nag. 154=1943 N.L.J. 1=A.I.R. 1943 Nag. 26.



2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops), <sup>1</sup>[The constitution and powers within such areas of cantonment authorities] the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.
3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.
4. Ecclesiastical affairs, including European cemeteries.
5. Currency, coinage and legal tender.
6. Public debt of the Federation.
7. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication; Post Office Savings Bank.
8. Federal Public Services and Federal Public Service Commission.
9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.
10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.
11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.
12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.
13. The Benares Hindu University and the Aligarh Muslim University.
14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal meteorological organisations.
15. Ancient and historical monuments; archaeological sites and remains.
16. Census.
17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom; pilgrimages to places beyond India.
18. Port quarantine; seamen's and marine hospitals, and hospitals connected with port quarantine.
19. Import and export across customs frontiers as defined by the Federal Government.
20. Federal railways; the regulations of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.
21. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

## LEG. REF.

<sup>1</sup> Added by 3 & 4 Geo. 6, Ch. 5, sec. 3.

LEGISLATION IN RESPECT OF PROPERTY AND CIVIL RIGHT, IF CAN BE AIMED AT A PARTICULAR RIGHT.—It cannot be said that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. The Legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the Courts. 1944 A.W.B. (P.C.) 4=A.I.R. 1944 P.C. 7=1944 F.L.J. 45 (F.C.).

PORTION OF AN ENACTMENT IMPUGNED—JUSTIFICATION ON THE GROUND OF ITS BEING NECESSARY TO MAKE THE WHOLE SCHEME OF THE ACT WATER-TIGHT.—The validity of a section of a particular Act must be judged according to its terms, and, if its enactment by the Provincial Legislature be beyond the powers of that Legislature, it cannot be justified on the ground that it is needed to make

the whole scheme of the Act water-tight. 1944 F.L.J. 1.

TAXING PROVISIONS IN ENACTMENTS.—In the Constitution Act of India there is no statutory bar by which taxing clauses are forbidden from being introduced into measures dealing with other subjects. I.L.R. (1942) All. 302=5 F.L.J. (H.C.) 43=A.I.R. 1942 All. 156.

EXECUTIVE ORDER OF THE CROWN REPRESENTATIVE attaching Bhadwa taluka and other smaller States to Gondal and other larger States—*Ultra vires*—Transfer of residuary judicial functions of smaller States from Agency Courts to Judicial Officers of larger States—Legality—Act of Crown Representative, if an act of State. See 1944 F.L.J. 20.

SCH. VII, LIST I, CL. 19 AND LIST II, CL. 31.—Scope—Madras Prohibition Act, sec. 4 (1) (a) not *ultra vires*—Possession of arrack in contravention of sec. 4 (1) (a)—Conviction is legal. See (1941) 1 M.L.J. 715.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.
23. Fishing and fisheries beyond territorial waters.
24. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.
25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.
26. Carriage of passengers and goods by sea or by air.
27. Copyright, inventions, designs, trademarks, and merchandise marks.
28. Cheques, bills of exchange, promissory notes and other like instruments.
29. Arms, firearms, ammunition.
30. Explosives.
31. Opium, so far as regards cultivation and manufacture, or sale for export.
32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.
33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit <sup>1</sup>[but not including Universities].
34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.
35. Regulation of labour and safety in mines and oilfields.
36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.
37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.
38. Banking, that is to say, the conduct of banking business by corporations, other than corporations owned or controlled by a Federated State and carrying on business only within that State.
39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.
40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.
41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such

## LEG. REF.

<sup>1</sup> Added by 3 & 4 Geo. 6, Ch. 5, sec. 7.

SCH. VII, LIST I, ENTRY NO. 28: SCOPE.—Legislation with respect to matters coming under Entry No. 28 means legislation with respect to the negotiable aspect of the instruments mentioned in that Entry. The other aspects of these instruments do not come within it. 1944 F.L.J. 197=1944 Cal. 196=48 C.W.N. 403=A.I.R. 1944 Cal. 196.

LIST I, NO. 31.—See (1941) 1 M.L.J. 715.

LIST I, NO. 34: 'FEDERAL LAW'—MEANING—COMPETENCY OF LOCAL LEGISLATURE TO REPEAL SUGARCANE ACT (1934) OF THE CENTRAL LEGISLATURE.—'Federal law' as used in Entry No. 34 of List I of Sch. VII of the Constitution Act, is either a law made by

the Federal Legislature after it has come into existence or a law made by the Indian Legislature during the transitional period, that is, between the enactment of the Constitution Act and till Federal Legislature comes into existence, but other existing Indian Laws which were enacted before the Constitution Act could not fall within the meaning of the 'Federal law' as used in the Constitution Act. As sugarcane as an agriculture and sugar manufacture as an industry are entirely provincial subjects the Provincial Legislature is competent to repeal the Sugarcane Act (1934) and to make its own laws about sugarcane and sugar as also about sugar factories. 200 I.C. 536=1942 A. 156=I.L.R. (1942) All. 302=1942 A.L.J. 112.

extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purposes of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalisation.

50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

54. Taxes on income other than agricultural income.

1754-A. The matters specified in the proviso to sub-section (2) of section 142-A of this Act as matters with respect to which provision may be made by laws of the Federal Legislature.]

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies;

56. Duties in respect of succession to property other than agricultural land;

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

#### LEG. REF.

<sup>1</sup> Inserted by 3 & 4 Geo. 6, Ch. 5, sec. 2

**LIST I, ENTRY NO. 38.**—"Conduct of Banking business"—What is—Scope of clause 38. See (1945) 1 M.L.J. 30.

**LIST I, ITEM 45 AND LIST II, ITEM 48.**—See 1942 F.C. 33=5 F.L.J. 61=46 C.W.N. (F.R.) 38=(1942) 2 M.L.J. 327. "EXCISE"—"TAXES ON THE SALE OF GOODS"—INTERPRETATION OF.—The term "excise" may have a wider meaning so as to include all duties levied on the consumption of excisable commodity at any stage from production to sale, but having regard to the context in which the expression is used and the scheme of the Government of India Act, and to avoid conflict with Item 48 in List II of Schedule VII, the expression "Duties of excise" as used in Item 45 of List I of Schedule VII must be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with, manufacture or production and that it extends no further. A clear distinction exists between the first sale and the last sale as the latter is not intimately connected with the manufacturer or producer while the former is. If "excise"

should be given the wider meaning, then the only taxes that would not amount to excise duty and would be left over for the Provinces to impose under Item 48 in List II would be license fees and certain turn over taxes, which will be merely illusory and that could not have been the intention of Parliament in using the words "taxes on the sale of goods" in Item 48 in List II of Sch. VII to the Act. 2 F.L.J. 6=43 C.W.N. (F.C.R.) 1=49 L.W. 36=1939 F.C. 1=1939 M.L.J. (Supp.) 1. The true distinction between an excise duty, sale tax and a cess on entry of goods as used in the Constitution Act does not consist in the fact that the tax is on goods or that the tax is payable by manufacturer or producer but it consists in the fact whether the tax is on the act of production or on the act of sale or on the act of introducing goods in a particular area. Two conclusions follow from this that a tax on consumption of goods or a tax on purchase of goods whatever else it may be, cannot be an excise duty. And a tax on raw produce required by the manufacturer for his manufacture may be an excise duty or may be a general tax or may be a special tax, and the fact whether it is one or the other will depend upon the true nature of the tax in the light of surround-

## LIST II.

## PROVINCIAL LEGISLATIVE LIST.

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all Courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subject to such detention.

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature and persons detained therein; arrangements with other units for the use of prisons and other institutions.

ing circumstances of each case. The expression "excise duty" in entry No. 45 of List I, in Sch. VII, Constitution Act, is used in a restricted sense so as to allow provinces to exercise powers under sale tax and cesses on goods without making those taxes excise duties in the British sense of the word. A.I.R. 1942 A. 156=1942 A.L.J. 112=I.L.R. (1942) All. 802. Fees and cesses are two forms of special taxation which a Provincial Legislature provided it is given authority to do so is entitled to resort to in order to recoup itself for any special expenditure which it has incurred for the benefit of a special class of persons against that special class. And the Provincial Legislature may recover the whole of this expenditure either by levying a fee which may be partly recurring and partly non-recurring and recurring portion may be based on monthly payment measured on the consumption of goods by the payer of fee or by levying a cess or partly by levying a fee and partly by levying a cess at its option. The imposition of a cess under Cl. (2) of S. 29 of the U.P. Sugar Factories Control Act is in the first instance a cess within the meaning of Entry No. 49 of List II and not a duty of excise within the meaning of Entry No. 45 of List I and if there be any difficulty in regarding it as a cess it can also be treated as a fee under Entry No. 54 of List II and Entry No. 36 of List III. The U. P. Sugar Factories Act, Cl. (2) of S. 29 and R. 21-A of U. P. Sugar Factories Control Rules are all *intra vires* the Provincial Legislature. 1942 A.L.J. 112=200 I.C. 526=1942 A. 156.

Sch. VII.—Lists II and III—"Agricultural land"—Mango grove, if included. 57 L. W. 260=(1944) 1 M.L.J. 361.

Sch. VII, List II, Item I—"Public order"—Order restricting movements of person—Legality. There is no warrant for construing "public order" in Item I of List II of Sch. VII as meaning that only a provision for detention and not restriction of movements for the purpose of maintaining public order could be made. The words "preventive detention for reasons connected with the maintenance of public order" have been added, not to restrict the expression "public order" but only because a specific reference was deemed desirable to that particular aspect of public

order. 24 Pat. 418=(1945) P.W.N. 239=A.I.R. 1945 Pat. 444.

List II, Entry No. 21.—The term "devolution" in Entry No. 21 of List II includes the operation of the principle of survivorship. 73 C.L.J. 415=54 L.W. 22=45 C. W.N. (F.B.) 81=4 F.L.J. 1=1941 F.O. 72=(1941) 2 M.L.J. 12. See also 48 C.W. N. 759.

Sch. VII, List II, Entry No. 21—*Scope* of. Entry No. 21 should be read and interpreted as a whole and in the light of entries Nos. 7, 8 and 10 of List III. I.L.R. (1942) Kar. (F.O.) 40=I.L.R. (1942) Lah. 623 46 C. W. N. (F. R.) 61=5 Fed. L. J. 33=A. I. R. 1942 F.O. 27. "Agricultural Land"—*Test*—As the expression "agricultural land" has not been defined in the Government of India Act, it must be understood in the sense which it ordinarily bears in the English language.

*Quære*.—Whether for the purposes of the relevant entries in Lists II and III of the Government of India Act it will not be right to take into account the general character of the land (as agricultural land) and not the use to which it may be put at a particular point of time. It is difficult to impute to Parliament the intention that a piece of land should, so long as it is used to produce certain things, be governed by and descend according to laws framed under List II, but that when the same parcel of land is used to produce something else (as often happens in this country), it should be governed by and descend according to laws framed under List III. I.L.R. (1942) Kar. (F.O.) 40=I.L.R. (1942) Lah. 623=5 Fed.L.J. 33=55 L. W. 484=46 C.W.N. (F.R.) 61=A.I.R. 1942 F.O. 27. See also 1943 P.W.N. 73; 48 C.W.N. 759 (Distinction between agricultural and non-agricultural land). The words "agricultural land" in entry No. 21 are used in the same sense as the word "land" in that entry, that is to say, the words "agricultural land" include rights in or over agricultural land and therefore include the rights of a usufructuary mortgagee in such land. 1945 F. L.J. 234=47 P.L.R. 233=A.I.R. 1945 Lah, 282. Allocation of Lands and Buildings in Chief Commissioners Province. See I.L.R. (1943) Kar. (F.C.) 10=47 C.W.N. (F. B.) 34=6 Fed.L.J. 18=A.I.R. 1943 F.O. 13=(1943) 2 M.L.J. 137.

5. Public debt of the Province.
6. Provincial Public Services and Provincial Public Service Commissions.
7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.
8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.
9. Compulsory acquisition of land.
10. Libraries, museums and other similar institutions controlled or financed by the Province.
11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.
12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorised by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.
13. Local Government, that is to say, the constitution and powers of municipal corporations, improvements trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.
14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.
15. Pilgrimages, other than pilgrimages to places beyond India.
16. Burials and burial grounds.
17. [Education, including Universities other than those specified in paragraph 13 of List I.]
18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.
19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.
20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.
21. Land, that is to say, rights in, or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.
22. Forests.
23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.
24. Fisheries.
25. Protection of wild birds and wild animals.
26. Gas and gasworks.
27. Trade and commerce within the Province; markets and fairs; money lending and money lenders.
28. Inns and innkeepers.
29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.
30. Adulteration of foodstuffs and other goods; weights and measures.
31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.
32. Relief of the poor; unemployment.
33. The incorporation, regulation, and winding-up of corporations [not being corporations specified in List I or Universities]; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.
34. Charities and charitable institutions; charitable and religious endowments.

## LEG. REF.

1 Substituted by 3 and 4 Geo. 6, ch. 5.

List II, Entries 27 and 29.—See 197 I. 618.

List II, Entry 31.—See 197 I.C. 618. Power to legislate "with respect to intoxicating liquors" includes power to prohibit. See 5 F. L.J. 17=A.I.R. 1942 F.C. 17 (F.C.)= (1942) 2 M.L.J. 6.

85. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

86. Betting and gambling.

87. Offences against laws with respect of any of the matters in this list.

88. Inquiries and statistics for the purpose of any of the matters in this list.

89. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments, [subject however, to the provisions of section one hundred and forty two A of this Act.]<sup>1</sup>

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

2[48-A. Taxes on vehicles suitable for use on roads, whether mechanically propelled or not, including tramcars.

48-B. Taxes on the consumption or sale of electricity, subject, however, to the provisions of section one hundred and fifty-four A of this Act.]

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

### LIST III.

#### CONCURRENT LEGISLATIVE LIST.

##### PART I.

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure

#### LEG. REF.

<sup>1</sup> Added by 3 and 4 Geo. 6, ch. 5, sec. 2 (8).

<sup>2</sup> Added by 3 and 4 Geo. 6 ch. 5, sec. 3.

Sch. VII, List II, Entry No. 34.—“Charitable institutions”—Meaning of. *See* (1945) 1 M.L.J. 372.

List II, Entry 48.—*See* (1939) 1 M.L.J. (Supp.) 1.

List II, No. 49: ‘LOCAL AREA—MEANING.—The words ‘local area’ as used in Entry No. 49 of List II have no technical meaning and they are merely used in the dictionary sense of the word and hence it should mean any limited area or any area peculiar to a place, and as such factory area might well be regarded as a local area. 1942 A.W.R. (H.C.) 46=1942 O.A. (Supp.) 94=1942 A.L.W. 81=1942 A.L.J. 112=I.L.R. 1942 All. 302=1942 A. 156.

Sch. VII, List I, No. 45, List II, Nos. 49 and 54 and List III, No. 86.—U. P. Sugar Factories Control Act, (1938), S. 29 (2) and U.P. Sugar Factories Control Rules, R. 21-A—Forms of special taxation to which Provincial Legislature can resort—Imposition of cess under S. 29 (2) of U. P. Sugar Factories Act, nature of—Act and R. 21-A of U.P. Sugar Factories Control Rules not *ultra vires* the Provincial Legislature. *See* 1942 A.L.J. 112.

List III, Item 2.—“Criminal procedure”—Order under S. 144, Cr.P. Code—Ordinance providing for restrictive orders—Legality. An order under S. 144, Cr.P. Code, preventing a person from entering a particular place comes within the provisions of item 2 of List III and within the ordinance-making power of the Governor-General. 24 Pat. 418=(1945) P.W.N. 239=A.I.R. 1945 Pat. 444.

dure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrator-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this list, but not including fees taken in any Court.

#### PART II.

26. Factories.

27. Welfare of labour; conditions of labour; provident funds; employer's liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibition.

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

#### NINTH SCHEDULE.

72. The Governor-General may, in cases of emergency, make and promulgate ordi-

List III, Entry No. 4.—“Civil Procedure” in the Concurrent Legislative List in Sch. VII to the Government of India Act must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters in the second entry in the Provincial Legislative List. 69 C.L.J. 573=2 F.L.J. 112

=43 C.W.N. 913=1939 Cal. 628.

List III, Entry No. 7: “SUCCESSION”—IF INCLUDES PRINCIPLE OF SURVIVORSHIP.—The word “succession” in Entry No. 7 of List III includes the principle of survivorship. 73 C.L.J. 415=54 L.W. 22=45 C.W.N. (F.R.) 81=4 F.L.J. 1=1941 F.C. 72=(1941) 2 M.L.J. 12.



Power to make ordinances in cases of emergency.

nances for the peace and good government of British India, or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act.

SCH. IX, S. 72—WHETHER EMBODIES ROYAL PREROGATIVE. When the powers of the Crown have been crystallized in a statute, as they have in sec. 72, Sch. 9, the exercise of those powers by virtue of the provisions of that statute does not constitute an exercise of the Royal prerogative, but the powers are exercised by virtue of the authority of the statute. S. 72 does not deal with the question of prerogative at all. I.L.R. (1943) Nag. 369=1943 N.L.J. 311=A.I.R. 1943 Nag. 211. Legislation by Ordinance and ordinary legislation—Difference between. Legislation by ordinance has no doubt been given the same effect as ordinary legislation and the ambit as to subject-matter is the same in both cases. But there are two fundamental points of difference: One is that by the very terms of S. 72 of Sch. IX the operation of the Ordinance is limited to a period of six months and, secondly, it is avowedly the exercise of a special power intended to meet an emergency. It is only consistent with the special character of this kind of law making that the responsibility for it should have been laid on the Governor-General whose personal judgment and discretion must be taken to be a very important factor. It may be that his position too cannot be described as that of the "agent" or "delegate," but the very conception underlying the ordinance-making power so connects it with the personal judgment and discretion of the Governor-General that the objection against delegation to subordinate executive authorities of any matter of principal is a serious one. 47 C.W.N. (F.B.) 41=6 F.L.J. 79=A.I.R. 1943 F.C. 86=(1943) 2 M.L.J. 207 (F.C.).

"EMERGENCY", MEANING OF.—Per *Sen, J.*—"Emergency" as used in S. 72 of Sch. 9 is something in existence which calls for immediate action. 44 Cr.L.J. 673=A.I.R. 1943 Cal. 285 (S.B.) See also 1943 Cal. 377=47 C.W.N. 802.

OTHER TERMS EXPLAINED.—The words "and may be controlled or superseded by any such Act" in S. 72, Sch. 9 refer only to a subsequent Act, an Act passed for the purpose of controlling or superseding the Ordinance, and cannot refer to an Act like the Defence of India Act passed previous to the Ordinance in a wholly different situation. Therefore, it cannot be said that Ordinance 2 of 1942 is controlled by the Defence of India Act. 1944 P.W.N. 420=22 Pat. 433=1943 Pat. 245 (S.B.).

LEGISLATION BY ORDINANCE—MATTERS IN LIST II.—The Governor-General has the same powers which the Central Indian Legislature

would have had at the time when the particular Ordinance is made and promulgated. By a declaration of emergency by the Governor-General under sec. 102, the Central Indian Legislature acquires the power to legislate on matters included in List II. If the Governor-General makes and promulgates an Ordinance after he has declared a grave emergency under S. 102, that Ordinance can directly deal with matters enumerated in List II. The object which Parliament has in view was to centralise powers "in the Centre" when a grave emergency appeared. 47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S.B.); I. L.R. (1943) 2 Cal. 1=(1943) 2 M.L.J. 207 (F.C.).

EMERGENCY—GOVERNOR-GENERAL IS SOLE JUDGE—RECITAL IN PREAMBLE.—The Governor-General alone is to be the sole judge under the Act of the existence of an emergency and, therefore, the mere recital in the preamble of the Ordinance that there was an emergency is enough. 22 Pat. 160=1942 F.L.J. 270=23 P.L.T. 737=A.I.R. 1943 Pat. 24 (F.B.).

DECLARATION OF EMERGENCY—COURT'S POWER TO GO BEHIND.—Whether the Governor-General has declared that an emergency has arisen necessitating an Ordinance, the declaration precludes the Courts from either inquiring whether an emergency exists or whether the Ordinance is conducive to the peace and good government of British India and apt to meet the emergency. 22 Pat. 565=24 P.L.T. 302=A.I.R. 1943 Pat. 346. See also (1946) 1 M.L.J. 145 (Effect of S. 317 and Schedule IX). As to scope of Ordinance making powers and List II subjects see (1944) 2 M.L.J. 167; 45 Bom.L.R. 50; (1943) 2 M.L.J. 463. Whether there was any emergency justifying the making of an Ordinance by the Governor-General is a matter falling entirely within the province of the Governor-General, and is not open for examination by the Courts. The sole Judge of this is the Governor-General and his decision is final. 23 Pat. 457=A.I.R. 1944 Pat. 373. See also I.L.R. (1943) Kar. 449=A.I.R. 1944 Sind 1 (F.B.).

LEGISLATION BY ORDINANCE—PROVISION IN ORDINANCE THAT ITS VALIDITY CANNOT BE CHALLENGED, Per Mitter, J.—The Governor-General under S. 72 of the Act cannot legislate on matters on which the Central Indian Legislature cannot legislate. The only difference is that an emergency must exist (of which he is the sole judge) before he can embark on legislation by Ordinance, and the legislation must be for the peace and good Govern-

## THE GOVERNMENT OF INDIA (AMENDMENT) ACT, 1929.

(2 &amp; 3 Geo. 6, Chapter, 66).

[1st September, 1939.

*An Act to amend the Government of India Act, 1935.*

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendments as to Proclamations of Emergency. 26 and 27, Geo. 5. c. 2.

1. (1) After section one hundred and twenty-six of the Government of India Act, 1935, there shall be inserted the following section:—

"126-A. Where a Proclamation of Emergency is in operation whereby the Governor-General has declared that the security of India is threatened by war—

(a) the executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority thereof is to be exercised, and any directions so given shall for the purposes of the last preceding section be deemed to be directions given thereunder;

(b) any power of the Federal Legislature to make laws for a Province with respect to any matter shall include power to make laws as respects a Province conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Federation or officers and authorities of the Federation as respects that matter, notwithstanding that it is one with respect to which the Provincial Legislature also has power to make laws;

ment of British India. But whether the particular provisions which he chooses to enact would promote peace or good Government is a matter which is entirely within his judgment. The propriety of the particular piece of legislation cannot be questioned by any outside body. But he cannot act in excess of the powers conferred on him by Parliament. Subject to what has been indicated above he cannot make a provision in his Ordinance that the validity of its provisions or a particular provision therein shall not be challenged in Courts of Judicature in India on the ground of *ultra vires* his powers. Such a provision would be illegal and would be discarded by Courts, on the principle that he would thereby be able to extend his power to make laws which Parliament never intended for him. 47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S. B.).

ORDINANCE—RETROSPECTIVE OPERATION.—IF CAN BE GIVEN.—Governor-General has power to give retrospective operation to his Ordinance. 47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S. B.). The exercise of the ordinance making power under the Government of India Act of 1935, is limited in two ways: (1) by the limitation as to the circumstances in which it can be exercised, and (2) by the limitation as to the time during which any measure so enacted may remain in operation. The existence of an emergency is a condition precedent to the exercise of the power. It is misleading to assume that the Ordinance making

authority enjoys plenary powers of legislation and then seek to deduce therefrom the inference that it must have the power to enact a provision with retrospective operation. Assuming that the ordinary legislature can pass a 'retro-active' law, it would not necessarily follow that the Ordinance making authority must also have the power to pass a 'retro-active' law. 6 F.L.J. 151=48 C.W.N. (F.R.) 1=A.I.R. 1943 F.C. 75=(1943) 2 M.L.J. 468 (F.C.).

LEGISLATION BY ORDINANCE—POWER OF GOVERNOR-GENERAL TO MODIFY ACT OF INDIAN LEGISLATURE. *Per Special Bench (Khundkar, J., contra).*—The Governor-General by creating a repugnancy by the provisions of an Ordinance promulgated by him under S. 72 can in effect destroy or modify an Act of the Indian Legislature, but he cannot directly repeal or amend it by an Ordinance. 47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S.B.). Powers of Governor-General to promulgate Ordinance—Special Criminal Court Ordinance (II of 1942)—Validity. See 45 Bom.L.R. 323 (F.B.). Amendment of ordinance by ordinance.—An ordinance can amend an ordinance. I.L.R. (1945) Nag. 809=1945 N.L.J. 491.

HIGH COURT'S POWERS UNDER LETTERS PATENT.—IF CAN BE AFFECTED. An ordinance passed by the Governor-General in cases of emergency under sec. 72 (Sch. IX), may curtail or limit the powers of the High Court under the Letters Patent. 22 Pat. 160=1942 F.L.J. 270=A.I.R. 1943 Pat. 24 (F.B.).

# INDIA (PROCLAMATION OF EMERGENCY) ACT, 1946.

[9 AND 10 GEO. 6, CHAPTER 23.]

*An Act to amend the Government of India Act, 1935, as respects the effect of Proclamations of Emergency under section one hundred and two of that Act.*

[14th February, 1946.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. In sub-section (1) of section one hundred and two of the Government of India Act, 1935 (which enables the Central Legislature, where a Proclamation of Emergency is in force, to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List), after the words "enumerated in the Provincial Legislative List" there shall be inserted the words "or to make laws, whether or not for a Province or any part thereof, with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act."

2. (1) Subject to the provisions of this section, this Act shall be deemed to have come into operation on the commencement of Part III of the Government of India Act, 1935.

(2) Where, before the passing of this Act, a High Court in British India has given a judgment or made a final order in any civil proceedings involving a question as to the validity of any law, ordinance, order, bye-law, rule or regulation passed or made in India, any party to the proceedings may, at any time within ninety days from the passing of this Act, apply—

(a) where an appeal from the judgment or order has been decided by the Federal Court, to the Federal Court; and

(b) in any other case, to the High Court,

for a review of the proceedings in the light of the provisions of this Act, and the Court to which the application is made shall review the proceedings accordingly and make such order, if any, varying or reversing the judgment or order previously given or made, as may be necessary to give effect to the provisions of this Act :

Provided that, on any such application, the Court may make such order as to the costs of the application and of the proceedings as may be just, and, where it varies or reverses the original judgment or order, may order any party in whose favour the variation or reversal operates to pay to any party adversely affected by the variation or reversal such compensation as may be just for any loss sustained by him which is attributable to anything reasonably done by him in reliance on the original judgment or order.

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cally propelled or not, including tramcars.

48-B. Taxes on the consumption or sale of electricity, subject, however, to the provisions of section one hundred and fifty-four-A of this Act."

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Sec. 2.—Pending suit filed in British Indian Court before Government of India Act, 1935 in respect of property situate in India and Burma—Separation of Burma Jurisdiction to try suit after separation, not taken

away as regards property in Burma. I.L.R. (1942) Mad. 376=5 Fed.L.J. (H.C.) 14=55 L.W. 45=A.I.R. 1942 Mad. 614=(1942) 11 M.L.J. 187.

(3) After section one hundred and fifty-four of the Act, there shall be inserted the following section:—

“154-A. Save in so far as any Federal law may otherwise provide, no

Exemptions from taxes Provincial law or law of a Federated State shall on electricity. impose, or authorise the imposition of, a tax on the

consumption or sale of electricity (whether produced by a Government or other persons) which is—

(a) consumed by the Federal Government, or sold to the Federal Government for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of a Federal Railway by the Federal Railway Authority or a railway company operating that Railway, or sold to that Authority or any such railway company for consumption in the construction, maintenance or operation of a Federal Railway;

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Federal Government for consumption by that Government, or to the Federal Railway Authority or any such railway company as aforesaid for consumption in the construction, maintenance or operation of a Federal Railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.”

Amendments of Ss. 88, 89 and 90. 4. (1) At the end of sub-section (3) of section eighty-eight of the principal Act there shall be inserted the following proviso:—

“Provided that, for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature or an existing Indian Law with respect to a matter enumerated in the Concurrent Legislative List, an ordinance promulgated under this section in pursuance of instructions from the Governor-General, acting in his discretion, shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him.”

(2) For the proviso to sub-section (1) of the said section eighty-eight there shall be substituted the following proviso:—

“Provided that the Governor—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if—

(i) a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; or

(ii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the required his or the Governor-General's previous sanction to the introduction pleasure, it had received the assent of the Governor-General or of His Majesty; and

(b) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance if—

(i) a Bill containing the same provisions would under this act have required the Governor-General's previous sanction for the introduction thereof into the Legislature; or

(ii) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General; or

(iii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His

Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty."

(3) In the proviso to sub-section (4) of section eighty-nine, and the proviso to sub-section (3) of section 90, of the Principal Act, after the words "repugnant to an Act of the Federal Legislature" there shall be inserted the words "or an existing Indian Law with respect to a matter enumerated in the Concurrent "Legislative List."

5. At the end of section two hundred and two of the principal Act there shall be inserted the following sub-section:—

"(2) If the office of any other judge of the Federal Court becomes vacant, or if any such judge is appointed to act temporarily as Chief Justice of India or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a judge of a High Court who is duly qualified for appointment as a judge of the Federal Court to act temporarily as a judge of that Court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of the Federal Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties."

6. For the proviso to sub-section (1) of section two hundred and nineteen of the principal Act (which enumerates the Courts in British India which are to be deemed to be High Courts for the purpose of that Act) there shall be substituted the following proviso:—

"Provided that, if provision has been made, whether before or after the commencement of Part III of this Act—

(a) by His Majesty by Letters Patent for the establishment of a High Court to replace any Court or Courts mentioned in this sub-section; or

(b) by the appropriate Legislature in India for the establishment of a Chief Court to replace the Judicial Commissioner's Court in the North-West Frontier Province, or the Judicial Commissioner's Court in Sind,

then, as from the establishment of the new Court, this section shall have effect as if the new Court were mentioned therein in lieu of the Court or Courts so replaced."

Amendment of Legislative Lists with respect to Universities.

7. (1) For paragraph 17 of the Provincial Legislative List there shall be substituted the following paragraph:—

"17. Education, including Universities other than those specified in paragraph 13 of List 1."

(2) The Federal Legislature shall not by virtue of paragraph 33 of the Federal Legislative List (which relates to corporations and in particular, to Corporations, whether trading or not, with objects not confined to one unit), and the Provincial Legislature shall not by virtue of paragraph 33 of the Provincial Legislative List (which relates to other corporations) have power to make any law with respect to universities, and accordingly—

(a) at the end of the first of those paragraphs, there shall be added the words "but not including Universities"; and

(b) in the second of those paragraphs, for the words "other than corporations specified in List I" there shall be substituted the words "not being corporations specified in List I or Universities".

(3) This section shall come into operation on the first day of April nineteen hundred and forty.

## THE GOVERNMENT SAVINGS BANK ACT (V OF 1873).

Year.	No.	Short title.	Amendments.
1873	V	The Government Savings Bank Act, 1873.	Repealed in part, XII of 1873 ; XVI of 1874; XII of 1891. Amended, XIII of 1916; XVII of 1917; XVI of 1923 ; II of 1943.

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[28th January, 1873.]

*An Act to amend the Law relating to Government Savings Banks.*

WHEREAS it is expedient to amend the law relating to the payment of deposits in Government Savings Banks; It is hereby enacted as follows:—

Preamble.

*Preliminary.*

Short title.

1. This Act may be called THE GOVERNMENT SAVINGS BANKS ACT, 1873.

Local extent.

2. It extends to the whole of British India.

[Commencement.] *Rep. by the Repealing Act, 1874 (XVI of 1874.)*

2. [*Repeal of Act XXVI of 1855*] *Rep. by the Repealing Act, 1873 (XII of 1873).*

Interpretation clause.

3. In this Act—

“depositor” means a person by whom, or on whose behalf, money has been heretofore, or shall be hereafter, deposited in a Government Savings Bank; and “deposit” means money so deposited:

<sup>1</sup> [“Secretary” means, in the case of a Post Office Savings Bank, the Post Master-General appointed for the area in which the Savings Bank is situate:]

[“minor” means a person who is not deemed to have attained his majority under the Indian Majority Act, 1875.] (*Subs. by Act XIII of 1916.*)

*Deposits belonging to the Estates of deceased Persons.*

4. If a depositor dies and probate of his will or letters of administration

Payment on death of depositor.

of his estate or a succession certificate granted under the Indian Succession Act, 1925 (XXIX of 1925), is not within three months of the death of the depo-

## LEG. REF.

<sup>1</sup> Substitutes by Act XVI of 1923 for the original definition, *vis.*, “Secretary” includes

every person empowered to manage a Government Savings Bank.

ditor produced to the Secretary of the Government Savings Bank in which the deposit is, then—

(a) if the deposit does not exceed five thousand rupees, the Secretary may pay the same to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, and

(b) within the aforesaid limit of five thousand rupees, any officer employed in the management of a Government Savings Bank who is empowered in this behalf by a general or special order of the Central Government may, to the extent to which he is empowered by such order and subject to any general or special orders of the Secretary in this behalf, pay the deposit to any person appearing to him to be entitled to receive it or to administer the estate.] (*Substituted by Act II of 1943*).

Payment to be a discharge.

5. Such payment shall be a full discharge from all further liability in respect of the money so paid:

But nothing herein contained precludes any executor or administrator, or other representative of the deceased, from recovering from the person receiving the same the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act or <sup>1</sup>[\* \* \*] <sup>2</sup>Act No. XXVI of 1855 to any person, and remaining in his hands unadministered, in the same manner and to the same extent as if the latter had obtained letters of administration of the estate of the deceased.

6. The Secretary of any such Bank <sup>3</sup>[or any officer empowered under section 4] may take such security as he thinks necessary from any person to whom he pays any money under section 4 for the due administration of the

money so paid,

and he may assign the said security to any person interested in such administration.

7. For the purpose of ascertaining the rights of the person claiming to be entitled as aforesaid, the Secretary of any such Bank <sup>4</sup>[or any officer empowered under section 4] may take evidence on oath or affirmation according to the law for the time being relating to oaths and affirmations.

Any person who, upon such oath or affirmation, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of an offence under section 193 of the

Indian Penal Code.

8. Where the amount of the deposit belonging to the estate of a deceased depositor does not exceed <sup>5</sup>[three thousand rupees], such amount shall be excluded in computing the fee chargeable, under the Court-Fees Act, 1870, on the probate, or letters of administration, or certificate (if any), granted in respect of his property:

#### LEG. REF.

<sup>1</sup> The words "the said" repealed by Act XII of 1891.

<sup>2</sup> Act XXVI of 1855 repealed by S. 2 of this Act.

<sup>3</sup> The words "or any officer empowered

under S. 4" inserted by Act XVI of 1923, S. 4.

<sup>4</sup> The words "three thousand rupees" were substituted for the words "one thousand rupees" by Act XVII of 1917.



Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorised to grant the same a certificate of the amount of the deposit in any Government Savings Bank belonging to the estate of the deceased. Such certificate shall be signed by the Secretary of such Bank, and the Court shall receive it as evidence of the said amount.

Act not to apply to deposits belonging to estates of European soldiers or deserters.

9. Nothing hereinbefore contained applies to money belonging to the estate of any European Officer, non-commissioned officer or soldier dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter from the said service.

*Deposits belonging to Minors.*

10. Any deposit made by, or on behalf of, any minor may be paid to him personally if he made the deposit, or to his guardian for his use if the deposit was made by any person other than the minor, together with the interest accrued thereon.

The receipt of any minor or guardian for money paid to him under this section shall be a sufficient discharge therefor.

11. All payments of deposits heretofore made to minors or their guardians by any Secretary of a Government Savings Bank shall be deemed to have been made in accordance with law.

Legalization of like payments heretofore made.

*Deposits belonging to Lunatics.*

Payment of deposits belonging to lunatics.

12. If any depositor becomes insane or otherwise incapable of managing his affairs,

and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be, such Secretary may, from time to time, make payments out of the deposit to any proper person,

and the receipt of such person, for money paid under this section, shall be a sufficient discharge therefor.

Where a committee or manager of the depositor's estate has been duly appointed, nothing in this section authorizes payments to any person other than such committee or manager.

*Deposits made by Married Women.*

13. Any deposit made by or on behalf of a married woman, or by or on behalf of a woman who afterwards marries, may be paid to her, whether or not the Indian Succession Act, 1865, section 4, applies to her marriage; and her receipt for money paid to her under this section shall be a sufficient discharge therefor.

Payment of married women's deposits.

Rules regulating certificates under section 8, and payment under section 10, 12 or 13.

*Rules.*

14. All certificates under section 8, and all payments under section 10, section 12 or section 13, shall be respectively granted and made by the Secretary of the Bank, subject to such rules consistent with this Act as the Central Government may, from time to time, prescribe.

**THE GOVERNMENT SEAL ACT (III OF 1862).<sup>1</sup>**

Short title given, Act XIV of 1897.

Declared in force throughout British India except as regards the Scheduled Districts Act (XV of 1874), S. 3.

LEG. REF.

<sup>1</sup> Short title: "The Government Seal Act,

1862". See the Indian Short Titles Act, 1897 (XIV of 1897). For Statement of Objects

[28th February, 1862.

*An Act to amend the law relating to the use of a Government Seal.*

WHEREAS it is expedient to adapt the law relating to the use of a Government seal to the present form of the Government in India; It is enacted as follows:—

Preamble.

Whenever it is required by any Regulation of a Local Government or by <sup>1,2</sup>[any Act of the Central Legislature] that the Seal to be used instead of seal of the East India Company shall be affixed on behalf or by the authority of the Government to any instrument or document, it shall be lawful, if the seal is to be affixed on behalf or by the authority of a Provincial Government to affix in lieu of the seal of the East India Company a seal bearing the designation of such Provincial Government or, if the seal is to be affixed on behalf or by the authority of the <sup>3</sup>[Central Government] a seal bearing <sup>4</sup>“the inscription “Government of India” or “Government of the Federation of India”] and such instrument or document so sealed shall to all intents and purposes be as valid and effectual as if the seal so used had been that of the East India Company.<sup>5</sup>

## THE GOVERNMENT SECURITIES ACT (X OF 1920).

See SECURITIES ACT (X OF 1920).

## THE GOVERNMENT TRADING TAXATION ACT (III OF 1926).

[24th February, 1926.

*An Act to determine the liability of certain Governments to taxation in British India in respect of trading operations.*

WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE GOVERNMENT TRADING TAXATION ACT, 1926.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

and Reasons of the Bill which became Act III of 1862, see Calcutta Gazette, 1862, p. 466. For proceedings in Council relating to the Bill, see *ibid.*, Supplement, pp. 28 and 71.

<sup>1,2</sup> Substituted for “any Act of the Governor-General of India in Council” by A.O., 1937.

<sup>3</sup> Substituted for “Government of India” by A.O., 1937.

<sup>4</sup> Substituted for the inscription ‘Government of India’ by A.O., 1937.

<sup>5</sup> “Legislation on this subject was originally suggested in order to meet a difficulty respecting the seal to be used under Act XIX of 1838 (for the registration of coasting vessels in the Bombay Presidency). Sec. 8 of that Act requires that certificates of registry ‘shall be sealed with the seal of the East India Company,’ and the Government of Bombay were advised by their law officers that no other seal could properly be used for such certificates until some Act should be passed ‘prescribing the seal to be used in lieu of the seal of the East India Company.’”

tion Act falls within the legislative powers conferred by sec. 65 of the Government of India Act, and is therefore *infra vires* the Government of India, I.L.R. (1941) Bom. 391=43 Bom.L.R. 84=1941 Bom. 93; 1930 A.L.J. 579=1930 A. 389. The Government Trading Taxation Act applies wherever a Government specified in the Act, i.e., a Dominion Government, including the Government of a Native Indian State, carries on a business anywhere. There is no justification for holding that the Act is confined to business carried on in British India. The title, preamble and the operative part of sec. 2 of the Act make it perfectly clear that it applies to every case in which a Dominion Government is carrying on a business, and when that happens, the Dominion Government is liable to Indian income-tax as though it were a company. I.L.R. (1941) Bom. 391=1941 Bom. 93. Applicability to Tehari State Government Trading Taxation Act of 1926, is applicable to the Tehari State, 1930 A.L.J. 579=1930 A. 389.

2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's

Liability of certain Governments to taxation in respect of trading operations.

Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable;

(b) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly.

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions.

SEC. 2.—The effect of the Act is to and to the definition of "company" in sec. 2 (6) of the Indian Income-tax Act, so as to include a Dominion Government deemed to be a company under Act III of 1926 and where a Dominion Government is carrying on a business anywhere, it is liable to British Indian Income-tax Act in respect of the income, profits and gains of that business which accrue or arise or are received in British India, as if it were a company working under like circumstances under the Income-tax Act. I.L.R. (1941) Bom. 391=43 Bom.L.R. 84=1941 Bom. 93. Where the sale of forest produce grown in a Native State was arranged in British India and the money was received in British India and what was done in the State itself was merely the acceptance of the offer of the purchaser, *held*, that the transactions of sale amounted to "Trading in British India" within the meaning of sec. 2. 1980 A.L.J. 579=1930 A. 389. Where a Native State sold timber grown in its territory in two places in British India and the income so derived was sought to be assessed to income-tax, *held*, that the income was not in the nature of capital and that it was assessable to income-tax. 1930 A.L.J. 579=1930 A. 389. Though the Government Trading Taxation Act came into force only in April, 1926, the Government of a Native State carrying on business in British India is liable to assessment in respect of transactions which took place in the previous year. 1930 A. 389. The income from the investments made by a Native State Bank of a part of its surplus funds in the Government of India Securities must be held to be profits from the business of the bank received in British India and as such taxable under the Indian Income-tax Act by reason of the Government Trading Taxation Act. A property situated in British India, taken over by such a Native State Bank from

a debtor who is a subject of that State, in part satisfaction of a loan advanced to him is not property occupied in British India for purposes of the business, but the income derived from such property is income arising in connection with such business and in that sense falls to be taxed under the Indian Income-tax Act. Profits made by such a bank on the sale of its investments in Government of India Securities, being the surplus realised by it over the cost price of such investments, which are not appropriated as accretions to capital but treated as profits, are assessable to income-tax under the Income-tax Act. I.L.R. (1941) Bom. 391=43 Bom.L.R. 84=1941 Bom. 93.

SEC. 2 (1) (a).—There is no justification for the view that the Government Trading Taxation Act is confined to business carried on in British India. There are no words in the Act confirming the operation of sec. 2 to trades or businesses carried on in British India. The words of the section are quite general in their terms. The Patiala State Bank, owned and controlled by the Maharaja of Patiala who constitutes the government of that State had its head office and all branches in Patiala, and it did not carry on business in British India. But in the year ending 31st March, 1935, the Bank collected and received in British India through the hands of its agents sums representing the interest on certain Government of India securities that it had acquired in the course and for the purpose of its business and also a substantial sum of money representing the profits accruing to it in respect of the sale at a profit of various investments similarly acquired. All these sums of money represented profits or gains of the Bank's business for the year in question and were sought to be assessed to income-tax under sec. 2 (1) (a) of the Government Trading Taxation Act. *Held*, that sec. 2 of the Act applied to the business of the bank al-

**GRADING—THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT (I OF 1937).**

[Amended by Act XIII of 1942 and Act XX of 1943].

[24th February, 1937.]

*An Act to provide for the grading and marking of agricultural <sup>1</sup>[and other] produce.*

WHEREAS it is expedient to provide for the grading and marking of agricultural <sup>1</sup>[and other] produce; It is hereby enacted as follows:—

1. (1) This Act may be called THE  
Short title and extent. AGRICULTURAL PRODUCE (GRADING AND MARKING)  
ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

2. In this Act, unless the contrary appears  
Explanations. from the subject or context,—

(a) “agricultural produce” includes all produce of agriculture or horticulture and all articles of food or drink wholly or partly manufactured from any such produce, and fleeces and the skins of animals;

(b) “counterfeit” has the meaning assigned to that word by S. 28 of the Indian Penal Code;

(c) “covering” includes any vessel, box, crate, wrapper, tray or other container;

(d) “grade designation” means a designation prescribed as indicative of the quality of any scheduled article;

(e) “grade designation mark” means a mark prescribed as representing a particular grade designation;

(f) “quality”, in relation to any article, includes the state and condition of the article;

(g) “prescribed” means prescribed by rules made under this Act;

(h) “scheduled article” means an article included in the Schedule; and

(i) an article is said to be marked with a grade designation mark, if the article itself is marked with a grade designation mark or any covering containing or label attached to such article is so marked.

3. The Governor-General in Council may,  
Prescription of grade designations. after previous publication by notification in the  
*Gazette of India*, make rules—

(a) fixing grade designations to indicate the quality of any scheduled article;

(b) defining the quality indicated by every grade designation;

(c) specifying grade designation marks to represent particular grade designations;

(d) authorising a person or a body of persons, subject to any prescribed conditions, to mark with a grade designation mark any article in respect of which such mark has been prescribed or any covering containing or label attached to any such article;

(e) specifying the conditions referred to in clause (d) including in respect of any article conditions as to the manner of marking, the manner in which the article shall be packed, the type of covering to be used, and the quantity by weight, number or otherwise to be included in each covering;

**LEG. REF.**

<sup>1</sup> Inserted by Act XIII of 1942.

though it was carried on exclusively in the State of Patiala, and the income, profits or

gains were therefore liable to income-tax in British India. 48 C.W.N. 101=1944 A.L.J. 63=70 I.A. 202=I.L.R. (1944) Bom. 33=46 Bom.L.R. 207=A.I.R. 1943 P.C. 181=(1943) 2 M.L.J. 565 (P.C.).

(f) providing for the payment of any expenses incurred in connection with the manufacture or use of any implement necessary for the reproduction of a grade designation mark or with the manufacture or use of any covering or label marked with a grade designation mark, <sup>1</sup>[or with measures for the control of the quality of articles marked with grade designation marks including testing of samples and inspection of such articles or with any publicity work carried out to promote the sale of any class of such articles]; and

(g) providing for the confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions with a grade designation mark.

Penalty for unauthorised marking with grade designation mark.

4. Whoever marks any scheduled article with a grade designation mark, not being authorised to do so by rule made under S. 3, shall be punishable with fine which may extend to Rs. 500.

Penalty for counterfeiting grade designation mark.

5. Whoever counterfeits any grade designation mark or has in his possession any die, plate or other instrument for the purpose of counterfeiting a grade designation mark shall be punishable with imprisonment which may extended to two years, or with fine, or with both.

Extension of application of Act.

6. The Governor-General in Council, after such consultation as he thinks fit of the interests likely to be affected, may by notification in the *Gazette of India* declare that the provisions of this Act shall apply to an article of agricultural produce not included in the Schedule, <sup>2</sup>[or to an article other than an article of agricultural produce] and on the publication of such notification such article shall be deemed to be included in the Schedule.

#### THE SCHEDULE.

(See section .)

1. Fruit.
2. Vegetables.
3. Eggs.
4. Dairy produce.
5. Tobacco.
6. Coffee.
7. Hides and skins.

#### THE GUARDIANS AND WARDS ACT (VIII OF 1890).<sup>3</sup>

Year.	No.	Short title.	Amendments.
1890	VIII	The Guardians and Wards Act, 1890.	Repealed in part, XIII of 1898, s 18; VI of 1900, s. 48; V of 1908; I of 1938. Repealed in part and amended, IV of 1926; Amended, XVII of 1929.

#### LEG. REF.

<sup>1</sup> Inserted by Act XX of 1943.

<sup>2</sup> Inserted by Act XIII of 1942.

<sup>3</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1886, Pt. V, p. 77; for Report of Select Committee, see *ibid.*, 1890, Pt. V, p. 77 and for Debates in Council, see *ibid.*, 1886; Supplement, pp. 419 and 566;

*ibid.*, 1890, Pt. VI, pp. 33 and 45. For Civil Rules of Practice made by the High Court, Madras, under the Code of Civil Procedure and certain other Acts, for observance by the subordinate Civil Courts of the Presidency except the Madras Small Cause Courts, see *Fort St. George Gazette*, 1905; Supplement, p. 1.

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THE SCHEDULE.—[*Repealed.*]

[21st March, 1890.]

*An Act to consolidate and amend the law relating to Guardian and Ward.*

WHEREAS it is expedient to consolidate and amend the law relating to guardian and ward; It is hereby enacted as follows:—

### CHAPTER I.

#### PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called THE GUARDIANS AND WARDS ACT, 1890.

SEC. 1: GENERAL.—Difference between the old Act (Act XL of 1858) and the present Act. 19 C. 301. Act is exhaustive. 30 M.

807—24 I.C. 290 (P.C.). The provisions of the Code will apply to proceedings under this Act unless the contrary is expressly de-

(2) It extends to the whole of British India, inclusive of [\* \* \*]<sup>1</sup> British Baluchistan; and

(3) It shall come into force on the first day of July, 1890.

2. [Repeal.] *Rep by the Repealing Act (I of 1938), S. 2 and Sch.*

#### LEG. REF.

<sup>1</sup> The words "Upper Burma and" were repealed by the Burma Laws Act (XIII of 1898), S. 18 and Sch. V.

clared therein. 7 P.R. 1898. Nature of proceedings under the Act. *See* 107 I.C. 606. Proceedings under the Act cannot be attacked for lack of formality and precision of procedure which the C. P. Code exacts from a Court in India in suit properly so called. 44 A. 587=1922 A. 338. The exercise of parental jurisdiction in guardianship matters by a District Judge cannot be guided by hard and fast rules, and if the order passed is on the whole a reasonable one, it will not be interfered with on appeal. 44 A. 587. A guardian cannot be appointed to the property of the minor member of an undivided Hindu family possessed of no separate property. A guardian of the person of such a minor may be appointed. 19 B. 809 (F. B.). *See also* 54 B. 75; 43 P.R. 1909=1 I.C. 745; 25 A. 407; 30 B. 152. As to necessity for sanction of Court for marriage of minor, *see* 28 S.L.R. '75. Admission by guardian or by collector as representing the Court of Wards will not necessarily bind the minor. 14 P. 70.

**POWERS OF HIGH COURT.**—The High Court has the power to appoint a guardian for an infant or his estate, irrespective of the Act. 16 B. 636. *See also* 1913 M.W.N. 906=21 I.C. 545; 54 B. 75. The powers and the jurisdiction of the Court, vested in it cannot be ousted by any agreement of the parties. 4 Bom.L.R. 963. Jurisdiction of the District Court in regard to minors is confined only to the powers expressly conferred on it by the Guardians and Wards Act. 40 B. 600=18 Bom.L.R. 582. Guardian—Appointment of—Infant residing out of the Ordinary Original Civil Jurisdiction of the High Court—Powers of the High Court. *See* 57 C. 533. The powers conferred upon the District Court are totally dissimilar to its powers as a Court of Ordinary Civil Jurisdiction and so an order purporting to be made under the Act which is not warranted by its provisions cannot be considered as a decree in a suit. 36 M. 39=13 I.C. 251=22 M.L.J. 193. There is nothing in the Act to prevent the Court from making a declaration that a person appointed by will is the guardian of a minor. 3 M.L.J. 182. When a matter of guardianship is before the Court under the Act, it is incumbent on the Court to hear such evidence as the parties desire to put before. Where it does not do so the High Court can interfere in revision. 34 C.W.N. 763=1931 C. 59.

**NATURE OF JURISDICTION.**—In dealing with the custody of illegitimate children, the

Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of these rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. 5 Bur.L.T. 164=17 I.C. 926. This equitable rule should be adopted in the case of parties in this country, neither the father nor the mother has any absolute right to the custody of their illegitimate child. 17 I.C. 926. The District Court should not assume direct responsibility under the Act for the marriage of minors for whom a personal guardian has been appointed. 98 P.R. 1914=27 I.C. 381 (22 B. 509, Foll.). There is no provision in the Act authorizing the Court to compel a person in possession of a minor's property to hand it over to the person appointed guardian. 13 I.C. 386. The scheme of the Act is to entrust the District Court, with the duty of looking after the welfare of the minor's person and property and for this purpose, gives it power to appoint a guardian. The guardian is really the hand of the District Court and is to act under its advice (control and constant supervision). The enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits and the Act does not provide any machinery for decisions upon or enforcing any such claims though so far as the guardian is concerned, the District Court is vested with very wide disciplinary powers over him in order that it may enforce the orders passed against him under the Act. 36 M. 39=22 M.L.J. 193=13 I.C. 251. Agency tract—*Ex parte* order of agent appointing guardian of infant—Appeal lies to High Court. 18 M. 227. A mandatory order directing the defendant to take possession of the persons of infants and bring them back to India, should not be made, as, if the minor resisted the defendant, it would expose him to a proceeding under a writ of *habeas corpus*. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Unauthorized alienation by a certificate guardian in excess of the powers is void. 18 C. 259 (doubted in 24 C. 265=1 C.W.N. 453). *See Notes* under sec. 31, *infra*. Orders apparently under this Act made without jurisdiction—Proceedings not had *bona fide*, orders in—Consent obtained by judicial pressure—Judge, no arbitrator, *see* 16 C.W.N. 444. Courts have a discretion to appoint a person other than the one who on the ground of relationship may have a prior claim. 5 M.L.T. 208=4 I.C. 1117. Effect of Act on inherent jurisdiction of Court. 19 C.W.N. 84. In enquiry under the Act, interest of minor to be the predominant consideration in making the order—Protracted enquiry unnecessary. 249 P.L.R. 1914.



3. This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by <sup>1</sup>[any

Saving of jurisdiction of Courts of Wards and Chartered High Courts.

competent legislature, authority or person in British India]; and nothing in this Act shall be construed to affect, or in any way derogate from, the jurisdiction or authority of any Court of Wards, or to take away any power possessed by <sup>1</sup>[any High Court established in British India by Letters Patent].

Definitions.

4. In this Act, unless there is something repugnant in the subject or context,—

(1) “minor” means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority:

(2) “guardian” means a person having the care of the person of a minor or of his property, or of both his person and property:

LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

**HABEAS CORPUS.**—A Mahomedan wife, divorced by her husband, who seeks to recover custody of a child of about 4 years, as its lawful guardian under the Mahomedan Law, from her husband, should seek her remedy not under sec. 491, Cr.P. Code, but under the Guardians and Wards Act, which is a special Act dealing with a special subject, i.e., the subject of minors. When the remedy under the Guardians and Wards Act is open, the High Court will not exercise its discretionary power under sec. 491, Cr.P. Code, which is only a general power in the nature of a *habeas corpus*. 1934 A.L.J. 946=1935 A. 55.

**WHO CAN APPLY, AND FOR WHAT PURPOSE.**—Any friend of the minor can invoke the protection of the Court in case of a minor being ill-treated, but a stranger must satisfy the Court that welfare of the minor would be better secured by removing the father from the lawful custody. 64 I.C. 576=23 Bom. L.R. 1225. Thus in castes not permitting widow-remarriage where infant girls are married, a stranger cannot successfully deprive the father of the custody of the infant daughter who is about to be given in marriage. 23 Bom.L.R. 1225. There is no machinery under the Act to work out the right of the mother under Muhammadan Law to visit her child in the custody of the father as guardian. 59 I.C. 562=13 Bur.L.T. 86. The provisions of the Act should not be put in force in order to enable a husband to get possession of the person of his wife. 67 I.C. 882=3 P.L.J. 293. See also Notes under sec. 25, *infra*. It is well settled that the manager of a joint Hindu family is regarded as guardian of the interest in the co-parcenary property of all the minor members of the family and therefore no certificated guardian can be appointed for such minor. 1936 O.W.N. 354=1936 Oudh 270.

**SEC. 3.**—Appellate Court, power or, to make *ad interim* order appointing guardian. 3 C.L.J. 29 (28 C. 734, R.) Foll. in 88 O. 927=3 C.L.J. 67. A minor cannot sue through a next friend for possession of the property from the defendant, which the latter claims to hold as *de jure* guardian. The

proper remedy is to apply for appointment of guardian of property under this Act. 21 Nag.L.R. 75=1925 N. 328. See also 112 I.C. 873; 57 C. 533.

**SEC. 4 (2).**—The word “guardian” is used in a very wide sense and does not necessarily mean a guardian duly appointed or declared by Court. Any person who has the care of the person of the minor is a guardian of the person and any person who has the care of the property of the minor is a guardian of the property within the meaning of the Act. 54 A. 128=1932 A.L.J. 21=1932 A. 215. The word “guardian” as defined in S. 4 (2) is a very wide term and must include a father, who is admitted on all hands and in every system of law to be the natural guardian of his children; and the word “care” in the definition includes the constructive custody of the father though the child is residing with another person. Where the plaintiff, a Mahomedan, sent his minor daughter along with his wife to his mother-in-law and after the death of the wife there, the daughter continued to live with the maternal grandmother for nine years, still, the father is the guardian of the minor as she is in his constructive custody. 1935 O.W.N. 1096=1935 Oudh 492 (F.B.). A *de facto* guardian is a guardian within S. 4 (2) and is removed from guardianship under S. 7 (2) by the Court’s order appointing guardian. 51 I.C. 236=36 M.L.J. 189. A *de facto* guardian is a “guardian” within the meaning of S. 4 (2) and on his removal or discharge the Court has power under S. 41 (3) to require him to deliver any property in his possession or control belonging to the ward. 1938 N.L.J. 202=1938 Nag. 399. Person holding the property of the minor’s share by virtue of a certain alleged will must be deemed to have been a person having the care of the minor’s property and therefore within S. 4 (2). 1934 L. 323.

**SEC. 4 (2) AND (3): “GUARDIAN”—MEANING.**—From the definitions of “guardian” and “ward” as given in S. 4, it appears that the word “guardian” is of general import and includes natural and testamentary guardians appointed by Court. 27 A.L.J. 1248=1929 A. 879=52 A. 110, and even *de facto* guardians. See also 36 Bom.L.R. 668=

(3) "Ward" means a minor for whose person or property, or both, there is a guardian :

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure, and includes a High Court in the exercise of its ordinary original civil jurisdiction :

<sup>1</sup> (5) "the Court" means—

(a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian ; or

(b) where a guardian has been appointed or declared in pursuance of any such application—

(i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian ; or

(ii) in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides or

(c) in respect of any proceeding transferred under S. 4-A, the Court of the officer to whom such proceeding has been transferred.]

(6) "Collector" means the chief officer in charge of the revenue administration of a district, and includes any officer whom the Provincial Government, by notification in the Official Gazette, may, by name or in virtue of his office, appoint<sup>2</sup> to be a Collector in any local area, or with respect to any class of persons, for all or any of the purposes of this Act :

(7) "European British subject" means an European British subject as defined in the Code of Criminal Procedure, 1882, and includes any Christian of European descent ; and

(8) "prescribed" means prescribed by rules made by the High Court under this Act.

\*[4-A. (1) The High Court may, by general or special order, empower any officer exercising original civil jurisdiction subordinate to a District Court, or authorise the Judge of any District Court to empower any such officer subordinate to him, to dispose of any proceedings under this Act transferred to such officer under the provisions

Power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers.

of this section.

(2) The Judge of a District Court may, by order in writing, transfer at any stage any proceeding under this Act pending in his Court for disposal to any officer subordinate to him empowered under sub-section (1).

(3) The Judge of a District Court may at any stage transfer to his own Court or to any officer subordinate to him empowered under sub-section (1) any proceeding under this Act pending in the Court of any other such officer.

#### LEG. REF.

<sup>1</sup> Substituted by Act IV of 1926, S. 3.

<sup>2</sup> For appointments of Collectors under this sub-section in—

(1) the Presidency of Bombay, see the Bom. R. & O., Vol. I.

(2) the United Provinces of Agra and Oudh, see U.P. List of Local R. & O., Vol. I.

The powers of the Local Government under this sub-section have been delegated to the Commissioner in Sind. *Vide* Notification No. 3453, dated 17th May, 1899, Bom. Govt. Gazette, 1899, Pt. I, p. 686.

<sup>3</sup> Inserted by Act IV of 1926, S. 2.

1934 B. 311; 1938 Nag. 399. A charitable society is not a "person" within the meaning of S. 4 (2) and it cannot be appointed

guardian of the property of a minor. 1930 C. 397=58 C. 15.

SEC. 4 (3).—"Ward" as defined in S. 4 (3) is wide enough to include every minor who has a guardian, even though the guardian may not be appointed under the Act. 1935 O.W.N. 1096=1935 Oudh 492 (F.B.).

SEC. 4 (5).—Minors who had left before the institution of the suit for England and were living there, were not "ordinarily resident" in the district and hence were beyond the jurisdiction of the District Court. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Under the Act a suit *inter partes* is not the form of procedure prescribed for proceedings in a District Court. 38 M. 807 (P.C.).

SEC. 4 (5) (b) (ii).—"For the time being ordinarily resides"—Interpretation. See 40 P.L.R. 64.

(4) When any proceedings are transferred under this section in any case in which a guardian has been appointed or declared, the Judge of the District Court may, by order in writing, declare that the Court of the Judge or officer to whom they are transferred shall, for all or any of the purposes of this Act, be deemed to be the Court which appointed or declared the guardian.]

## CHAPTER II.

### APPOINTMENT AND DECLARATION OF GUARDIANS.

Power of Parents to appoint in case of European British subjects.

5. (1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing,—

(a) by the father of the minor, or

(b) if the father is dead or incapable of acting, by the mother.

(2) Where guardians have been appointed under sub-section (1) by both parents, they shall act jointly.

6. In the case of a minor who is not an European British subject, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.

Power of the Court to make order as to guardianship.

7. (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

SEC. 7: APPOINTMENT OF GUARDIAN.—Under the Act, it is open to a Court to appoint a guardian of the properties of a minor even though the minor is not entitled to present possession of these properties. 70 I. C. 360=14 L.W. 706. Such appointment will not interfere, with the right of the persons to possession of the properties as executor or trustee or otherwise. 70 I.C. 360. Where owing to disputes between rival claimants, there is likelihood of the property being lost, a guardian should immediately be appointed. 96 I.C. 283. Appointment of person who has not applied as guardian not proper. 107 I.C. 397. An order appointing a husband as guardian of his minor wife cannot be passed in disregard of the Civil Court's decree that he cannot have the custody of her person until she attained majority. 2 Lah.L.J. 509. The provisions of the Act should not be enforced to enable a husband to get possession of his wife which he has failed to do by execution of the decree obtained by him for restitution of conjugal rights. 57 I.C. 822 (2). Once the power of the Court is invoked, it is its duty as soon as any dispute about the guardianship of the minor's property or any allegation of detriment to the minor's interest resulting from such dispute is properly brought to its notice to set right the matters in the interests of the minor and appoint a proper person as his guardian. 64 I.C. 438. The conception of a *dual guardianship* is by itself not repugnant to law and there may be cases where there are more than one guardian. The guardianship of a father or a mother does not cease while the minor child is in the

possession of another person who has been lawfully entrusted with the care and custody of such minor by the father or mother. There is nothing in law to prevent the father or the mother of a minor, who may be his or her lawful guardian for the time being from entrusting lawfully the care and custody of such minor to more than one person at a time. 15 Pat. 817=18 Pat.L.T. 535=1937 Pat. 263.

CONSIDERATIONS FOR THE COURT IN APPOINTING GUARDIANS.—The law does not make it incumbent upon the Court to grant every application for guardianship. The welfare of the minor is the sole criterion in deciding whether a guardian should be appointed or not. 42 I.C. 191=90 P.L.R. 1917; 19 I. C. 783=118 P.L.R. 1913; 28 I.C. 507. See also 33 I.C. 77=19 M.L.T. 294 (Personal law of the minor should also be considered). A person can apply for the appointment of another guardian under S. 7, though an order of removal under S. 39 is not obtained. 104 I.C. 562=1927 Oudh 516. See also 41 P.L.R. 12; 1940 All. 315. Where the dispute is as to the validity of the marriage of the minor and the matter is not free from difficulty, the Court should refer them to a regular suit. 1927 Oudh 516. An order of appointment of a guardian to a minor can only be made on the sole ground of welfare of the minor; the Court cannot go against the will of the minor especially when he is old enough to form an intelligent opinion. 11 I.C. 478=196 P.W.R. 1911. It is clear that before making an order on an application under sec. 7 the Court ought to insist on evidence showing that the order is in the best in-

## (a) appointing a guardian of his person or property, or both, or

terest of the ward or child. It is not competent for the Court to make an order in advance, but the Court is bound to consider whether the applicant is the proper person to have the custody of the child. I.L.R. (1941) Bom. 488=43 Bom.L.R. 615=1941 Bom. 344. The appointment of a guardian of a minor cannot be settled by an agreement between the contesting applicants for guardianship. The Court has to consider the welfare of the minors on evidence before it and not to pass judgment in accordance with the terms of a compromise. It is the duty of the Court to consider whether or not the compromise is in the interests of the minor. 1940 L. 9=41 P.L.R. 678. *See also* 41 Bom.L.R. 625=1939 Bom. 367. Where it appeared that the appointment of the elder sister of the minor as his guardian would promote his welfare and the minor who was aged 14 was also in favour of such an appointment. *Held*, that the sister should be appointed guardian of the person of the minor in preference to a philanthropic body such as the Society for the protection of children in India. 58 C. 15=1930 C. 397. *See also* 35 C.W.N. 158=1931 C. 563. It is not proper for a Court to appoint a guardian of a person of a minor who is at least over 17 years old, as he comes of age very soon. The order of appointment would simply deprive him of his right to manage his own affairs for three years more. It is not for the Courts to moralize on the advantage of keeping a youth under tutelage for a longer period than the law ordinarily contemplates. 182 I.C. 992=1939 Lah. 221. *See also* 27 M.L.J. 30=41 I.A. 314=38 M. 807 (P.C.). A Court should not entertain an application for a guardian to be appointed for a minor where the previous arrangements are quite satisfactory. 101 I.C. 259. Where there is nothing established against a father except that he and his wife are on bad terms and living apart, he is entitled to the custody of his child. 18 L.W. 173=1924 M. 45. As to the nature of the father's right, *see* 83 I.C. 308=1925 L. 250. *See also* 10 Mys.L.J. 156 (following 46 A. 706). Immorality of father is not by itself a disqualification. 10 Mys. L. J. 156; nor change of religion. 41 I.C. 571. The fact that he at one time agreed to allow the child to remain with the mother is immaterial as it is a revocable agreement. 1925 L. 250. So also leaving child even with a mere friend. 96 I.C. 617=1926 A. 687. A mother should be left undisturbed as regards the guardianship of her minor girl, where there is no property to be administered by the Court and a statutory guardian is unnecessary. 84 P.R. 1915=31 I.C. 237. The re-marriage of a mother is not a sufficient reason to deprive her of the custody of her children. The question in cases of

guardianship always is whether it is for the welfare of the minor to appoint a guardian. 28 I.C. 507=36 P.W.R. 1915. When the mother of a minor is managing the affairs of her son properly, no guardian need be appointed. 60 P.W.R. 1913=19 I.C. 783. A mother is in the absence of the father, the proper guardian for the person and property of a minor, until the contrary is proved. 19 I.C. 428. As to right of a step-mother for guardianship, *see* 134 I.C. 596=1931 O. 326. Where no charge of waste or mismanagement had been proved, the mere desire of the relatives of the minor is not a sufficient reason for depriving the widowed mother of her recognized claim to be the guardian of her minor child's property. 68 I.C. 474. The appointment of the minor's paternal aunt as guardian is proper, when it is proved that the mother is living in open adultery and has borne children of such connection. 23 I.C. 938. An uncle should not be preferred specially when he is separate and was not on good terms with the minor's father during his lifetime. 19 I.C. 428. The fact that one seeks the assistance of her relatives in the management of the property is not objectionable. 19 I.C. 428. The Guardians and Wards Act contemplates only the appointment of an *individual as guardian*. The appointment of a *Society or its Secretary* as such as guardian is invalid. The Secretary may however be appointed in his individual capacity. 35 C.W.N. 158=1931 C. 563. *See also* 58 C. 15=1930 C. 397. It is against intention of the Act that any *one residing out of British India* should be appointed guardian of the person of a minor, as the Court cannot exercise its proper control over such a guardian. (22 M. L.J. 68, Foll.) 54 M. 758=1931 M. 478=60 M.L.J. 615. *See also* 1940 Pesh. 14; 18 Lah. 426=1937 Lah. 797.

**INTERFERENCE WITH LEGAL RIGHTS OF GUARDIANSHIP.**—A Court can both in equity and under the Act interfere with the legal rights of guardianship of the parents. 41 I.C. 571=11 S.L.R. 13. The welfare of the children should primarily be considered. The Court should ascertain what would be for the welfare of the minors, whether any of them was sufficiently advanced to make an intelligent preference, what means were at the disposal of such parents to provide for them in future, and whether the father would under altered circumstances be able to provide a fit home for his children. 41 I.C. 571. If the father is not able to provide a fit home, he should be held to be not fit to be the guardian. The provisions of the Act are in no way limited by the English practice. *English decisions* cannot be considered to have any authority in India when dealing with a conflict between Hinduism and Islam. *Change of religion* by itself does not necessarily render a father

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

unfit to be the guardian of his minor children. 41 I.C. 571. Whether the general rule that a child should follow the religion of the father could apply without qualification to a case where the religion has been newly adopted by the father and is not that in which the child was born or reared. 41 I.C. 571.

**EFFECT OF ORDER.**—An order appointing a guardian is final (subject to any other order passed in appeal) even if it was made under a misapprehension of the case. 52 I.C. 831=73 P.R. 1919. Appointment of guardian of person and property of a minor under the Act means removal of natural guardian. 50 I.C. 580; 42 I.C. 505=6 L.W. 760. When a guardian is appointed by Court for minor's property no other person, not even the *de facto* guardian, can legally bind the minor's estate. 37 M. 38=21 M. L.J. 1077=12 I.C. 568.

Per *Das, J.*—The appointment of a person other than the natural guardian under S. 7 (1) implies under S. 7 (2) of the Act the removal of the natural guardian, and such removal under S. 7 (2) results in a permanent cessation of his powers under S. 41 of the Act. The powers of the natural guardian do not revive upon the removal or death of the guardian appointed, even if no successor is appointed by the Court in his place. When a natural guardian is passed over and the Court appoints another person as guardian, that is only on the footing that he is unfit, and has, by his unfitness, forfeited his natural rights. It does not matter in the least whether the unfitness is found because of positive misconduct or waiver or any other cause, or whether it is established on contest or admitted or implied from conduct, (e.g.) by failure or refusal to act or consenting to somebody else being appointed. The Court takes the control and management of the person and property of the minor out of his hands and places it in the hands of a person of its choice. This guardian so appointed by the Court is but the hand of the Court, and through that agency, the Court representing the Crown controls and manages the person and property of the minor. The death or removal of this agent of the Court cannot bring any merit to the superseded natural guardian and cure his unfitness. It may be that when on the death or removal of a guardian appointed by the Court the question of the appointment of a successor crops up; the superseded father or mother may again pray for his or her appointment but that he or she may do, not on the basis of his or her rights as natural guardian, for those rights have ceased, but only as a person related to the minor and interested in his welfare, and he or she must satisfy the Court that the unfitness has ceased. If he or she so satisfies the Court and is ap-

pointed, it is not on the basis of a revival of his or her power as natural guardian at all. 50 C.W.N. 129.

**ANCESTRAL PROPERTY.**—No guardian can be appointed in respect of a Hindu minor's undivided ancestral property. 46 I.C. 815 [25 A. 407 (P.C.), Foll.]. See also 140 I.C. 198=1932 C. 730. But see also 59 C. 570=138 I.C. 739=1932 C. 502 and cases cited therein (High Court can appoint such guardian under powers conferred by Letters Patent). See also 1933 M. W. N. 1293; 36 C.W.N. 769=1932 Cal. 730 (Guardian can be appointed only when the minor who is a member of joint Hindu family governed by Mitakshara law is shown to have separate property of his own).

**TRUST PROPERTY.**—No guardian in respect of trust properties can be appointed under S. 7; nor can sanction be granted under S. 29 to sell the properties. Such a sale is invalid. 23 M. L. J. 267=42 I.C. 273. A right to a portion of the income of the trust properties does not vest the properties in the beneficiary so as to attract the provisions of Ss. 7 and 29 of the Act. 23 M.L. J. 267.

**SECURITY.**—A conditional order "that upon petitioner furnishing security he is appointed guardian of minor's property" is *ultra vires* and bad *ab initio*. 49 M. 809=1927 M. 36=51 M.L.J. 726 (F.B.) (30 M.L.J. 508, Foll.; 40 M. 775=37 I.C. 892, Overruled). But see 1930 L. 497, *contra*. The practice of issuing suspensory orders of guardianship deprecated. 49 M. 809. The Act does not require two orders, *vis.*, interim order of approval and a "final order" of appointment of the guardian of property nor does it postpone the appointment till security is furnished. 30 M.L.J. 508=34 I.C. 432. But see 1930 L. 497 (F.B.), *contra*. [See also Notes under S. 10, *infra*.] An order appointing a person guardian of the property of a minor, conditional on his furnishing security, is not void *ab initio*. S. 7 of the Act, which empowers the Court to make an order appointing a guardian of the person or property of the minor is comprehensive in its terms and does not lay down, expressly or by necessary implication, that the Court cannot impose a condition of this kind, in cases where it thinks fit to do so. S. 31 (a) is not exhaustive as to the powers of the Court to demand security. It obviously confers on the Court powers which are additional and not exclusive. It deals with the obligations of a guardian of property, who has already been appointed as such, and empowers the Court to require him to furnish security if and when, subsequent to his appointment, it becomes necessary to do so. It does not in any manner control or qualify S. 7 under which the Court has full power to make the appointment on such terms and subject to

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

such conditions as it, in its discretion, considers conducive to the welfare of the minor. 1930 L. 497 (F.B.). A guardian to the property of a minor was appointed on condition of furnishing security in 1902. The guardian furnished security in 1909. *Held*, that the appointment of the guardian took effect from 1909. 1930 L. 497 (F.B.). In case of a conditional order of appointment of a guardian, the minor's natural guardian's acts done in good faith prior to the furnishing of security by the guardian appointed are valid. 40 M. 775=37 I.C. 892. An order of appointment of a guardian of property of an infant on condition that he furnishes security is an order under S. 7 (1) and not under S. 34 and is appealable under S. 47 (4). 24 I.C. 202. *See also* 49 M. 809.

PRACTICE AND PROCEDURE.—The proceedings under S. 7 are summary. 65 I.C. 888=15 S.L.R. 175. Section contemplates only a summary inquiry followed by an order for the welfare of the minor. 40 B. 513=35 I.C. 57. When a minor is to attain majority shortly, the Courts cannot prolong the age of minority by appointing a guardian under S. 7. 38 M. 807=27 M.L.J. 30=41 I.A. 314 (P.C.). *See also* 1939 Lah. 221=41 P.L.R. 542. Ss. 7 and 8 do not necessarily require that when proceedings have been instituted on a proper application, application should be taken from the person whom the Court appoints, though certainly in practice it is more usual to take one. 73 I.C. 256. But *see also* 117 I.C. 901; 1933 L. 220; 38 C. 226; 1931 L. 212. A Court dealing with an application under the Act should not dispose of the matter in the absence of the applicant by making an order in favour of his opponent as though the absent person were a defaulter in a civil suit. 19 A.L.J. 489=63 I.C. 567. In determining whether a person is a minor the Court should take an independent view of its own and not adopt a finding in some civil suit that that person is a minor. 19 A.L.J. 489=63 I.C. 567. In an application for the appointment of a guardian for the property of a minor, it must be shown that the minor as some property, as without that there is no foundation for the application. An enquiry for such purpose is, no doubt, not meant to be a lengthy and elaborate one, but there must be some basis for finding that there is some property at all. 1940 Lah. 9=41 P.L.R. 678. When an application is made on the footing and with the

claim that the minor is entitled to separate property, the Court should appoint a proper person as guardian of his property leaving it to the guardian to institute suits for the recovery of the property claimed. 40 B. 513=35 I.C. 16=18 Bom.L.R. 343.

MALA FIDE APPLICATION.—Where no guardian for the person or property of a minor was necessary, and a master instigated his servant who was the grandfather of the minor to make an application for appointing himself as the guardian, so that the minor may be married to his son, it was held that it was not a *bona fide* judicial proceeding and orders made thereon were wholly without jurisdiction. 15 C.L.J. 142=16 C.W.N. 444.

TESTAMENTARY GUARDIAN—CL. (3).—Under Hindu Law, a man cannot appoint a testamentary guardian for his minor nephew. 12 I.C. 452=220 P.W.R. 1911. It is only where there is a written will appointing a guardian that a testamentary guardian stands in the way of the appointment of a statutory guardian by the Court. 16 L.W. 415=1922 M. 70 (1). *See also* 40 M. 672=34 I.C. 766=30 M.L.J. 504. In an application for the appointment of a guardian of a minor, the Court has jurisdiction and is bound to consider the fact that there is a will although no probate had been granted in respect of the same. 42 C. 953=28 I.C. 972=19 C.W.N. 513. Where there is a testamentary guardian for a minor an order appointing another person to be his guardian shall not be made unless the Court has ordered under S. 39 or S. 41, the removal of the testamentary guardian. 29 Bom.L.R. 1577. *See also* 100 I.C. 738=28 P.L.R. 127. If the validity of the will is in question, it is discretionary with the Court to defer decision of guardianship until the question of probate has been determined. 29 Bom. L. R. 1577. (17 B. 560; 16 M. 380; 29 B. 832, Ref.). European British subject—Whether mother can be preferred to testamentary guardian. 31 C. W. N. 394=101 I.C. 609=1927 C. 389. An application by a person, who has been appointed guardian of a minor under a will, to be appointed as a guardian, can be entertained, even though he has not obtained probate of the will. It is not incumbent on him to take out probate as a condition precedent to his obtaining a certificate of guardianship. 1936 A.L.J. 331=1936 A. 368.

APPOINTMENT OF GUARDIAN—DISCRETION—



**INTERFERENCE IN APPEAL.**—Where a guardian for a minor is appointed by a single Judge in exercise of his discretion, though an appeal is competent from his order, the fact that the making of the order is a matter of discretion is a good ground for refusing to exercise the appellate jurisdiction, unless the appellant succeeds in establishing a strong case, such as would justify interference in appeal. (71 I.C. 824 and 21 M. L.J. 1, Rel. on.) 14 Lah. 804=1933 L. 881.

**APPOINTMENT OF GUARDIAN—RESIDING OUT OF JURISDICTION.**—There is nothing in the Guardians and Wards Act which debars a Court from appointing a guardian who is not residing within the jurisdiction of the Court to which an application is made. Under S. 7 a Court will appoint a guardian whenever it is satisfied, that it is for the welfare of the minor that an order should be made. S. 39, Cl. (h) does not imply that a person applying for appointment must be residing within the jurisdiction of the Court to which the application is made. What Cl. (h) means is that in certain cases, ceasing to live within the jurisdiction of the Court which made the order of appointment may be ground for the removal of the guardian from his office and no more. The only duty cast on the Court under the Act is to appoint the best person to act as guardian regardless of his place of residence. 1933 A.L.J. 1333=1933 A. 780=56 A. 20.

**INTERLOCUTORY ORDER—REFUSAL OF APPLICATION TO BE APPOINTED GUARDIAN—APPEAL.**—An interlocutory order passed at an intermediate stage of the proceedings refusing the application of a party to be appointed guardian of a minor's property, as being unfit, the proceedings being kept pending, is not a final order within the purview of S. 7 (1) or S. 47 (a), so as to be appealable. 38 C. W. N. 1083. See also 1934 L. 323.

**SECS. 7 AND 8: THIRD PARTY—APPLICATION FOR APPOINTMENT OF GUARDIAN—MINOR'S RIGHT TO FUND DISPUTED—PROCEDURE.**—Where a person with whom a certain fund was deposited on behalf of a minor filed an application to Court under S. 7 to appoint a guardian for the minor in respect of the said fund and the Court decided in the face of opposition that the minor's natural father should be appointed guardian with direction for deposit of the amount in a Bank, the interest alone being payable to the guardian. Held, that original petition would be deemed to be under S. 8 (b) of the Act and the Court had power to appoint a guardian in spite of the denial of the minor's right to the fund, and that the Court could order the investment of the amount in dispute but that it acted wrongly in directing payment of interest to the guardian, while the minor's title to the fund was in dispute. 1934 M. 496=66 M. L. J. 310.

**SECS. 7 AND 12.**—A Hindu father has the

absolute right of appointing by will the guardian of his minor child, and the will so far as the appointment of the guardian is concerned speaks from the date of the testator's death. And when there is a testamentary guardian, the Court has no power to appoint another person as the guardian or to give another person the custody of the minor child, unless it be temporary custody under S. 12 of the Guardians and Wards Act, until the testamentary guardian is removed from his office. In such a case the fact that the will remains unprobated and that there is a contest as to its validity may be a ground for the Court passing an order for the temporary custody of the minor child, but the Court cannot say that it will refuse to take notice of the will and pass an order for the custody of the minor in favour of a person other than the testamentary guardian. I. L. R. (1938) Mad. 757=47 L.W. 470=(1938) 1 M.L.J. 422.

**SECS. 7 AND 17.**—In a contest, regarding guardianship of the person of a minor girl, aged about three years, between her mother (having custody) who has remarried and the minor's paternal grandfather the primary question for decision is whether it is necessary for the welfare of the minor for the guardian of the person to be appointed at all. The person, who has her interests most at heart is the mother, and, in view of the age of the minor, it would not be for her welfare to be taken away from her mother and handed over to her paternal grandfather. The mere fact that the mother had agreed to hand over the child to her paternal grandfather on being allowed to remarry makes no difference as the welfare of the minor is the overriding consideration. 160 I.C. 1013=1936 Pesh. 63.

**SECS. 7 AND 19.**—An application by a Hindu father for an order appointing him guardian of the person of his minor son does not lie, because S. 19 prohibits the Court making such appointment. Moreover, an order under S. 7 is not necessary. A Hindu father is the lawful guardian of his minor children, and a declaration by a Court cannot increase his powers in that respect. 13 R. 590. See also 1937 Bom. 98.

**SECS. 7 AND 39.**—A Court which has jurisdiction under the Guardians and Wards Act can remove a guardian as well as appoint him. Where in the first instance an *ex parte* order of appointment is made, it can, when the matter comes up for final orders, be set aside by the same Court. 189 I.C. 823=1940 All. 315. Under the Guardians and Wards Act, it is not essential that a person who applies for being appointed guardian of the property of a minor should be a resident of the district in which the property is situated. The power of the Court under S. 39 to remove a guardian who is not residing in the dis-



Persons entitled to apply 8. An order shall not be made under the last for order. foregoing section except on the application of—

- (a) the person desirous of being, or claiming to be, the guardian of the minor, or
- (b) any relative or friend of the minor, or
- (c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or
- (d) the Collector having authority with respect to the class to which the minor belongs.

9. (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

Court having jurisdiction to entertain application.

trict within which the property is situated is discretionary and it cannot reasonably be inferred therefrom that the applicant must necessarily be a resident of the district in which the property is situated. 44 P.L.R. 203=A.I.R. 1942 Lah. 162 (1).

SEC. 8.—A Court has no power to make an order appointing a guardian of minors except on a substantial application. 38 C. 226=15 C.W.N. 676=10 I.C. 334. *See also* 131 I.C. 296=1931 L. 212; 1933 L. 220; 73 I.C. 256. The mere fact that the mother of a minor is a pardanashin lady is no obstacle to her being appointed guardian of the minor son. 38 C. 226. An application by a cousin of two minor girls for his appointment as their guardian was objected to by another who alleged that the girls were his illegitimate children by the wife of another man. *Held*, that the objector had no legal or moral right to claim to be the guardian of the minors and that the cousin should be appointed guardian. (29 A. 210, Dist.) 10 O.W.N. 635=1933 O. 312. A first cousin, once removed, of a minor comes within the terms of S. 8 (b) and is, therefore, entitled to make an application for the appointment of a guardian. I.L.R. (1939) 2 Cal. 440=185 I.C. 880. The jurisdiction of the District Court is limited by S. 9 to infants ordinarily resident within the district and minors who have left India months prior to the proceedings are not ordinarily resident in the district. 38 M. 807=41 I.A. 314=27 M.L.J. 30 (P.C.). Failure to serve notice under S. 11, if fatal. 18 C.W.N. 160=16 I.C. 900. The appointment of Official Receiver as guardian of the minor's property without any application by him is contrary to the provisions of S. 8 of the Act and therefore invalid. 117 I.C. 901. *But see also* 73 I.C. 256; 1933 L. 220. Where the name of a third party was suggested by the counsel for the objector and consented to by the counsel for the petitioner and the Court accordingly appointed him as a guardian, the fact that there was no proper application under S. 10 by the third party to be appointed as guardian does not invalidate the appointment. (1928 L. 458, Dist.) 34 P.L.R. 17=1933 L. 220. *See also* 149 I.C. 708=1934 A. 849.

SECS. 8 AND 25.—Illegitimate minor girl aged seven years—Mother living with another paramour—Girl in possession of putative father—Appointment of guardian—Duty of Court—Considerations. 1936 S. 63=163 I.C. 192.

SEC. 9.—According to the Act, the applicant for guardianship of minor must be residing within the jurisdiction of the Court to which the application is made. 36 A. 280=24 I.C. 59. It is not necessary that the applicant for guardianship of the person of a minor should reside in the district in which the application is made. (36 A. 280, Diss. from.) 18 Lah. 426=39 P.L.R. 640=1937 Lah. 797. Residence is a matter of fact, not of presumption. 34 Bom.L.R. 1293=1932 B. 592. The fact that a minor is found actually residing at a place at the time the application under the Act is made does not determine the jurisdiction. It must be proved where the minor ordinarily resides, as required by S. 9 (1). The mere fact that the minors were taken to a place when the mother went to visit that place would not make that place the place of ordinary residence of the minors. I.L.R. (1940) All. 269=1940 A.L.J. 238=1940 All. 329. A mother of minor children, who was living in Ferozepore District filed an application in that district for guardianship of her children. The minors were with the father who was living in Rohtak district. The father obtained their custody as a result of a compromise with the mother in a criminal case. The elder child was born in Rohtak district and the younger in Ferozepore. *Held*, that in the circumstances the minors must be taken to ordinarily reside in Rohtak district and that, therefore, the Ferozepore Court had no jurisdiction to hear the application. 40 P.L.R. 708. Where a girl wife for the most part resided with her parents in one district and only occasionally with her husband who was a resident of another district, it is the Court in the former district that has jurisdiction to entertain an application for appointment of a guardian for the girl. 34 Bom.L.R. 1293=1932 B. 592. A mofussil Court other than the District Court has no jurisdiction to entertain proceedings by a father for the

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

10. (1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure, for the signing and verification of a plaint, and stating, so far as can be ascertained,—

custody of his minor child. A suit will not lie for the purpose in the Civil Court. 42 M. 647=37 M.L.J. 93=53 I.C. 399 (F.B.). A District Court, the jurisdiction of which is, as defined under the Guardians and Wards Act, has no inherent powers as are not expressly conferred upon it by the Act. 121 I.C. 168=1930 S. 43. A suit by a father for custody of his child is maintainable especially as no remedy exists under the Guardians and Wards Act. 44 I.C. 753=10 Bur.L.T. 186. See also 29 I.C. 768=8 Bur.L.T. 128; 157 I.C. 941. But see 38 M. 807 (P.C.); 42 M. 647=37 M.L.J. 93. Under S. 9, the original side of the Calcutta High Court has jurisdiction to entertain an application for the appointment of a guardian of the person of a minor who ordinarily resides within its ordinary original civil jurisdiction but at the time of the presentation of the application was temporarily residing outside such jurisdiction. The jurisdiction over infants under Cl. 17 of the Letters Patent preserved by S. 3 of the Guardians and Wards Act, is operative on the person and estate of all infants within Bengal Division of the Presidency. I.L.R. (1943) 2 Cal. 554=A.I.R. 1944 Cal. 433.

SECS. 9 (1) AND 25.—In order to give the Court jurisdiction for purposes of appointment of guardian under S. 9 (1) and for purposes of passing order under S. 25, the minor must be ordinarily resident within the local limits of the Court's jurisdiction. 39 Bom.L.R. 103=1937 B. 158=I.L.R. (1937) Bom. 348.

SEC. 9 (3).—The words "ordinarily resides" mean more than a temporary residence even though the period of such temporary residence may be considerable. 53 P.L.R. 1902. See also 38 M. 807=24 I.C. 290 (P.C.); 1932 B. 592=34 Bom.L.R. 1293. In determining the jurisdiction of the Court the question of domicile is relevant for fixing the ordinary residence of the minor. 34 B. 121=4 I.C. 262. See also 8 Bur.L.T. 73=29 I.C. 890.

SEC. 10.—Where the name of a third party was suggested by the counsel for the objector and consented to by the counsel for the petitioner and the Court accordingly appointed him as a guardian, the fact that

there was no proper application under S. 10 by the third party to be appointed as guardian does not invalidate the appointment. 34 P.L.R. 17=1933 L. 220. A suit *inter partes* is not the form of procedure prescribed by S. 10 for proceedings touching the guardianship of infants. See 38 M. 807 (P.C.). Illness of a child in the custody of the adoptive father is no reason to make over the child to the natural father. 1923 L. 376. Application stating age and date of birth of minor is no evidence to prove age of minor. 4 I.C. 744. As to a conditional order of appointment of guardian and the effect of such order, see 1930 M. 19 and cases referred to therein. On this section, see also 15 C.W.N. 457=7 I.C. 702; 49 M. 809; 1930 L. 497 and other cases cited under S. 7, *supra*; 6 I.C. 645=74 P.L.R. 1910; 2 A.L.J. 81; 26 A. 594; 1905 A.W.N. 104.

JURISDICTION AND PROCEDURE.—Though a Judge is not authorised by law to appoint a guardian in the absence of an application for such appointment, once an application is filed under S. 10 of the Act, the jurisdiction of the Judge comes into play, and it is open to him as a result of the enquiry, to appoint a person other than the applicant as guardian, provided such person has intimated his willingness to act as guardian. No doubt it would be more in conformity with law that such willingness is communicated to the Court in the form of an application in accordance with S. 10. But the absence of such application by the appointee is no bar to the jurisdiction of the Court to appoint him. 1934 A.L.J. 652=1934 A. 849. See also 144 I.C. 173=1933 L. 220.

SECS. 10, 11 AND 17: SCOPE—APPOINTMENT OF NON-APPLICANT—JURISDICTION.—The absence of an application by the person appointed as guardian is not a ground which invalidates his appointment. Once an application is made in accordance with the provisions of S. 10 of the Act for the appointment of a guardian for a minor, and notices sent to the interested persons under S. 11 and such persons avail themselves of the opportunity and appear in Court and adduce evidence in the enquiry the Court can appoint as guardian any person which it thinks best in accordance with S. 17 of

(a) the name, sex, religion, date of birth and ordinary residence of the minor ;

(b) where the minor is a female, whether she is married, and, if so, the name and age of her husband ;

(c) the nature, situation and approximate value of the property, if any, of the minor ;

(d) the name and residence of the person having the custody or possession of the person or property of the minor ;

(e) what near relations the minor has, and where they reside ;

(f) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment ;

(g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court and with what result ;

(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both ;

(i) where the application is to appoint a guardian, the qualifications of the proposed guardian ;

(j) where the application is to declare a person to be guardian, the grounds on which that person claims ;

(k) the causes which have led to the making of the application ; and

(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in subsection (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.

11. (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof,

Procedure on admission of and cause notice of the application and of the date application. fixed for the hearing—

(a) to be served in the manner directed in the Code of Civil Procedure on—

(i) the parents of the minor if they are residing in British India,

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and

(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given ; and

the Act. In the absence of a definite provision in the Act that the Court has no jurisdiction to appoint a person who has not applied under S. 10, the objection on that ground is at best a technical one and cannot be given effect to. 1934 A.L.J. 652=1934 A. 849.

SEC. 11: OBJECT AND SCOPE OF.—The object of S. 11 is to give an opportunity to all the persons interested in the minor of being heard before an order appointing a guardian is passed. 1934 A.L.J. 652=1934 A. 849.

APPEAL.—A person who is not made a party in an application under S. 10 but to whom notice ought to have been given

under S. 11 (a) as a person interested in the result of the application, cannot under S. 47 (a) file an appeal from the order passed on the application. 27 I.C. 121=18 O.C. 65.

EVIDENCE.—In an application for appointment of guardian, Court should give applicant an opportunity to let in evidence regarding his allegations. 1926 L. 716=107 I.C. 606.

SECOND APPLICATION.—Where a person's application to be appointed as guardian of a minor is rejected and there is no appeal from that order a subsequent application for the same purpose by the same person is not competent. 1923 N. 36.

(b) to be posted on some conspicuous part of the court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The Provincial Government may, by general or special order,<sup>1</sup> require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

12. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

Power to make interlocutory order for production of minor and interim protection of person and property.

#### LEG. REF.

<sup>1</sup> For instance of such order, see Ben. Stat. R. & O., Vol. II; U. P. List of Local R. & O., Vol. I.

SEC. 12.—S. 12 by reason of the wording used as well as by reason of its location in the Statute only applies during the pendency of guardianship proceedings. After guardian is appointed, Ss. 24 and 25 do apply. 119 I.C. 423=1929 L. 487. Under S. 12 (1) the Court has the power to pass interim orders for the protection of the person or property of a minor. Thus it can pass an order by way of injunction for the protection of a female minor against an unsuitable marriage. Such an order should issue under O. 39, R. 2 (1) read with S. 141, C. P. Code, and disobedience of the same is punishable under sub-R. (3) of O. 39, R. 2. 28 N.L.R. 332. Where during the pendency of an application for being appointed guardian of the person and property of a minor, the petitioner applied for the appointment of a receiver to sell certain articles belonging to the minor and to apply the sale proceeds towards the payment of debts due from the minor's estate and the Court ordered the same, held, that the order appointing a receiver was not *ultra vires* of S. 12 of the Act. 34 C.W.N. 192=1930 C. 384. The recognised principle is that a father is not only the natural guardian but has an inalienable right to the custody of his minor son unless there are overwhelming circumstances to the contrary. 49 A. 332=101 I.C. 529=1927 A. 458. Court's power to put minor in possession of guardians. 37 A. 515=29 I.C. 416. See S. 25, *infra*. High Court has power to make interlocutory orders issuing injunction to stop the marriage of minors, for the protection of their persons and property. 86 I.C. 226; 88 I.C. 576=1925 L. 375. District Judge has no power to direct any party to

proceedings to deposit in Court any sum due to minor.—Jurisdiction. 24 I.C. 518=42 A.L.J. 789. See also 11 I.C. 554. On an application under S. 12, the Court has power to direct payment of the minor's money into Court or to appoint a receiver of his property. 36 B. 20=11 I.C. 634=13 Bom.L.R. 487. See also 116 I.C. 642=1929 N. 119; 1924 A. 682; 90 I.C. 611=1925 L. 489. Order so appointing receiver is one under C. P. Code, O. 40, R. 1 and not under this section. 26 B. 20. Minor placing as adopted son—Where guardian in possession of property—No jurisdiction in Court to order widow to file inventory of deceased's property and to furnish security. See 3 S.L.R. 52=2 I.C. 369. An order of a Court rejecting an application by a guardian for the custody of a minor, on the ground that the proper course was to bring a civil suit, is not appealable, but can be revised. 13 P.R. 1897. The order of the Munsif under an order of the Court for the temporary custody and protection of a minor is not contrary to S. 12(3). 10 P.R. 1898. From the date of order appointing guardian of the minor, the latter becomes a ward of the Court, and the Court could and should take action and assist the guardian. 37 A. 515=29 I.C. 416. The person appointed to take temporary possession of the property of the minor under S. 12 is the person who should be held responsible for making enquiries and deciding whether *prima facie* the property concerned belongs to the minor or to some other person laying claim thereto. 1941 A. M.L.J. 53.

PRACTICE AND PROCEDURE.—See 137 I.C. 425.

SECS. 12 AND 25: APPLICABILITY.—APPLICATION BY APPOINTED GUARDIAN FOR CUSTODY OF MINOR.—The Court can entertain an appli-

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in the section shall authorise—

(a) the Court to place a female minor in the temporary custody of a person, claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

13. On the day fixed for the hearing of the application, or as soon afterwards

Hearing of evidence before  
making of order.

as may be, the Court shall hear such evidence as may be adduced in support of, or in opposition to the application.

14. (1) If proceedings for the appointment or declaration of a guardian

Simultaneous proceedings in  
different Courts.

of a minor, are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

(2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

<sup>1</sup>[(3) [In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case to, and be guided by such orders as they may receive from, their respective Provincial Governments.]

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

cation by a guardian appointed by it for the custody of the minor under the provisions of Ss. 12 and 25. So long as the custody of a minor is not actually made over to the guardian appointed by Court, the proceeding for the appointment of the guardian does not terminate and the applicability of S. 12 is not barred. There is another way of looking at the matter. A minor who is not delivered to the guardian, after he has been appointed by a competent Court, can be treated as having left or been removed from the custody of the guardian under S. 25 (1) of the Act. I.L.R. (1938) L. 318=1938 Lah. 313. The Court has jurisdiction to entertain an application by a guardian appointed by it for the custody of the minor although the minor has been removed out of its jurisdiction. To place a restricted meaning on the words "for the time being ordinarily resides" in S. 4 (5) (b) (4) so as to interpret them to mean where the minor actually is at the time of the application would be tantamount to rendering nugatory all the provisions of the Act and to making the law helpless against the machinations of recalcitrant persons who do not propose to part with the minor in favour of the appointed guardian. I.L.R. (1938), Lah. 318=1938 Lah. 313.

SECS. 12 AND 43 AND C. P. CODE, O. 39: DISTINCTION IN THE POWERS EXERCISABLE THERE.—There is a difference between a

Court issuing an injunction under O. 39, C. P. Code and a Court exercising similar powers under the Guardians and Wards Act in the interests of the minor. Ss. 12 and 43 of the latter Act enable the Court to pass orders *suo motu* unlike O. 39, R. 2, C. P. Code and it can *suo motu* deal with disobedience of its orders. 189 I.C. 813=1940 N.L.J. 157=1940 Nag. 203.

SEC. 13.—The procedure under S. 13 is not intended to be summary. 44 I.C. 976=134 P.W.R. 1917; 105 I.C. 616. See also 83 I.C. 320=1925 N. 233; 89 I.C. 865; 26 P.L.R. 164; 1926 L. 117. An order made without proper inquiry is bad and ought to be set aside. 15 I.C. 195=71 P.W.R. 1912. See also 63 P.L.R. 1917=44 I.C. 976. On this section, see also 23 B. 698; 15 I.C. 195; 27 I.C. 121; 4 I.C. 603; 17 B. 560. Ss. 13 and 17 are wide enough to cover an enquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual. 27 I.C. 121=18 O.C. 66. See also 105 I.C. 616. Whether preliminary enquiry as to whether the minor is possessed of property is not necessary before action is taken under the section, see 99 I.C. 222=1927 O. 68.

SEC. 14 (2): RESIDENCE OF MINOR NOT DETERMINABLE—JURISDICTION OF.—Where the minors ordinarily resided cannot be found out as both parties claim that the minors resided with them, the matter should be heard by the Court where it is alleged the minors have property. 1934 L. 208.

15. (1) If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.

Appointment or declaration of several guardians.

(2) On the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.

(3) On the death of a mother, being an European British subject, who during the incapacity of the father of her minor child has, by will or other instrument to take effect on her death, appointed a guardian of the child, the Court may, if the father becomes capable of acting, appoint him to be sole guardian of the child or guardian of the child jointly with the guardian appointed by the mother, as it thinks fit.

(4) Separate guardians may be appointed or declared of the person and of the property of a minor.

(5) If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

16. If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared and give effect to the order.

Appointment or declaration of guardian for property beyond jurisdiction of the Court.

17. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

Matters to be considered by the Court in appointing guardian.

SEC. 15.—A Hindu mother who remarries loses her natural right to be a preferential guardian of the person of her minor children. She can however be appointed guardian by the Court. 48 I.C. 75. There is nothing in the Hindu Law which prevents the Court from appointing more persons than one as guardian of the person of a minor. 48 I.C. 75. See also 1927 C. 389=101 I.C. 609. The Court, when it appoints a person as the guardian of a minor's person, should put the person appointed as guardian in a position to support the minor. 1930 A. 255 (2). Where property is not large and the Court has appointed separate guardians of persons of the minors, and the appointment of as many guardians of property as that of persons would lead to waste, property may be left in the hands of one of such guardians. 1930 A. 255 (2).

SEC. 15 (2).—Among European British subjects whether mother can be preferred to testamentary guardian, see 31 C.W.N. 394=101 I.C. 609=1927 C. 389. As to appointment of joint guardians, see *ibid.*; 48 I.C. 75.

SEC. 16.—Where a person has been appointed under the Act as guardian of the property and person of a minor, he becomes the guardian of the property of the minor, in whichever district or districts the pro-

perty may be situated. The effect of the appointment is that he becomes the certificated guardian for all purposes until he is discharged and cannot lay aside his status as such and pose as a natural guardian. 2 A.L.J. 460. The section is directory and does not in any way affect or prejudice the status of a certificated guardian when appointed generally over the property of a minor. 2 A.L.J. 460. Under sec. 3 a guardian, of whose person or property the guardian has been appointed by the Court of justice, shall be deemed to have attained his majority when he has completed his age of 21 years and not before. Such a minor can be major in one district and a minor in another. 2 A.L.J. 460. Decree for the specific performance of a contract of sale made by a guardian of minor's property should not be decreed except on proof of certain benefit to minor. 45 I.C. 192.

SEC. 17 [See also Notes under sec. 7]: SCOPE OF SECTION.—The words of sec. 19 so far from being subject to the provisions of sec. 17 expressly override them. 19 N.L.R. 45=1923 N. 199 (38 M. 807, Foll). See also 47 I.C. 817=12 S.L.R. 14; 32 Bom.L.R. 386=1930 B. 239=54 B. 560; 54 A. 128=137 I.C. 219=1932 A. 215; 1942 O.W.N. (B.R.) 22.

JURISDICTION.—When an application is made for the appointment of a guardian for



(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

a minor and notices are issued to all persons interested in the minor, all the interested parties have an opportunity of putting their case before the Court, and actually appear before the Court and adduce all the evidence that they have, the Court has jurisdiction under sec. 17 to appoint such person as it thinks should be appointed. The fact that the person so appointed has not himself filed an application under sec. 10 of the Act does not deprive the Court of its jurisdiction to appoint him. 149 I.C. 708=1934 A.L.J. 652=1934 A. 849. See also 1934 L. 208.

CONSIDERATIONS FOR THE COURT—PERSONS ENTITLED TO BE GUARDIANS.—The welfare of the minor is the paramount consideration in an application for the appointment of a guardian for the person of a minor though the rights of guardianship under the minor's personal law must also be considered, but the qualification or otherwise of the proposed guardian is only secondary to that of the minor's welfare. 22 M.L.J. 68=13 I.C. 16. See also 13 I.C. 453=22 M.L.J. 247; 4 P. 109=1925 P. 444; 13 C.L.J. 735. The primary consideration in appointing a guardian under the Act is the welfare of the minor provided that the appointment is not inconsistent with the law to which the minor is subject. After the death of her Hindu husband leaving a young daughter, the wife embraced the Mahomedan religion and married a Mahomedan. The grandmother (mother's mother) and the mother were persons competing for the guardianship. The lower Court held taking into consideration the age, sex and circumstances of the parties, etc., that the mother was the proper guardian but that as the child should be brought up in the religion of her father, the grandmother should be the guardian when the child reaches the age of ten. Held, that as the child while very young was not likely to have any convictions on question of religion, the mother was entitled to the custody in preference to the grandmother if she was otherwise a suitable guardian. Held, further, that the order directing that the grandmother should be the guardian after the child became ten years old was not proper. If subsequently the child was brought up in any religion other than Hindu—which was her father's religion and in which she should be brought up—the grandmother could then make an application for getting herself appointed guardian. 202 I.C. 107=15 R. Pesh. 34=A.I.R. 1942 Pesh. 41. Under the Mahomedan law, in the case of a male minor child of over 9 years, his consanguine brother who is male paternal relation has a

preferential right to the custody over the minor's mother. But this right is not unqualified but is conditional upon the Court being satisfied that the male paternal relation is a fit and proper person to be appointed guardian. According to the proper interpretation of S. 17 in the case of a Mahomedan guardian to be appointed in the order of relations with preferential rights, the appointment can be made only of a relation who in the opinion of the Court is a fit and proper person. The paramount consideration in an appointment under S. 17 is the interest of the child, consistently with the law to which the minor is subject. S. 17 cannot be construed as laying down that once it is shown that there is a relation alive in the order of relations entitled, according to the Mahomedan law, to the guardianship of the child that relation must be appointed. The Mahomedan law does not require that such a relation should be appointed if the Court considers that he is not a fit and proper person to be appointed guardian. The Court, if that relation is not a fit and proper person, must then look down the list for some other relation, and if there is no other relation, then, under the Mahomedan law, a stranger may be appointed guardian. I.L.R. (1942) Kar. 363=A.I.R. 1942 Sind 154. When a minor girl is living and has been living with her mother's sister, ever since her mother's death when she was an infant and now when she is of marriageable age, it is not in the interests of the minor that her custody should be given to her father. 170 I.C. 592=1937 Lah. 481. Under the Act a Court in appointing a guardian or declaring a guardian of the minor is guided first by the provisions of sec. 17 of the Act and secondly by what appears to be the welfare of the minor consistently with the law to which the minor is subject. By placing the provisions of the section above the law to which the minor is subject, the Act makes it open to the Court to consider other matters as well as the personal law even if they are opposed to that law. Thus, the Court may consider the opinion of the minor, whatever it may be, if he be old enough to form an intelligent preference; and in considering what is for the welfare of the minor the Court must have regard to his age, sex and religion and any existing or previous relations of the proposed guardian with the minor or his property. 7 O.W.N. 950=1930 O. 471. See also 1936 Pesh. 207; 162 I.C. 632=1936 R. 63. Matters to be considered by the Court in appointing a guardian under this section, *vis.*, the legal right to be appointed a guardian, the preference of the



minors, and the existing previous relationship are very minor considerations as compared with the main question, what order would be for the welfare of the minor. 9 Bom.L.R. 923=32 B. 50. The interest, well-being and happiness of the minor ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. 9 Bom.L.R. 923=32 B. 50. See also 13 O.C. 140=6 I.C. 1001; 192 P.L.R. 1913=19 I.C. 609; 33 A. 222=8 I.C. 785; 26 I.C. 300; 1936 Pesh. 207. Consistently with the welfare of the minor the Court should also have regard to the wishes of the deceased parents of the minor and also to the minor's wishes when he is of years of discretion. 25 I.C. 112=18 C.W.N. 1193 (32 B. 50; 29 A. 210, Foll.) The Guardians and Wards Act does not permit the Court to subordinate the law to which the minor is subject to the considerations of what will be for the minor's welfare. 1938 A.L.J. 982=1939 All. 15=I.L.R. (1938) All. 963. Personal law of the minor can be disregarded if the minor's welfare leaves no alternative. 28 O.C. 172=85 I.C. 624=1925 O. 623. Selection of guardian cannot be referred to arbitration. 112 I.C. 451. A boy aged 14 years and a girl aged 16 years, are old enough to form an intelligent preference; such preference is strongly entitled to consideration under sec. 17 (3). 12 N. L.R. 35=32 I.C. 977. As to consulting the wish of the minor, see also 134 I.C. 596=1931 O. 326. Being litigious is in itself no disqualification for guardianship. 87 I.C. 903=1925 O. 398. The circumstances that the mother of the minor girl has been forced to leave the house of the person claiming guardianship, that there has been litigation between them, that the person claiming guardianship is the legal heir of the minor girl and that the minor girl wishes to remain with the person who helped her mother and for whom she has life-long affection, make it desirable that girl should remain in the custody of the person with whom she has so long stayed. 1929 A. 857. Sec. 19 precludes from appointing any one other than the father of the minor as guardian of the minor unless the minor's father is found to be unfit to be guardian of the minor's person. 19 N.L.R. 45=1923 N. 199. But see also 83 I.C. 308=1925 L. 250; 1925 O. 282; 87 I.C. 1024=1925 O. 421; 86 I.C. 957=1925 M. 1085. The sister of the minor applied to be appointed guardian of his person and property. The minor who was aged 14 opposed this and it appeared that, after her appointment, the minor attempted to commit suicide. It did not, however appear that his conduct was due to ill-treatment by the sister. There being no other relatives the Court revoked the order of appointment and directed the Society for Protection of Children in India to visit the boy at his sister's house. The Society, however, was not appointed guardians. *Held*,

(1) that it was necessary to have a guardian appointed for the person of the minor; (2) that under the circumstances of the case the sister was the only proper person to be appointed guardian, the Society being authorised at the same time to visit the boy and look after his interests in consultation with the guardian. 58 C. 15=1930 C. 397. The District Court is justified in superseding a guardian who does not furnish security within the fixed time. 192 P.L.R. 1913=19 I.C. 609. Discretion under the section is very wide—No interference by High Court. 13 O.C. 103=11 I.C. 340. If it thinks it would be injurious to the minor to give effect to the father's wishes it can interfere even in his lifetime. 22 M.L.J. 247=13 I.C. 453. Father marrying a second wife—Not valid ground of disqualification. 28 M.L.J. 442=29 I.C. 14. On the death of Hindu adoptive father, whether natural father or remote adoptive relations should be preferred, see 4 P. 109=1925 P. 444. See also 15 C.W.N. 558; 7 I.C. 234. Simple illiteracy is no disqualification for the appointment of a mother as guardian of her sons. 33 I.C. 918=20 C.W.N. 663. The fact that the mother of a Muhammadan minor is divorced is no ground to refuse guardianship if she is of good character. 89 I.C. 865. Under the Mahomedan Law, a mother is disqualified from guardianship of her minor daughter where she re-marries a man who is not related to the minor within prohibited degrees. S. 17 does not interfere with this rule and, therefore, the paternal grandfather of the minor can be appointed guardian of the person and property of the minor. 138 I.C. 148=1932 L. 492. Since minor girl married to Sunah—Girl repudiating marriage on attaining majority—Husband, whether a fit person to be appointed guardian. See 95 I.C. 271; 1926 O. 521. The mere fact of unchastity is not enough to deprive a mother of her rights of guardianship. 74 I.C. 59=1923 W. 305. Re-marriage of a minor's mother is no disqualification. 1917 P.L.R. 251. Right of guardianship—Competition between outcasted mother and paternal grandfather in caste—Hindu Law. See 2 A.L.J. 663=28 A. 233; U.B.R. (1892-1896), Vol. 11, 418. The mere fact that an applicant is a pardanashin lady is no ground for rejecting her claim to be appointed guardian of the property of a minor. 1922 N. 232; 15 C.W.N. 676. Paternal uncle, see 43 I.C. 849; Paternal aunt, see 67 P.L.R. 1914. Step-mother, see 134 I.C. 596=1931 O. 326; 18 C.W.N. 163=16 I.C. 900=17 C.L.J. 405. Husband who failed to get restitution is not a good guardian. 67 I.C. 882=3 Lah.L.J. 293. That the first wife was not properly treated, is not a ground for presuming that the children will not be properly looked after. 39 M. 473=28 M.L.J. 442. The legislature advisedly draws a distinction between the

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

18. Where a Collector is appointed or declared by the Court in virtue of his office to be guardian of the person or property,

Appointment or declaration of Collector in virtue of office.

or both of a minor, the order appointing or declaring him shall be deemed to authorize and require the person for the time being holding the office to act as

guardian of the minor with respect to his person or property, or both as the case may be.

Guardian not to be appointed by the Court in certain cases.

19. Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint and declare a guardian of the person—

legal rights of husband and parents on the one side and those of the other near relations on the other. 39 M. 473. *See also* 86 I.C. 957=1925 M. 1085. Where the applicant was a distant relation of the husband of a childless widow who was living happily with her father, *held*, that the father of the minor widow was her proper guardian. 7 A.L.J. 1149=8 I.C. 785. (16 C. 584, R.) The presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person, as such a person stands to gain by the minor's death. 44 M.L.J. 62=1923 M. 359. The desirability of having a very near relation like the elder sister appointed guardian of the property of a minor should not be overlooked, where no adverse interest is for the present apparent or is made out by evidence before the Court. In such a case the furnishing of security to the satisfaction of the Court would be ample protection of the minor's interest. 58 C. 15=1930 C. 397. Mahomedan Law—Guardianship for marriage. 38 I.C. 787=25 C.L.J. 551. Where a male child has been born and brought up in the faith of his father, he should not be handed over to his mother who has left that faith and has thereby stepped outside the family in which she was married, with the certainty that the boy will be induced to leave the religion of his father for the new religion of the mother. Where a minor aged 6 years, who has been brought up in the Shiah religion of his father till the latter died was claimed by the mother, who had since become converted to Christianity, as her ward. *Held*, that in spite of the personal law, the Court could refuse the application of the mother for the custody of the child and place him under the protection of his paternal grandfather. 7 O.W.N. 950=1930 Quidri 471. A female relation of a Mahomedan minor who has under the

Mahomedan Law a preferential right to the custody of the minor, can be appointed guardian of the person of the minor under S. 17 if the welfare of the minor would be better served thereby, although she has married a person who is not related to the minor in the prohibited degrees. Under the section, the welfare of the minor is the primary consideration and even a stranger may be appointed a guardian in preference to a relation if the Court considers that the welfare of the minor demands it. The section, no doubt, also enjoins that the Court should, wherever possible, make an appointment which is inconsistent with the personal law to which the minor is subject; and that when the personal law definitely forbids the appointment of a certain person as guardian, such person should not be appointed. I.L.R. (1941) 1 Cal. 419=45 C. W.N. 515=1942 Cal. 281. Under the Mahomedan Law, a maternal aunt has a preferential right to the custody of a minor to that of the step-mother of the father of the minor. She no doubt loses the right to the custody if she marries a person who is not related to the minor within the prohibited degrees. But it does not necessarily follow from this that she is disqualified from being appointed a guardian of the minor by a Court acting under the Guardian and Wards Act. The Mahomedan Law nowhere lays down that a woman who had married a stranger to the minor is "disqualified" from being appointed a guardian under any circumstances. It merely lays down that such a woman loses any preferential right which she had by virtue of her relationship to the minor. 76 C.L.J. 303.

COMPETITION BETWEEN HUSBAND AND FATHER OF MINOR WIFE.—The language of the section obviously implies that when any of the three contingencies mentioned in the

sub-clauses exist, there is no authority in the Court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the Court conferred upon it by S. 17 to appoint or declare a guardian is ousted where the case is covered by S. 19. The section means not only that in the presence of the husband or the father no one else should be given preference, when either of them is fit to be appointed the guardian, but on its language it even ousts the jurisdiction of the Court altogether and prevents it from appointing even the husband or the father as the guardian when both of them are not unfit to be the guardian. The legislature did not intend to settle the competition that may arise under the personal law governing the minor between the husband and the father of the minor. 54 A. 128=137 I.C. 219=1932 A. 215. Immorality is not decisive to show that he is not fit to be guardian. 10 Mys. L.J. 156, following 46 A. 706.

**RELIGION OF MINOR.**—A child in India must, under ordinary circumstances, be presumed to have his father's religion and his corresponding civil and social status, and it is therefore ordinarily the duty of a guardian to train his infant ward in such religion. 32 I.C. 897=46 P.W.R. 1916 [11 W. R. 77 (P.C.), foll.] Effect of change of religion on right of guardianship, *see* 167 P.L.R. 1901; 60 P.R. 1901. *See also* 13 O.C. 140=6 I.C. 1001. The father of an infant is *prima facie* entitled to say in what religion his infant child should be brought up, but, at the same time in a proper case (e.g., when the father has abdicated his right) there is undoubted jurisdiction in the Court to disregard those wishes. 25 C. 881=2 C.W.N. 379. *See also* 22 M.L.J. 247=11 M.L.T. 53. The scope of the enactment is merely to remove legislative prohibition, to confer expressly a certain jurisdiction and to define exactly the position of those who avail themselves of or are brought under, the Act, leaving persons to whom any existing rules of law apply, unaffected. 4 C. 929=4 C.L.R. 247 (F.B.). The Act contains no provisions enabling the Court to act of its own motion. (*Ibid.*)

**MAHOMEDAN FATHER—APPOINTMENT AS GUARDIAN—DIFFERENCE IN RELIGION.**—An application for being appointed as guardian of his child by a Mahomedan father should be decided in the discretion of the Court after due consideration of the matters set out in S. 17. The child being a child of a Mahomedan marriage, the Mahomedan Law on the subject should receive due consideration at the hand of the Court, but the Mahomedan law need not necessarily govern the application. Where a Mahomedan divorces his Buddhist wife with a three months' old female child who is brought up in her mother's religion for none years afterwards, the mother having married a Buddhist, it is in the interests of the child

that the mother should remain the guardian. The facts that the father is comparatively more well to do and able to maintain and educate the child and had given maintenance to the child who had never seen him do not override the consideration of the minor's interests. 145 I.C. 843=1933 R. 201.

**MUHAMMADAN MOTHER.**—Where the mother of the minors, who were Mahomedans and of the age of 11, 9 and 8, was not of good character and had married a Hindu Jat, *held*, it is in the interest of the minors to be brought up in the religion of their Mahomedan father and that the children were not so young that they cannot be separated from the mother. 149 I.C. 973. (1)=1934 L. 287. Where the mother of two Mahomedan girls, five and a half and two and a half years of age, did not appear to be of good character and had married a Hindu. *Held*, the mother was not a proper person to have custody of the minors, but the girl of two and a half years was too young to be separated from her mother. 151 I.C. 322 (1)=1934 L. 291. In the case of a Mahomedan minor, the Court is not debarred by any provision of Mahomedan Law from appointing the mother as guardian merely because she had remarried outside the prohibited degrees. It cannot be said that the Court should subordinate the welfare of the minor and must, whatever the consequence, appoint the natural guardian under the personal law. I.L.R. (1944) All. 368=1944 A.W.R. (H.C.) 156=A.L.R. 1944 A. 202.

**GUARDIAN OF INFANT IN AN UNDIVIDED HINDU FAMILY.**—The High Court can, in the exercise of its inherent jurisdiction under Cl. 17 of the Letters Patent (and apart from the Guardians and Wards Act, 1890), appoint a guardian of an infant coparcener in an undivided Mitakshara family. 59 C. 570=138 I.C. 739=1932 C. 502. Parents entrusting custody of children to third persons—Forfeiture of natural rights. *See* I.L.R. (1943) 2 Cal. 527.

**SECS. 17 AND 18—CUSTODY OF TENDER YEARS.**—**FACTS FOR COURT'S CONSIDERATION FOR COURT.**—In proceedings for custody of a minor child under the Act the paramount consideration is the interest of the child rather than the rights of the parents. In the case of a child of tender years, the natural mother of the child is the proper person to have the custody of the child, though the father is the natural guardian of her child. It is impossible to find an adequate substitute for the mother for the custody of a child of tender years, and in the absence of any evidence to show that she is not a proper person to have the custody of the child, she must be given custody of the child in preference to the father. I.L.R. (1941) Bom. 455=43 Bom. L.R. 79=1941 Bom. 103. If a girl willingly and with understanding embraces the Mahomedan religion, the fact that she was under

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

### CHAPTER III.

#### DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS.

##### General.

20. (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

Fiduciary relation of guardian to ward.

18 years of age would not invalidate the conversion and make her subsequent marriage void, if all the necessary formalities at the conversion and the subsequent nikah had been faithfully observed, because a minor girl above 15 years, i.e., the age of minority under the Mahomedan Law, can be validly converted to the Mahomedan religion if in addition to a mere repetition of the words of faith she has understood their meaning. The Court is not concerned to inquire into the motive or sincerity of religious belief or observance. 186 I.C. 183 = 1939 Sind 311.

Sec. 19.—[See also notes under S. 7 and S. 17, *supra*.] S. 19 recognizes the natural right of the father and is controlled by S. 17 according to which the paramount consideration is the welfare of the minor. 47 I.C. 817=12 S.L.R. 14. But see 23 L.W. 213=1925 M. 1085, which lays down that the prohibition contained in this section applies also to a husband or father. S. 19 does not make a father the guardian of the person of a minor girl, when he is not already the natural guardian under the personal law applicable to the minor. The Act is not intended to interfere with the personal law of minors. 1935 L. 25. See also 13 R. 590. S. 19 is no bar to an application by the father under S. 25. 1940 A.L.J. 238=I.L.R. (1940) All. 269=1940 All. 329. See also 24 Bom.L.R. 779=1922 B. 405. Father being a natural guardian, he cannot be appointed or declared guardian under this section. See 83 I.C. 308=1925 L. 250; 1925 O. 282; 87 I.C. 1024=1925 O. 421; 86 I.C. 957=1925 M. 1085. But see also 86 I.C. 640=21 L.W. 244=1925 M. 398=48 M.L.J. 179. During the natural guardian's life, a Court cannot appoint another guardian, unless in its opinion, the natural guardian is unfit. 38 M. 807=41 J. A. 314=27 M.L.J. 30=18 C.W.N. 1089 (P. C.). See also 2 L.W. 531=29 I.C. 740; 5 U.B.R. (1892-1896) Vol. II. 413 (415); 32 S.L.R. 213. "Father" in S. 19 (b) means father of a child born in wedlock. 36 I.C. 646=8 L.B.R. 415. A Hindu father's consent does not operate to deprive him of the guardianship of his children by reason

of Act XXI of 1850. 47 I.C. 817=12 S.L.R. 14. The mere fact that the father has changed his religion does not amount to unfitness within the meaning of S. 19. Where the father is alive and able to provide for the welfare of his children, no guardian can be appointed. 138 I.C. 685=1932 L. 385. Guardianship of illegitimate child—Adoption by Mahomedan. See U.B.R. 1892-1896, Vol. II, 415. Court, if can delegate duty of enquiry as to fitness, see 21 O.C. 194=48 I.C. 60. Minor girl—Husband not a proper guardian before puberty. 43 I.C. 849. See also 7 S.L.R. 199=24 I.C. 944. Where the application is to appoint a guardian of the person of a minor who is a married female and it has been found that the husband is not unfit to be her guardian, an order declaring the husband guardian under S. 19 (a) of the Act is not competent. The proper course for the husband would be to apply for custody of his minor wife under S. 25 of the Act. (24 Bom.L.R. 779 and 41 I.A. 314, Ref. to.) 32 Bom.L.R. 386=1930 B. 239. Appointment of a person as manager of an infant's properties does not create the relationship of guardian and ward. 35 C.W.N. 850=53 C.L.J. 589. Parents entrusting custody of child to third persons—Forfeiture of natural rights. See I.L.R. (1942) 2 Cal. 554.

SECS. 19 AND 25.—As long as the father of the minor is alive and is not proved to be unfit to be guardian of the minor, the Court cannot make an order appointing him or anybody else as guardian. But it can order the person who has custody of the minor to hand the minor to the custody of the father. The proper procedure for the father is to apply under S. 25 and not to ask for declaration under S. 19. 158 I.C. 911=1935 A.L.J. 1016=1935 A. 838. See also 13 R. 590; 1940 All. 329. S. 19 bars an application by the maternal grandmother of Mahomedan minor girls against their father for the appointment of a fit and proper person as their guardian and for custody of the minor girls unless the father is shown to be unfit. Though the maternal grandmother under the Mahomedan

(2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.

21. A minor is incompetent to act as guardian of any minor except his own wife or child or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.

Capacity of minors to act as guardians.

22. (1) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.

Remuneration of guardian.

(2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Provincial Government, by general<sup>1</sup> or special order, directs.

23. A Collector appointed or declared by the Court to be guardian of the person or property, or both, of a minor shall, in all matters connected with the guardianship of his ward, be subject to the control of the Provincial Government, or of such authority as that Government by notification<sup>2</sup> in the Official Gazette, appoints in this behalf.

Control of Collector, as guardian.

#### *Guardian of the Person.*

24. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

Duties of guardian of the person.

#### LEG. REF.

<sup>1</sup> For instance of such order, see Beng. Stat. R. and O., Vol. XL.

<sup>2</sup> For notifications appointing authorities to whose control Collectors appointed under the Act shall be subject, in—

(1) Bengal, see Beng. Stat. R. & O., Vol. II; (2) Bombay, see Bom. R. & O. Vol. I; (3) U. P. of Agra and Oudh, see U. P. and Oudh List of Local R. & O., Vol. I; (4) Punjab, see Notification No. 632, dated 28th June, 1901, in *Punjab Gazette*, 1901, Pt. I, p. 756.

Law is entitled to the custody of minor girls who have not attained puberty, failing their mother, in preference to the father, the latter is their legal guardian, and S. 25 cannot apply so as to entitle the maternal grandmother to the custody of the minor girls in the absence of proof that the minors had ever been in the custody of the grandmother and had left or been removed from such custody. There can be no question in such a case of the Court arriving at the conclusion that "it will be for the welfare of the wards to return to the custody" of the grandmother. 54 L.W. 395=1941 Mad. 944=(1941) 2 M.L.J. 548.

SEC. 20.—Guardian dealing with ward's money—Investment—Duty to account for profits—Breach of trust. 54 I.C. 926=157 P.R. 1919.

C. G. M.—348

SECS. 20 AND 27: APPLICABILITY.—All guardians, whether appointed by will, instrument, or Court, are governed by Secs. 20 and 27 of the Act. 1940 O.W.N. 995=1940 R.D. 468.

SEC. 21.—A minor step-mother is competent to act as guardian of the person of her infant step-son. 18 C.W.N. 160=16 I. C. 900=17 C.L.J. 405. (5 Bom.L.R. 542; 3 B. 2, Rel.)

SEC. 22.—See 24 B. 95=1 Bom.L.R. 547; 1925 O. 260.

SEC. 23.—See 3 C.L.J. 165.  
CASE-LAW.—Persons appointed as guardians to deal with minor's property. See 96 I.C. 17=28 Bom.L.R. 628.

SEC. 24: RELIGION.—The father of an infant is *prima facie* entitled to say in what religion his child should be brought up. 22 M.L.J. 247; 25 C. 881. But where the Court thinks it would be injurious to the child's interest, it will interfere. 22 M.L.J. 247. Where the parents are not of the same religion, the mother after the death of the father should bring up the child in its father's religion. 22 M.L.J. 247. See also 41 I.C. 571. The Court may restrain a marriage if it is unsuitable even though the guardian has given his consent. 10 I.C. 136. See also 98 P.R. 1914=27 I.C. 381. A ward of Court cannot marry without the consent of the Court. 42 C. 351. See also 32 B. 52; 57 I.C. 651; 39 M. 473. On this section, see also 8 C.W.N. 37; 36 M. 39=13 I.C. 251=22 M.L.J. 193; (1911) 2 M.W.

25. (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and, for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.<sup>1</sup>

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

#### LEG. REF.

<sup>1</sup> See now Act V of 1898.

N. 519. As to what are material considerations in sanctioning an application for the marriage of a minor girl, *see* 1933 A.L.J. 1188=1933 A. 480. District Judge is competent to sanction the marriage of a minor girl under the guardianship of one appointed by the Court with a particular bridegroom. 52 I.C. 998. Where the Court sanctioned the marriage of a minor boy aged 12 to a girl aged 10 and the grounds alleged were that the boy who was himself very rich was likely to get a very rich father-in-law, that the boy was grown up and desired his marriage and it was also said that because the Sarda Act which would take effect soon was likely to postpone the marriage for a long time, it was better to have the marriage celebrated, so that the boy might avoid the temptations of a dissolute life. *Held*, that the welfare of the minor was the only test in such a case and that the grounds set out would not be a justification for sanctioning the marriage of such a young boy. *Held, also*, that it was not the province of the Judge to set at naught the principle underlying the Sarda Act or to teach others to flout it. 1930 M.W.N. 57.

REVISION.—Order not warranted by Act—Revision lies. *See* 36 M. 39. *See also* 34 P.L.R. 333.

SEC. 25.—[*See* Notes under Secs. 17 and 19, *supra*.] The only remedy of a guardian seeking the restoration of the custody of his minor ward is by way of an application under S. 25 of this Act. A separate suit is not maintainable for the purpose. 9 R. 569. *See also* 68 M.L.J. 662. *Quære*, whether S. 25 was intended to apply to the case of a person who has not been declared or appointed a guardian under the provisions of the Act. 132 I.C. 636=35 C.W. N. 158=1931 C. 563. An application under S. 25 must be made to the Court where the minor ordinarily resides. 118 I.C. 415 (1)=1929 R. 129 (1). The refusal by a person to deliver back the child to its natural guardian when asked to do so by the latter amounts in effect to a removal from his custody and he can, therefore, apply under S. 25 of the Act. 1929 M. 81. *See also* 54 A. 128=1932 A. L. J. 21=1932 A. 215; 158 I.C. 584=1935 O. W. N. 1096=1935 O.

492 (F.B.) (Application by Muhammadan father for custody of his minor girl.) Where it appeared that the father had been tried of serious charges in relation to his treatment of his children and though he had been acquitted of criminal prosecution, his conduct was otherwise reprehensible. *Held*, that he was disentitled from claiming custody of the minor children who were residing in a convent. 132 I.C. 636=35 C.W.N. 158=1931 C. 563. *See also* 1935 A. 838. Matters to be considered in passing order under the section. *See* 107 I.C. 759. The father has a right to custody of a minor child. 47 A. 706; 18 L.W. 173=1924 M. 45. But as to conflict of rulings, 1925 O. 282; 1925 O. 257; 83 I.C. 308=1925 L. 250; 86 I.C. 957=1925 M. 1085; 86 I.C. 640=1925 M. 398. The decision of the question whether it would be for the welfare of the child to return to the custody of its guardian depends entirely on the circumstances of each case. When the guardian of the person of a ward applies for the custody of the ward, he is only asking the Court to help him to discharge the duty cast on him by law with reference to his ward and it is for those, who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of the person against whom the application is made. This onus is especially heavy when the guardian is the father of the child. 1929 M. 81. Before the Court can pass an order for the arrest and delivery of a minor girl to her husband, the guardian, the Court has first to be satisfied that it is for the welfare of the ward to return to her guardian. The Court cannot assume that it is for her welfare to so return, and if the order is passed without the Court deciding that question, the order will be set aside. 43 L.W. 650=1936 M. 556=71 M. L. J. 396. There is no legal prohibition against the appointment of a person as a guardian who is not residing within the jurisdiction of the Court or the making of an order under S. 25 in favour of such a person, though naturally the Courts would as an ordinary rule be reluctant to make such an order. 39 Bom.L.R. 103=1937 B. 158=I.L.R. (1937) Bom. 348.

FATHER—RIGHTS OF.—The father has an



inalienable right to the custody of his children and he cannot be deprived of it except for strong reasons. 41 P.L.R. 841=1939 Lah. 359. The father, as the natural guardian, has the legal right to the custody of his child and the Court will not interfere with his right except when the safety or the welfare of the child requires such interference. The Court will be perfectly justified in imposing limits upon the father's right of custody, if the exercise of such rights will materially interfere with the health and happiness of the minor. 74 C.L.J. 196. An immoral father has not the same right to the custody of his children as a moral man. (1924 A. 622, not appr.) 1929 M. 81. See also 120 I.C. 747. Although according to Hindu Law a father is the natural guardian of his children during their minority and has, therefore, a paramount right to the custody of his children, yet each case must depend upon its own circumstances and the right of the father is liable to be defeated where it is shown that it is better in the interests of the minor and for its welfare that it should remain where it is. If a minor girl has for many years from a tender age lived with grandparents or other near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance and bear both upon the question of the interests and welfare of the minor and on the *bona fides* of the petition by the father for the custody of his minor girl. 41 L.W. 190=1935 M.W.N. 412=1935 M. 195. A Hindu father is the natural guardian of his children during their minority, and has *prima facie* a paramount right to their custody, and must be given such custody unless he is unfit or there are other circumstances. But the welfare of the minor child is a very important matter for consideration and the interests and welfare of the minor are sometimes even paramount to the rights of the father. A minor girl about one year old was, on her mother's death, taken to live with her maternal uncles with the consent of her father who took a second wife and had by her four children. She remained with her uncles ever since until she was 13 years of age and was fondly brought up and well-cared for by her uncles and grandmother. The father did not show the slightest interest in her welfare till then, but suddenly applied for her custody under S. 25 of the Act. The minor girl showed her preference clearly in favour of remaining with her uncles, and it also appeared that the petition made by the father was not *bona fide* but out of spite and grudge against the maternal uncles. Held, that the minor girl of 13 years was capable of forming a good opinion on the matter and that the interests and welfare of the minor demanded that she should remain where she was

and the father's petition should be refused. 41 L.W. 400=1935 M. 363=68 M.L.J. 213. See also 50 L.W. 520=1939 Mad. 611=(1939) 2 M.L.J. 515. The father is the natural guardian of his minor child and has a right to claim custody of the child, but such right can be defeated if the Court thinks it better in the minor's interests to leave him in another's custody. In determining the minor's welfare, the question whether the application for custody is *bona fide* or not should be considered. If it is not *bona fide*, that is a reason for not disturbing the existing custody. The Court may in that connection take into account the failure on the part of the father to take steps over a long period to get custody of the minor. Another consideration is whether he is a fit person for the minor to be returned to. The fact that the father treated the minor's mother and was about to marry a second wife will also count against him, especially when his application is belated, made after the lapse of a long time. 158 I.C. 99=1935 M. 368. See also 1939 Mad. 611=(1939) 2 M.L.J. 515. A minor, provided he or she is old enough to understand the nature of his or her acts, though under 18 years of age, is able in spite of the father's power of general control over his or her education, religious and otherwise, to change his or her religion. But in this, as in all other matters under the Guardians and Wards Act, the Court in deciding who shall have the custody of the minor will consider the interests and welfare and interest of the minor and in so doing the Court can set aside her own preferences in her own interest and for her good. Further, a father does not lose the right of custody of his minor child if he becomes converted to another religion or if his child becomes so converted. 1939 Sind 311; 39 Bom.L.R. 103=1937 B. 158; 41 L.W. 789=68 M.L.J. 662. Where a District Judge appointed the father guardian of the property of a ward, and the father, in response to a petition by the father, requesting that no order as regards the guardianship of her person was necessary. Held, that the conditional order of appointment as guardian of the property is of no effect. The District Judge was not correct in saying that no order as regards the guardianship of the person was "necessary". 1930 M. 19. On this section, see also 27 I.C. 257; 13 A.L.J. 742; 29 I.C. 768; 28 L.W. 597=17 Bom.L.R. 332. Though, according to the *Muhammadan Law*, the mother is the guardian of her minor son below 7 years of age, and so an application by the father for the custody of a child aged less than 7 at the time of the application would be incompetent, nevertheless, if during the course of the proceedings, the infant has attained 7 years of age, it is open to the father to continue the application. The only remedy of a father for the



custody of his minor son is by an application under S. 25. The words "removed from his custody" should receive a liberal construction as including removal from constructive custody. A refusal to deliver a minor to his natural guardian when asked to do so by the latter amounts in effect to removal from his custody. 124 I.C. 381; 25 A.L.J. 585 (rights of Mahomedan father and mother over minor child). Natural father of a child consented to the mother retaining the child during its infancy. The mother separated from the father before birth of the child and lived with another man as his wife. On her death the natural father applied for the custody of the child. The natural father was a man of good character. *Held*, that he was entitled to apply for and obtain the custody in preference to the other man with whom the mother lived as wife after separation from the natural father and that the child must be deemed to have been in his custody at the time of its birth. (39 M. 608; 49 A. 332, Ref.; 40 B. 600, Diss. from.) 12 R. 161=149 I.C. 1045=1934 R. 49 (1). A Mahomedan father who is the lawful guardian of his minor children by a wife who has been divorced by him, does not require an order of the Court to support his right to act as the guardian, in fact an application for appointing him guardian under the Guardian and Wards Act does not lie. Being the guardian of his children under his personal law, he is entitled to apply for an order under S. 25 of the Act for custody of his children, although the fact that he is the lawful guardian does not mean that the Court is compelled to pass an order in his favour under S. 25. The welfare of the minor is of primary importance and the Court will be guided by that consideration in making or not making an order. 1945 M.W.N. 704=58 L.W. 587=(1945) 2 M.L.J. 463. Petitioner who lived with his wife and minor child in the house of his father-in-law for nearly two years and thereafter lived apart called upon the wife to come with the child and live with him but the latter refused. The petitioner having applied under S. 25 of the Act for custody of his minor child, *held*, that the father as the natural guardian of his minor child was entitled to apply under S. 25, that the minor must be deemed to be in the constructive custody of the petitioner and that the refusal of the wife to go and live with him with the child was in law a removal of the child from the custody of the petitioner. *Held*, further, that an application under S. 25, and not a suit was the proper remedy of the petitioner. 151 I.C. 1037=36 Bom.L.R. 668 1934 B. 311. The word 'custody' in S. 25 includes both actual and constructive custody. 39 M. 608=30 M.L.J. 21; 25 A.L.J. 585; 58 B. 724=36 Bom.L.R. 668=1934 B. 311. Even where the minor has never been in the custody of the guardian, in order to

make the Act workable, a fiction must be imported into S. 25, whereby it is deemed that the child has been constructively in the guardian's custody and has left it. 1930 M. 19. About mother's right to custody, *see* 56 I.C. 242=24 C.W.N. 711; 31 C.L.J. 365=57 I.C. 13. *See also* 1931 A.L.J. 333 (minor alleged to be member of joint Hindu family). But whether she by her conduct precludes herself from demanding the custody, *see* 1 M.L.J. 347; 23 C. 290. Where immoral conduct is proved against her she is not entitled to custody. 14 M.L. A. 309. *See also* 1929 M. 81. A Court is not justified in refusing relief to the guardian under S. 25 of the Act on the ground that the guardian is too weak to keep the minor. 1927 L. 266. It is the duty of the Court to protect the weak against the high handed acts of the strong and this duty had to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge. 100 I.C. 807=1927 L. 266. In order to take action under S. 25, it is immaterial whether the minor left the guardian's custody of his own accord or was forcibly removed by the respondent. 100 I.C. 807=1927 L. 266. Father leading an immoral life—Children living with maternal uncle—Power delegated by the father whether can be revoked. 103 I.C. 361=1927 N. 314. For the purposes of S. 25, it is not really necessary that the applicant should be a lawful guardian under the personal law. The application can be made by any person having the care of the person of the minor. The father of an illegitimate son who had the care of his person has, therefore, a *locus standi* to maintain a petition under the section. The petition must be decided on equitable considerations, the sole criterion for decision being the welfare of the minor. 15 L. 630=35 P.L.R. 677=1934 L. 1003. *See also* I.L.R. (1940) All. 269=1940 A.L.J. 238=1940 All. 329. Under Hindu Law the father of a minor girl ceases to be the guardian of her person as soon as she is married. 1935 L. 25. On the death of her husband, this right does not revive in favour of the father, but devolves upon the husband's relations. Where therefore at the time of the application under S. 25 by the father the girl was in custody of her natural guardian, the mother-in-law, it cannot possibly be said that she had been removed from lawful custody, and the order for the delivery of the minor to her father under S. 25 is illegal. 1935 L. 25. *Ex parte* order directing production of minor—Application to cancel the order dismissed—Order of dismissal not appealable—Proper remedy of the party is to apply to set aside *ex parte* order. 92 I.C. 36=1926 N. 351. A husband is, by Hindu Law, a natural guardian of his minor wife and entitled to custody and

comes within the definition in S. 14 of the Act as being "a person having the care of the person of a minor" and, therefore, is entitled to apply under S. 25 for the custody of his wife. 121 I.C. 175=1930 Sind 135. See also 33 Bom.L.R. 386. Where a husband obtains a decree for restitution of conjugal rights against this minor wife, his only remedy would be to get an attachment against the property of his wife, if she has any. It would be altogether wrong to permit the husband to achieve his object by making an application under the provisions of sec. 25 to take custody of his minor wife against whom the decree was passed. (1936) A.L.J. 211=1936 A. 267=161 I.C. 816, Reversed.) 164 I.C. 915=1936 A. 657.

"CUSTODY"—"GUARDIAN."—The meaning of the word "custody" is not confined to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody. 54 A. 128=1932 A.L.J. 21=1932 A. 215. "Custody" in sec. 25 includes the actual as well as the constructive custody of the minor, and the section is not limited to the powers of enforcing the guardian's right to the extreme case of an actual leaving or removal. A ward in the actual custody of another person with the permission of the guardian is deemed to be in the constructive custody of the guardian, and the refusal of the person in actual custody to hand over the minor to the guardian amounts to a removal of the minor from the constructive custody of the guardian within the meaning of sec. 25 of the Act. 151 I.C. 1037=36 Bom.L.R. 668=1934 B. 311. See also 74 C.L.J. 196; 39 M. 608=30 M.L.J. 21; 25 A.L.J. 585; 161 I.C. 816=1936 A.L.J. 211=1936 A. 267. Any person who has the care of the person of the minor is a 'guardian' of the person; so if a female relation is under the Muhammadan Law entitled to the custody of the minor and not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having the care of the person of the minor. 54 A. 128=137 I.C. 219=1932 A. 215. A father can make an application under sec. 25 for the custody of his minor son although the minor was never in his custody and lived all along with his maternal grandparents. The word "custody" as used in that section refers not only to actual but also to constructive or legal custody. When the father of a child is alive and has not abandoned his right, the maternal grandfather or for the matter of that any other relation who has actual custody of the boy must be deemed to have that custody with the knowledge and consent of the father. Legally it is the father who has the custody of the child in such

circumstances, and the child can be deemed within the meaning of the section, to be removed from such legal custody, when the person in whose actual possession he is, repudiates to the guardian's knowledge the right of the latter to the actual or legal custody of the minor. 74 C.L.J. 196. Sec. 25 does not apply if the ward has never been in the custody of the guardian. Custody means actual custody and not constructive custody. When the father of a minor has never had actual custody of the child, there is no jurisdiction in the Court to direct the custody of the minor child to be handed over to the father in proceedings under the Act. I.L.R. (1941) Bom. 488=43 Bom.L.R. 615=1941 Bom. 344.

GUARDIAN—MEANING OF.—"Guardian" in the Guardians and Wards Act means a person having the care of the person of a minor or of his property or both and is used in a wide sense. It does not necessarily mean a guardian duly appointed or declared by the Court, but includes a natural or even a *de facto* guardian. 151 I.C. 1037=36 Bom.L.R. 668=1934 B. 311. See sec. 4, *supra*.

NATIVE CHRISTIAN MINOR.—Father of the father and mother and their appointees, no other person is entitled as of right to the custody of an Indian Christian minor or to the guardianship of his or her property. 132 I.C. 120=1931 M. 529=60 M.L.J. 695.

RIGHT OF FATHER.—The right of the father under the Act is only to apply for custody of the minor under the Act for the custody of the minor and cannot bring a separate suit. 39 M. 608=24 P.C.; 23 M. 647 (P.C.); 38 M. 609 (P.C.). See also 9 B. 569 following [36 A. 594; 38 M. 807 (P.C.); 42 M. 647].

PRACTICE.—Orders as to the custody of a child under the Act are always of a temporary nature. Those interested in the child are at liberty to apply to the Court for modification or alteration of the order whenever necessary. 101 I.C. 101=1931 Bom. 103.

JURISDICTION.—Application by mother for custody of minor daughter—Minor removed from Court's jurisdiction—Application cannot be granted. 177 I.C. 427=1938 Lah. 84; 40 P.L.R. 64=I.L.R. 1938 L. 318=1938 L. 318.

SECS. 25 AND 19.—Where a father applies for the custody of his illegitimate children by a prostitute, and it is found that the mother was continuing to lead a life of prostitution, it is in the interests of the minors that they should not be allowed to remain in the custody of the mother and that the father should be given their custody. Sec. 19 is not a bar to such an order being made. I.L.R. (1940) All. 269=1940 A.L.J. 238=1940 All. 329. See also 15 Lah. 630=1934 Lah. 1003.

26. (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be defined by the order granting it.

#### *Guardian of Property.*

27. A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property.

SEC. 26.—See 19 I.C. 655=11 A.L.J. 209; A.W.N. (1899) 204; 8 M.H.C.R. 94.

SEC. 27: APPLICABILITY.—Sec. 27 applies to guardians recognized by the law whether or not they have been appointed guardians under the Guardians and Wards Act. It does not and was not intended to confer any power upon a person who without any lawful authority in that behalf has usurped the position of a guardian, or has taken upon himself the care of the property of a minor. 12 E. 656=1934 E. 355. A guardian appointed under the Act cannot ratify the unauthorized acts of a former guardian. 54 I.C. 311. It is unwise on the part of the guardian to admit that his wards were liable for a debt when the debt could not be legally recovered owing to the lapse of time. 56 I.C. 328=23 O.C. 27. Where a guardian acting in the interests of the minor enters into a compromise of a doubtful right, it is binding on the minor. 14 M.L.J. 442. A guardian has a discretion under sec. 27 to allow a remission of rent on failure of rain or other source of irrigation. 28 I.C. 5=8 S.L.E. 222. On this section, see also 83 I.C. 24=1924 A. 622 where the income from a business inherited by a minor is the principal source of his maintenance, money borrowed by his guardian for the efficient conduct of that business is money borrowed for the benefit of the minor's estate. 44 O.W.N. 1048=1940 Cal. 532. The mere fact that the guardian has filed abstract statement of assets and liabilities does not release him from liability to account unless he gets a discharge from such liability from the Court. 15 C.L.J. 57=7 I.C. 214 (34 C. 211, Rel.). A promissory note executed by the certificated guardian for goods supplied to the shop owned by the minor does not impose a personal liability on the minor and the creditor is not entitled to recover the amount from the minor or his estate. 34 Bom.L.R. 1001=1932 B. 480. Although a guardian can under certain circumstances sell or charge his ward's estate or property, he cannot bind him personally by a simple contract debt nor can he bind his estate except by a document purporting to bind it. This principle applies even to a case where the promissory note was executed by the guardian (appointed by the Court) after obtaining sanction from Court and the amount was utilised

for the benefit of the minor. [11 B. 551 (P. C.) and 20 B. 61, Foll.] 34 Bom.L.R. 996=1932 B. 480. Though a debt incurred on behalf of a minor for necessary purposes of the minor or a covenant to pay a debt so incurred can be enforced against the property of the minor, a guardian cannot impose an unconditional personal liability on the minor by executing a promissory note on his behalf because any qualification of the promise contained in a promissory note such as that it is only to be enforced against a minor, if necessity binding on the minor be shown, is wholly foreign to the idea of a negotiable instrument. 65 M.L.J. 350=56 M. 879. Where the guardian of a minor executed a mortgage which was found to be invalid and unenforceable as such for want of proper attestation, the personal covenant contained in the deed can be enforced against the estate of the minor, if the liability was one binding on the minor under Hindu Law. 54 M. 163=1931 M. 410=60 M.L.J. 56 [39 M.L.J. 29 (F.B.) Foll.]. A decree can be passed against a minor's estate on a contract entered into by his guardian in a case in which the estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor was subject. (42 M. 185, Foll.) 139 I.C. 383=1932 M. 696.

EXECUTION APPLICATION.—A guardian cannot make an application for execution of a decree on behalf of a minor who has attained majority without a proper power of attorney. If, however, the minor ratifies the act, the application is valid. 32 P.L.R. 290=1931 L. 600 (1929 L. 478, Appl.). Liability of guardian for his failure to invest his ward's money for interest—Liability not outside the Act. 33 B. 419=11 Bom.L.R. 512=3 I.C. 172. Where the omission of the guardian to invest the minor's property in trust securities as directed by sec. 20 of the Trusts Act and to file proper accounts was the main cause of the loss caused to the minors though the action of others also partly caused the loss, held, that the guardian and his surety were liable for the whole loss sustained by the minors. 136 I.C. 517=1932 S. 181. Negligence of guardian—Order passed by Revenue Court—Right of minor to avoid. See 138 I.C. 465=1932 A.L.J. 437=1932 A. 293 (F.B.).

PURCHASE OF LAND FOR MINOR.—A guardian

28. Where a guardian has been appointed by will or other instrument, his powers of testamentary guardian, power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

29. Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court,—

of a minor, although he occupies a position which is fiduciary in character, cannot be held to be debarred from acquiring immovable property on behalf of his ward, provided in doing so he acts as a prudent man who is acting carefully with his own money. Though a guardian in possession of minor's property may fall under sec. 94 of the Trusts Act, he cannot be held in every case to come within sec. 95 of the Trusts Act as the words "so far as may be" in that section make it subject to sec. 27 of the Guardians and Wards Act. 49 L.W. 644=1939 Mad. 645=(1939) 1 M.L.J. 745.

SECS. 27, 29 AND 30.—Under sec. 27 of the Act, a guardian may, subject to the provisions of the Act, do all acts which are reasonable and proper for the realisation, protection or benefit of the property of the minor. Other sections in the Act place restrictions on the guardian's power to alienate or charge the immovable property of the minor. It follows that the restrictions contained in sec. 29 and the provisions of sec. 30 do not apply to a mere borrowing of money by a guardian. A loan contracted without the sanction of the Court by a guardian appointed under the Act will be binding upon the minor if the lender had made proper enquiries and had satisfied himself as to the legal necessity for the loan, whether or not the money was actually applied for the benefit of the minor. The fact that the true necessity was not mentioned in the recitals in the bond is of little importance, as such recitals are merely a piece of evidence as to the nature of the alleged necessity and are not conclusive on the point. 72 C.L.J. 542=44 C.W.N. 1048=1940 Cal. 532. See also 31 P.L.B. (J. & K.) 125.

Sec. 28.—See 11 O.O. 29. Guardian appointed by Court cannot avoid the duties imposed by the Act, by purporting to act as natural guardian. 87 I.O. 238=1925 O. 693. See also 62 I.O. 616=23 C.W.N. 634; 61 P.B. 1918=47 I.O. 353. Testamentary guardian, powers of. See 9 L.L.J. 458=1928 Lah. 90.

SECS. 28 AND 29.—A sale by a certificated guardian in contravention of secs. 28 and 29 is voidable and not void. 8 P. 226=117 I.O. 161=1929 P. 202. Where a compromise has been entered into on behalf of a minor and sanction for that compromise has been duly granted under O. 32, r. 7, C. P. Code.

the permission of the Court under sec. 29 of the Act is not necessary. 122 I.O. 103=1930 L. 250. Joint Hindu family.—Application by father to be appointed guardian of property.—Proper procedure in such cases. 112 I.O. 873.

Sec. 29.—Sec. 29 refers to the powers of guardians appointed and declared by the Court whether they are permanent or temporary guardians. An order of Court directing the sale of property by a temporary guardian is, therefore, not *ultra vires*. 40 P.L.R. 151 (1)=1938 Lah. 308. In a case where the property of a minor has been conveyed by the guardian without permission of the District Judge, the minor in a suit brought against him, cannot avoid the transfer without securing the benefit which he has received. 11 B. (1939) All. 614=1938 A.L.J. 521=1938 All. 369. Sec. 29 is imperative, and absence of permission for a particular transaction renders it void. Where a parent has applied for a particular mortgage of the ward's property for a specified amount on certain terms and granted by the Court, and circumstances change subsequently and part of the money is not required, the guardian is bound to obtain a new permission from the District Judge for a mortgage under the changed circumstances. If the guardian executes a mortgage for an amount less than that specified in the original sanction application on different terms, without obtaining permission for the mortgage, the mortgage is void and unenforceable against the minor, because the former permission cannot cover the mortgage which is different from the contemplated one and executed under different circumstances. The provisions of sec. 29 cannot be said to be complied with. 1937 A.L.J. 1851=1938 All. 109. A deed of family arrangement entered into by a certificated guardian in which no distinct title is conferred on any body and all that is done is a relinquishment of claim by some person in respect of property assigned to another and a recognition of the antecedent right of that other person to the property does not amount to a transfer falling within sec. 29 requiring sanction of the Court. 11 B. (1938) All. 125=1938 A.L.J. 23=1938 All. 170. Where a guardian granted a five years' lease of certain land belonging to the minor and the transaction was approved by the minor and his relatives and was duly com-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or

(b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

communicated to the Court but subsequently on the application of a third party the Court cancelled the prior lease and directed a fresh auction, *held*, that the first lease granted was within the competency of the minor and that the Court's order cancelling the same was made without jurisdiction. 132 I.C. 203=1930 L. 1017. When a certified manager creates an occupancy tenancy, whether deliberately or inadvertently, by giving a lease without the previous permission of the Court the landlord is not bound by it. It is not in any way an intolerable restraint on efficient management to provide that the creation of a permanent tenancy should not be made without the Court's permission. It is not a matter of any difficulty for a manager to approach the Court and obtain the necessary permission. The question whether the act opposed is a prudent one or not is immaterial. 177 I.C. 931=1938 Nag. 314. *See* 1942 O.W.N. (B.R.) 22 (2)=1942 B.D. 38.

SECS. 29 & 30.—Sec. 29 does not apply to transfers of property made on behalf of minors by their guardians *ad litem* and no sanction of the Court is necessary. 44 I.C. 564=61 P.W.R. 1918. Sec. 29 (h) has no application when the contract for the benefit of the minor is entered into not by the guardian but by the Court. 1935 L. 863. As regards raising of loans on the security of property of the minor, *see* A.W.N. (1908) 75=5 A.L.J. 260=30 A. 188; 1933 M.W.N. 791. As to effect of sanction of Court, *see* 50 M. 217=25 L.W. 25=1927 M. 233. Surrender of an ex-proprietary holding is not a transfer within the meaning of sec. 29, notwithstanding previous permission of the District Judge, *was not necessary* in such a case. 101 I.C. 804=1927 A. 546. The karta of a joint Hindu family who is appointed guardian of minor member of the family under the Act comes under the control of the Court and cannot mortgage the minor's share as karta. 62 I.C. 616=23 C.W.N. 634. *See* 87 I.C. 238=1925 O. 633. Sale of minor's property by guardian without permission of the Court is voidable, though the sale was for the minor's benefit and was a perfectly honest transaction. 13 I.C. 594. *See also* 1933 M.W.N. 791; 6 A.L.J. 491=31 A. 378; 25 A. 59. Sale of ward's property—Power of Court to stop sale injurious to ward. 109 P. B. 1915=29 I.C. 804. A mortgage executed by a guardian appointed under the Act without the permission of the Court is not absolutely void. It is only voidable. 16 C.W.N. 716=14 I.C. 515. *See also* 1938 Mad. 322=(1938) 2 M.L.J. 428; 17 Pat. 460=19 Pat.L.T. 594=1938 Pat. 337. To avoid the mortgage it is not necessary for the minor to bring an action to set aside the transaction. 13 C.W.N. 716=14 I.C. 515. A transaction is voidable at the instance of the

minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it, for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority. It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation. 17 Pat. 460=19 Pat.L.T. 594=1938 Pat. 337. As to power of guardian to alienate ward's property among Parsis, *see* 48 Bom.L.R. 981. This section only enables the Judge to give permission to the guardian to sell such portion of the properties as may be necessary on an application properly framed by the guardians for that purpose. It confers no power whatever on the Judge to deal with the minor's property on his own motion in any way. 12 O.L.J. 322=7 I.C. 46. Courts should be slow to hold that when a Court has granted sanction to create a mortgage that sanction does, not protect a subsequent lender of money who lends on the faith of that sanction and who is in no way a party to any slackness or fraud in obtaining that sanction. Where the transaction is not the same as the sanctioned transactions, it is not covered by the sanction and one is thrown back to the position of a mortgage by a guardian without the sanction of Court (i.e.) it could be avoided and when the minors or principal avoid such transaction they can be held liable to restore what they have gained as a consequence of it. 1941 N.L.J. 447=I.L.R. (1942) Nag. 161=1942 Nag. 12. Contract by guardian to sell—Liability of ward. 40 I.C. 490=22 C.W.N. 477. Mortgage in excess of sanction voidable. 19 I.C. 624. *See* 22 M. 289; 11 I.C. 764; 8 A.L.J. 754; 1941 N.L.J. 447. Permission to mortgage minor's property—Guardian has no power to confer power of sale on mortgagee. 10 I.C. 872. Sale without permission of Court is voidable. 13 I.C. 594. Alienation by guardian by way of sale or mortgage—Distinction between. 50 M. 217=1927 M. 233. *See also* 51 M.L.J. 869. Contract for sale with permission of Court by certificated guardian is a valid contract and so a suit for damages for its breach lies. 35 A. 499=11 A.L.J. 783. *See also* 19 I.C. 624. A transfer, 15 years after the sanction granted by the District Judge, cannot be held to be in pursuance of the sanction. 35 A. 150=11 A.L.J. 107. Under sec. 30 disposal of immovable property by a guardian in contravention of secs. 28 and 29 is voidable and could be set aside in a proper proceeding. 49 C. 911=28 C.W.N. 57=1922 O. 150. The scope of an enquiry under sec. 29 is entirely distinct from

Voidability of transfers made in contravention of section 28 or section 29.

30. A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

the scope of an enquiry under O. 21, r. 83, C. P. Code. 49 O. 911. O. 21, r. 83, C. P. Code, does not render unnecessary the fulfilment of the requirements of sec. 29 in a case which falls within the scope of both these provisions of the law. 49 O. 911. Lease by Court guardian for seven years—Sanction of Court not obtained—Lease in accordance with compromise sanctioned by Court—Validity. 68 I.C. 997=35 C.L.J. 206. Power of Collector appointed as guardian to sell minor's property. See 96 I.O. 17=28 Bom.L.R. 628.

APPEAL.—Orders under secs. 29 and 30 are not appealable. 87 I.C. 251=1923 A. 14.

PRACTICE AND PROCEDURE.—Absence of recital of necessity for alienation in order sanctioning alienation—Effect of. See 50 M. 217=51 M.L.J. 869=1927 M. 233. Sale by guardian on behalf of minor—Condition subsequent not complied with—Effect of. 25 A. L.J. 725=50 A. 63=1927 A. 631. As to the necessity of restoring the benefit taken in case of avoidance of transaction entered into by guardian, see 25 A.L.J. 1017=50 A. 218; 34 C.W.N. 948; 51 A. 1027.

SECS. 29 AND 31: SCOPE—SANCTION FOR LOAN—SUBSEQUENT CANCELLATION — LENDER ADVANCING LOAN DURING CONTINUANCE OF SANCTION.—If APPROVED.—Where the Court passes an order authorising the guardian of a minor to raise a loan on the security of minor's estate, the lender is entitled to trust that order and rely on it and is not bound to inquire as to the expediency or necessity of the loan. The subsequent cancellation of the order of sanction after the money has been advanced cannot make any difference in the rights of the lender. 16 Pat.L.T. 135=14 P. 410=1935 P. 225.

SECS. 29, 33 AND 34: COURT AUTHORISING GUARDIAN TO RAISE SIMPLE LOAN.—DUTY OF LENDER TO ENQUIRE AS TO NECESSITY.—If an order of Court authorises the guardian of a minor to raise a loan on the security of the minor's estate, the lender is entitled to trust to that order and is not bound to enquire as to the expediency or necessity of the loan for the benefit of the minor's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter; but, apart from any charge of that kind he is entitled to rest upon the order. There is no reason why the same principle should not apply when the guardian instead of raising a loan on the security of the minor's property obtains money on a simple bond after obtaining the sanction of the Court for a simple loan. [11 C. 379 (P.C.), App.] 160 I.C. 64=1936 A.L.J. 155=1936 A. 172. See also 17 L. 688=1936 L. 946.

SEC. 30: MEANING OF WORDS.—It is clear that the 'guardian' contemplated by sec. 30 of the Guardians and Wards Act, is not only a certificated guardian who is the natural guardian of the ward, but also a certificated

guardian who is not the natural guardian. I. L.R. (1938) All. 614=1938 A.L.J. 521=1938 All. 369. The words "any other person affected thereby" in sec. 30 do not include a creditor whom a transfer of property might injuriously affect. 75 P.R. 1914=22 I.C. 829. Whether the words of sec. 30 contemplate the avoiding of a transaction by a person other than the minor. See 1938 M.W.N. 802=1938 Mad. 822=(1938) 2 M.L.J. 428. A permission obtained by a certificated guardian by a fraudulent misrepresentation is a nullity but a transfer made in pursuance thereof is only voidable. 1931 A.L.J. 997. Transfer of minor's interest in decree—Judgment-debtor cannot impugn. 41 I.C. 289=27 C.L.J. 110. On this section, see also 54 C. 687.

APPEAL.—An order under sec. 30 is not appealable. 44 A. 458=1923 A. 54 (1)=87 I. C. 251.

LIMITATION.—When an assignment by the guardian of a minor of a mortgage to which the minor is entitled is repudiated by the minor, the minor himself filing a suit for recovery of the mortgage money, the assignee has no right to file a suit on the mortgage as assignee and to ask the Court to recognise his transfer. It is not correct to say that the minor cannot repudiate a transfer by his guardian except by filing a suit under Art. 44 of the Limitation Act, see ~~Art. 44 of the~~ Guardians and Wards Act makes the transfer voidable and it is unnecessary to inquire whether it was beneficial to the minor or not. 1934 M.W.N. 802=1938 Mad. 822=(1938) 2 M.L.J. 428. Where a person has been appointed under the Act to be the guardian of the property of certain Mahomedan minors, an alienation by him of the minor's properties without obtaining the Court's permission would be only voidable and not void. It would operate as a valid transfer unless set aside at the instance of the minors concerned. Art. 44 of the Limitation Act gives the minors three years from the date of their attaining majority to set aside the alienation. Where a transfer is made by a *de facto* guardian, the position may be different. I.L.R. (1941) Mad. 775=53 L.W. 650=1941 Mad. 481=(1941) 1 M.L.J. 800 (F.B.). Where a guardian sells immoveable property belonging to the minor without the sanction of the Court and subsequently executes a second sale with the permission of the District Judge, the latter transferee can sue for possession without expressly suing to have the prior sale set aside. To such a suit Art. 120 and not Art. 91 of the Limitation Act will apply. 34 C. W.N. 948. Where the minor sues after attaining majority to set aside the transfer by his guardian, the suit is governed by Art. 44 and not Art. 144, Limitation Act. 1931 A. L.J. 997=1932 A. 108=53 A. 738.

SECS. 30 AND 31.—Where a guardian of a



31. (1) Permission to the guardian to do any of the acts mentioned in S. 29 shall not be granted by the Court except in case of necessity or for an evident advantage to the ward.

Practice with respect to permitting transfers under section 29.

minor appointed under the Act obtains the sanction of the Court authorising him to execute a mortgage of the minor's property and to borrow a certain amount for the purpose of paying off a mortgage decree against the estate, and executes a mortgage for the amount authorised by Court, and no fraud or underhand dealing is alleged, the person who lends money to the guardian and takes a mortgage from the guardian is entitled to rely upon the sanction itself for the validity of the transaction. The lender is not bound to go behind the order of the Court sanctioning the mortgage, is entitled to rely upon it, and if he acts *bona fide*, he is not bound to see to the application of the money or any part of it. The circumstance that the guardian does not subsequently apply the money in its entirety for the purpose for which he borrows it is irrelevant. If the guardian applies the bulk of the money borrowed for the purpose sanctioned by the Court, but applies a small part of it for different purpose which is not sanctioned, it would still be open to the creditor who has advanced the money to establish that there was legal necessity for that amount also. When he has paid the whole amount of the consideration on the faith of the sanction, and the amount advanced does not exceed the amount sanctioned by the Court, he is entitled to claim the whole amount advanced by him as a mortgagee. 40 Bom.L.R. 180=1938 Bom. 234.

S.W.C. 31.—[See also under sec. 29]. Sec. 31 does not make the holding of any enquiry by Court essential. The fact that the guardian mentioned one debt in the application for permission for sale but the sale-deed purports to have been executed to pay off totally different debts, and the fact that the sale was actually made for a higher sum than that proposed do not show that the interests of the minor were prejudiced in any manner by the sale. 172 I.C. 637=1938 O.W.N. 104=1938 Oudh 65. Under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The High Court has also jurisdiction to sanction an alienation by the father of a minor or the manager of a joint family where the Court is satisfied that the transaction is for the benefit of the minor. The father or manager has no doubt power under the Hindu Law to sell or mortgage for legal necessity or for the benefit of the estate; but that is no ground for depriving father or manager in a Hindu joint family of his right to come to the High Court and apply to appoint him the guardian of the property of a minor member and for empowering him as such to sell or mortgage the family estate including the minor's undivided

share, and if the requisite facts are proved, the Court ought in a proper cause to make an order sanctioning the alienation. 167 I.C. 947=38 Bom.L.R. 1286=I.L.R. (1937) Bom. 432=1937 B. 98. See also 13 B. 590.

SANCTION—GRANT OF—FACTS TO BE CONSIDERED.—All that the District Judge has to consider in an application by the certificated guardian for sale of the minor's property is whether such a sale is necessary or is for the evident advantage of the ward. While granting permission the District Judge should mention that the transaction may take place at a certain figure; the certificated guardian, however, should not be directed to sell to a certain party; the sanction under sec. 31 is therefore complete authority to the certificated guardian to sell to any person he likes who is willing to comply with the terms upon which permission to sell is accorded by the District Judge. 8 P. 228=117 I.O. 161=1929 P. 202. See also 17 L. 688=1936 L. 946. Subsequent cancellation of the order of sanction does not affect the validity of a transaction made primarily. 14 P. 410=16 Pat.L.T. 135. Sanction of Court, effect of—If conclusive as to necessity for alienation. See 15 Pat.L.T. 787=1935 P. 74. Where a Judge in a case in which an enquiry is necessary allows through his remissness a transaction to take place to the detriment of the minor the sanction which he has given is not a bar to a reopening of the transaction. But absence of enquiry would not vitiate a transaction if the Judge has been able to conclude a good bargain. 115 I.C. 273=1929 O. 354. See also 17 L. 688=1936 L. 946. A sale of the property of a minor by a guardian appointed by the Court, with the sanction of the Court, has to be upheld, and the alienee can rely upon, and is protected by, the order of consent, unless it is shown that the order of sanction was obtained by fraud or underhand dealing and that the alienee was a party thereto. It is not necessary for the alienee to prove that the transaction was in the interests of the minor. 165 I.O. 530=38 Bom.L.R. 796=1936 B. 389. A certificated guardian can enter into a contract with an intending purchaser, but such a contract is subject to sanction being accorded to the proposed transaction and when the sanction has been accorded, the contract becomes a completed contract by virtue of that sanction. After the sanction is actually accorded, it is not necessary for the certificated guardian to solemnly enter upon another contract with the proposed purchaser. 8 P. 226=117 I.O. 161=1929 P. 202. Under sec. 31 (2) of the Act the Court sanctioning a sale by a guardian of a minor should in the order granting sanction recite the necessity for the sale or the advantage to be derived from it; but the omission to do this is only an irregularity, and cannot invalidate the order or



(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the Court with his own hand, or when from any cause, he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation and be dated and signed by him.

render the sale voidable. 165 I.C. 530=38 Bom.L.R. 796=1936 B. 389. A contract entered into by a certificated guardian without authority is not void but only voidable and the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract, restore such benefit so far as may be. 27 A.L.J. 1140=1929 A. 890.

**ACKNOWLEDGMENT.**—A *de facto* guardian has no power to acknowledge debt so as to bind a minor. 1933 M.W.N. 365.

**ACQUESCENCE.**—A minor is not bound by any acquiescence on the part of his guardian though it may be a piece of evidence against him (the minor). 37 C.W.N. 237=1933 P. C. 20=64 M.L.J. 1 (P.C.).

**DE FACTO GUARDIAN—ALIENATION BY.**—(i) *Hindu minor.* (Held, by the Full Bench, Beaumont, C.J., dissenting).—The *de facto* guardian of a Hindu minor can validly sell the property of the minor to a third person for legal necessity. (*Hanoomanpersaud's case*, Rel. on; 49 B. 576, Overruled.) 34 Bom.L.R. 1483 (F.B.). (ii) *Indian Christian minor.*—An alienation by a *de facto* guardian of an Indian Christian minor is void. 152 I.C. 120=1931 M. 529=60 M.L.J. 695. (iii) *Burmese Buddhist de facto guardian.*—A *de facto* guardian of a Burmese Buddhist cannot bind the ward's estate. Unless a guardian is appointed by the Court and gets permission from the Court to dispose of the property of the ward, it cannot part with or encumber in any way the property of the ward. 1933 B. 83. See also 134 I.C. 214=1931 B. 178.

**ALIENATION BY GUARDIAN—INVALID SANCTION OF COURT—CLAIM FOR DAMAGES.**—Apart from any personal covenant, personally binding on him, a guardian selling the property of his minor ward is not personally liable for damages to the vendee if the latter is deprived of the whole or part of the property in consequence of the permission of the District Judge conferring authority on the guardian to transfer being found to be invalid. 151 I.C. 120=1934 A.L.J. 350=1934 A. 645.

**ARBITRATION—REFERENCE.**—Where a Burmese mother referred a dispute to arbitration on behalf of herself and her minor sons but it appeared that she was never appointed guardian, held, that the reference and the award were invalid and not binding on the minors. [15 B. 186 (P.C.), Rel. on.] 142 I.C. 189. A guardian has no power to make a reference to arbitration on behalf of a minor. 130 I.C. 810=1931 P. 92 (19 C. 334, Ref.; 39 C. 232, Dist.) (But see also 131 I.C. 736=1932 L. 728, where it has been held that a reference to arbitration made by a properly constituted guardian in good faith

and for the benefit of the minor would be binding on him). See also 1931 A. 307.

**SEC. 31 (2): GENERAL.**—Sec. 31 (2) is mandatory and not merely directory. 23 O. C. 72=56 I.C. 323. See also 27 Bom.L.R. 483=87 I.C. 712=1925 B. 320; 98 I.C. 500; 103 I.C. 698=1927 L. 665. A sale by the certificated guardian of a minor without the sanction of the Judge is not void *in toto* but is only voidable. If the minors have been benefited by the sale, they cannot avoid the sale without restoring the benefit to the purchasers. 98 I.C. 500. See also 1926 O. 88; 142 I.C. 152=1933 M. 352 (sale by mother upheld where major portion of the price was applied for purposes binding on the minor); 95 I.C. 421; 95 I.C. 680=1926 O. 169. In considering validity of a transaction entered into on minor's behalf, the tests to be applied are (1) to see whether a man of ordinary prudence would have entered into such a transaction in respect of his own property, (2) and whether the circumstances were such that, had the guardian applied to the Court for sanction, the Court would have given the sanction. 1925 M. 215=47 M.L.J. 928. What amounts to sanction by Court, see 12 O.L.J. 453=89 I.C. 60. Permission to the guardian to sell, say, land, under sec. 29 shall be granted only if it is necessary or advantage to the ward. 1925 O. 213=1925 C. 420. A District Judge giving an *interim* sanction to a sale of a minor's property by a guardian cannot after its execution and registration order a re-sale thereof. 46 I.C. 542. Non-observance of some rules prescribing particular forms of procedure does not make the order a nullity, but non-observance of rules creating a bar renders the order null and void. 1925 O. 238=1925 C. 420. A District Judge cannot cure the error, unless it is by minor to set aside the sale—Onus. 45 M. 429=42 M.L.J. 333=1922 M. 135. Permission to sell—Necessity not mentioned—Error. 23 O.C. 72=56 I.C. 323; 8 P. 48. Judgment against minor is binding unless guardian is guilty of fraud. 87 I.C. 335=1925 O. 633.

**BURDEN OF PROOF.**—In primary cases, it is for the transferee to prove that a loan taken by a guardian of the Hindu minors who constitute a joint family, was for the purpose of family necessity. But once the loan is taken with the sanction of the District Judge, the burden of proof would change, and if the minors come to avoid the transfer, then it will be for them to show that the transfer is not binding upon them. Where, however, the mortgagees, fully knowing the terms of the order of the District Judge under which the guardian has been permitted to take a

(3) The Court may in its discretion attach to the permission the following among other conditions, namely :—

(a) that a sale shall not be completed without the sanction of the Court ;

(b) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs ;

(c) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the Court directs ;

(d) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs.

(4) Before granting permission to a guardian to do an act mentioned in S. 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.

32. Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the

Variation of powers of guardian of property appointed or declared by the Court.

Collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent

as it may consider to be for the advantage of the ward and consistent with law to which the ward is subject.

33. (1) A guardian appointed or declared by the Court may apply by

loan, grant the loan without complying with the terms of such order, it is not open to them to claim any benefit which they would have been entitled to otherwise because of the sanction given to the guardian. In such circumstances, the mortgagees, in order to establish the fact that the mortgage-deed is binding on the minors, have to show that the loan was taken for family necessity. 152 I.C. 503=1935 A. 41.

APPEAL AND REVISION.—Order of District Judge fixing expenses of minor's marriage is not open to appeal or revision. 48 A. 300=92 I.C. 482=1926 A. 301.

SEC. 31 (4).—The words "any person" means any person interested in an application made on behalf of a minor not merely his friends or relatives. 35 M. 743=11 I.C. 946=21 M.L.J. 685.

SECS. 31, 33 AND 43: LEASE WITHOUT PERMISSION.—POWER TO CANCEL.—POWER TO DEAL WITH MINOR'S PROPERTY.—The District Judge cannot exercise judicial authority in relation to third persons in proceedings under the Guardians and Wards Act. If the lease executed by the guardian is voidable, the same not having been executed with the permission of the District Judge, the latter has no power to cancel it in the sense that the lease becomes inoperative by force of that order. Any question as regards the validity of the lease is to be determined by a competent Court in a regular suit. There is no provision in the Guardians and Wards Act which empowers the District Judge to exercise disposing power

over the minor's property under the management of a lawful guardian. It is the function of the guardian to deal with the property of the minor and to administer it. The guardian may obtain the advice of the District Judge under sec. 33. The District Judge may also make an order under sec. 43 regulating the conduct or proceeding of any guardian appointed or declared by the Court. But he cannot deal with the minor's property and do everything which the guardian might do. Besides cancelling an instrument executed by the latter, he has no power to declare that the cancellation of the lease already executed is to take effect from a certain date and that it shall be valid till that date arrives. 1934 A. 1043=1934 A.L.J. 1208.

SEC. 32.—A minor's interest in a trust can be protected and the benefits thereof secured to the minor, by the appointment of a guardian of the property of the minor in respect of such interest. 39 A. 288=37 I.C. 885. As to jurisdiction to dispossess third person in possession of the estate, see 47 A. 313=23 A.L.J. 28=1925 A. 277. An order of suspension of the guardian can be passed by the Judge under sec. 32. 40 I.C. 397. On this section, see also 57 M. 712=66 M.L.J. 351; 64 C.L.J. 556, cited under sec. 43, *infra*.

SEC. 33.—The directions of Court under sec. 33 do not impose a liability on a minor where none existed. The effect of the sanction under sub-cl. (3) of sec. 33 is that it raises a statutory presumption of a faithful performance by the guardian of a duty cast upon him and protects him as regards his own

Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward.

petition to the Court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward.

(2) If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

(3) The guardian stating in good faith the facts in the petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.

Obligations on guardian of property, appointed or declared by the Court.

34. <sup>2</sup>Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall,—

(a) if so required by the Court, give a bond as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;

(b) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court or within such other time as the Court directs, a statement of the immoveable property belonging to the ward, of the money and other moveable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward;

(c) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs;

(d) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts, or so much thereof as the Court directs; and

#### LEG. REF.

<sup>1</sup> See sec. 3 (20) of the General Clauses Act (X of 1897).

<sup>2</sup> For instances of notifications issued under this section, see Bom. R. & O., Vol. III.

liability either under his bond or in general to the Court or as against the minor. The sanction does not, however, have the effect of making the minor personally bound by a contract by the guardian which does not purport to charge the minor's estate. 34 Bom. L.R. 996. See also 1934 A. 1043. Where a guardian granted a five years' lease of a certain land belonging to the minor and the transaction was approved by the minor and his relatives and was duly communicated to the Court but subsequently on the application of a third party the Court cancelled the prior lease and directed a fresh partition. Held, that the first lease granted was within the competency of the minor and the Court's order cancelling the same was made without jurisdiction. 132 I.C. 203=1930 L. 101. A Mahomedan mother who had been appointed guardian of her minor child by Court referred a dispute, in which the minor was interested, to arbitration without having obtained the previous sanction of the District Judge. When the award was filed, in Court, permission was obtained from the Court that the award should be filed inasmuch as it was for the benefit of the minor, but there again the

mother acted as guardian. The minor's suit after attaining majority to avoid the award was dismissed by Court on the basis of the award. Held, that the mother's reference to arbitration without the necessary sanction of Court rendered the award and decree voidable at the instance of the minor and the latter could sue to have same set aside within three years of attaining majority. 1931 A.L.J. 170=1931 L. 100. Section 34 of the Guardians and Wards Act, 1850, which allows a Court to require the guardian to pay into Court a fixed sum at stated intervals without regard to the question whether this is in excess of the balance shown on the guardian's account, does not make it mandatory for security to be furnished in all cases in which a guardian is appointed, he shall, if so required by the Court, furnish security. The section does not make it obligatory for security to be furnished in all cases in which a guardian has been appointed or declared. It is in no sense exhaustive of the jurisdiction of the High Court to make orders for giving security in guardianship matters and leaves untouched the powers of the High Court to make conditional orders under the Letters Patent. There is nothing invalid or illegal in making a conditional order. Where a person is appointed guardian of the property of a minor on condition of his furnishing security, if security is not

(e) apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.

given, the order does not become effective so far as the appointment of the prospective guardian is concerned—since the order does not become operative by reason of the failure to furnish security, the minor never becomes a ward; and in such a case sec. 3 of the Majority Act has no application. The minor would become a major on attaining the age of 18 years. 1945 Bom. 449. *Per Divotia, J.*—The word “appointed” in sec. 3 of the Majority Act means validly appointed. *A fortiori* a conditional order cannot operate to prolong the period of minority if the condition is not fulfilled with the result that the order does not come into operation at all. The period of minority is not extended in such a case. I.L.R. (1945) Bom. 449=47 Bom.L.R. 83=A.I.R. 1945 Bom.243.

OLS. (c) AND (d).—For scrutiny of guardian's accounts, regular suit is the proper remedy. 26 L.W. 44=100 I.C. 600. *See also* 1926 M. 478=50 M.L.J. 273; 107 I.C. 152=7 P. 144.

CL. (d): SCOPE OF SECTION.—94 I.C. 79=1926 M. 825=50 M.L.J. 273. The only order which a Court can pass under sec. 34 (d) is for the payment of the balance on the accounts exhibited by the guardian and not on the basis of accounts as may be discovered after an investigation. 1942 A.L.W. 691. There is nothing in sec. 34 to warrant the suggestion that the expression “balance due from him on those accounts” is necessarily intended to empower the Court to compel the guardian to pay into the Court, not the sum which he admits to be due at the foot of the accounts exhibited by him, but the sum which the Court finds as enquiry held by it to be due. 121 I.C. 368=1930 S. 49. *See also* 140 I.C. 590=34 P.L.R. 540=1933 L. 484; 1930 L. 420. Sec. 43 read with sec. 34 implicitly provides for expenditure in connection with the auditing of the accounts relating to the property of the ward. 11 P.L.T. 349=1930 P. 384. The guardian of a minor gave on lease a plot of land belonging to a minor to his brother-in-law. The Court held that the lessee was a benamidar for the guardian and called on the latter to deposit the lease money in Court. *Held*, that the claim against the guardian could be sustained only on the basis of a contract or a quasi-contract and such a claim could be enforced by a regular suit and not by a summary remedy. 136 I.C. 2=1932 L. 272. If no accounts are furnished by the guardian, it does not preclude the Court from going into accounts and calling on the guardian to pay such balance as the Court may find to be due. The power of Court is not limited to directing the guardian to pay such balance as he may or may not show. (46 A. 458; 7 P. 144, Foll.) 141 I.C. 148. Where a petition against a guardian states that a certain amount is due from

the guardian and the Court finds that the exact amount due is something different. *Held*, that the Court can record any definite finding as to exact amount due from guardian. 164 I.C. 282=17 P.L.T. 756=1936 P. 447.

SEC. 34 ( ).—Although under the Hindu Law money borrowed for the purposes of the marriage of a member of a Hindu family must be regarded as borrowed for legal necessity, yet when a guardian has been appointed by the Court, the powers of such guardian with regard to incurring liabilities on behalf of the ward are limited. Such guardian is incompetent to borrow money for the purpose of the marriage of one of his wards and his sister dependent on them without the permission of the Court in view of sec. 34 (e). 8 O.W.N. 1146=1931 O. 403. An order passed in respect of maintenance of a dependant of a minor is one passed under sec. 34 and being of a temporary nature is not binding when the minor attains majority. 1935 Pesh. 174. All orders passed under the provision of sec. 34 (e) are temporary orders, having no effect after the owners of the estate attain majority. Once the minor attains majority, the Court is *functus officio* and the late ward is empowered himself to cancel or vary the arrangements made by the temporary orders which were passed during his minority. (5 O.W.N. 207, Dist.) 161 I.C. 41=1936 Pesh. 34. An order issuing warrant against an ex-guardian for recovery of arrears of maintenance said to be due to the minor up to the date of his making over possession of the minor's estate to the new guardian is bad, when the ex-guardian has no property of the minor in his hand and has made it over to the new guardian and has submitted accounts. If on the accounts anything is found due from him to the minor, appropriate steps could be taken against him for the recovery of the said amount. 68 C. L.J. 68. There is no provision in the Guardians and Wards Act empowering the Court to issue a distress warrant on the minor to recover from him sum alleged to be due by him to the ex-guardian. 1937 Cal. 422. Consent order for payment of money by husband to wife or school authorities for maintenance and school expenses of minor children is valid but not executable as decree for money under C. P. Code, O. 21, r. 11. 41 Bom.L.R. 625=1939 Bom. 367.

SECS. 34 (d), 34-A, 35 AND 36.—Sec. 34 (d) does not empower the Court to direct a guardian to pay into Court more than the amount shown to be due in the accounts filed by him. Sec. 34-A, which was inserted by the amending Act of 1929, does not contemplate anything more than an audit and the Court is given no other powers beyond those which it possessed before the insertion of sec.

134-A. "When accounts are exhibited by a guardian of the property of

Power to award remuneration for auditing accounts.

a ward in pursuance of a requisition made under clause (c) or section 34 or otherwise, the Court may appoint a person to audit the accounts, and may direct that remuneration for the work be paid out of income of the property.

35. Where a guardian appointed or declared by the Court has given a bond

Suit against guardian where administration-bond was taken

duly to account for what he may receive in respect of the property of his ward, the Court may, on application made by petition and on being satisfied that the engagement of the bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the Court, or otherwise as the Court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for the ward, in respect of any breach thereof.

#### LEG. REF.

1 Inserted by Act XVII of 1929, sec. 2.

34-A. Moreover, secs. 35 and 36 contemplate a suit being filed against a guardian who has not fulfilled his duty and is required to make restitution to the estate. 1944 M.W.N. 267 =57 L.W. 284=A.I.R. 1944 Mad. 397=(1944) 1 M.L.J. 341.

SMOS. 34 AND 35: SCOPE.—This section does not deprive the Court of its general power to impose conditions on guardians and so the appointment of a guardian conditional on his furnishing security is not *ultra vires*. 40 M. 775=37 I.C. 892. See also 49 M. 809=51 M.L.J. 726 (F.B.). [See also notes under secs. 7 and 10, *supra*.] Court can ask guardian to apply income for maintenance. 34 P.R. 1912=14 I.C. 789. Under sec. 34, cl. (e) directing the guardian of a ward to pay a certain sum of money to another is not an order under sec. 2 (14), C. P. Code, and is therefore not executable as a decree. 41 M. 241=41 I.C. 341 (36 M. 39, Foll.). Attachment of property of guardian is improper. 1923 L. 506 (1).

SECURITY.—Appointment of guardian does not become effective until security is furnished. 71 I.C. 572. The Court is the judge under a bond executed by sureties under sec. 34 (a) and can alone sue on the bond in the absence of an assignment in due form of law. 42 M. 302=36 M.L.J. 114=49 I.C. 567. Limitation is that prescribed by Art. 68 of the Limitation Act except where the bond charges immovable property. 42 M. 30. The District Court can supersede a guardian if he fails to furnish security within the fixed time. 19 I.C. 609=192 P.L.R. 193. Order appointing a person guardian subject to his furnishing security within a time—Failure to furnish—Penalty. 51 I.C. 88=17 A.L.J. 377.

APPEAL.—Direction to guardian to deposit money due to minor not appealable. 37 I.C. 309. No appeal lies from an order fixing the amount to be applied for the maintenance, education and advancement of the ward and the persons depending on him. 27 I.C. 921=28 M.L.J. 96.

SM. 34-A.—Sec. 34-A was inserted by Act XVII of 1929. The necessity for this

section is stated as follows in the Statement of Objects and Reasons:—"The Guardians and Wards Act, 1890, contains no specific provision for the auditing of the accounts of minor's estates and the meeting of the cost of the audit out of the estates. The audit of such accounts tends to be left to the Judges of Subordinate Courts or District Courts or to ministerial officers, who have rarely the time or training to apply anything in the nature of a thorough test. With a view to clearing the possibility of defalcation an accurate audit of these accounts is desirable. Accordingly the present Bill has been framed for the purpose of giving express power to the Court to award remuneration for auditing accounts out of the income of property. Cl. (3) empowers the High Court to make rules for the audit of the accounts of persons who should be appointed as guardians and the scales of remuneration to be granted to the auditors. Necessary expenditure out of capital is not income and hence audit fee which can be charged only on income cannot be charged on it. 309 I.C. 291=1943 O.W.N. 133 (1)=A.I.R. 1943 Oudh 384. See also I.L.R. 1945 Mad. 119=(1944) 1 M.L.J. 341.

SEC. 35.—The Court has got the power under sec. 35 to assign a security bond executed by the guardian to some other person. The effect of the words "as trustee for the ward" in sec. 35 considered. 34 O.W.N. 953.

Under sec. 33, the cause of action arises to the assignee after an assignment to him. The assignment of the bond to the assignee subsequent to the date of suit by assignee cannot give him an antecedent cause of action against the sureties. 22 Pat. 114=A.I.R. 1943 Pat. 218.

A Court can assign the bond under sec. 35 even after the ward has attained the age of majority. 23 Pat. 114=A.I.R. 1943 Pat. 218.

SECURITY BOND BY GUARDIAN—ASSIGNMENT.—Where a person appointed as guardian of a minor under the Act executes a security bond in favour of the Court undertaking to "duly account for all the movable property and for all the money which he shall receive



36. (1) Where a guardian appointed or declared by the Court has not given

Suit against guardian where administration-bond was not taken.

a bond as aforesaid, any person, with the leave of the Court, may, as next friend, at any time during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian, or, in case of his death, against his representative, for an account of what the guardian has received in respect of the property of the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative, as the case may be.

(2) The provisions of sub-section (1) shall, so far as they relate to a suit against a guardian, be subject to the provisions of S. 440 of the Code of Civil Procedure as amended by this Act.<sup>1</sup>

#### LEG. REF.

<sup>1</sup> See new Order XXXII, Rules 1 and 4 (2) in the First Schedule to the Code of Civil Procedure (Act V of 1908).

on account of the movable and immovable properties of the minor", etc., and to be liable for a certain amount of money in default of the due performance of his duties as guardian, making his immovable properties security for the amount in addition to his personal liability, the bond is conditioned for the due performance of the duties of the executant as guardian. The obligation to pay comes into force the moment there is failure to account for the monies received by the guardian. If as the result of the engagement of the bond not being kept up and of the failure of the guardian to account for the monies, the Court assigns the bond under sec. 35 what the assignee gets is not a mere right to sue but a right to enforce a liability under the bond which has accrued due, and when the liability is also secured by a charge or mortgage of immovable property, the charge or mortgage is also assigned along with the right to enforce the liability. The assignee under sec. 35 is entitled to enforce the liability and the charge or mortgage therefor as if the bond had been executed in his favour. When a newly appointed guardian of the ward takes an assignment the assignment is in trust for the ward. When the assignee guardian assigns the bond to the ward on the latter becoming a major that assignment is only in fulfilment of the duty the assignee is bound to hand over all the property of the ward to the latter. Such an assignment is perfectly valid and entitles the ward to sue and to enforce its terms. 1938 M.W.N. 379=1938 Mad. 829. See also 1943 Pat. 218 as to the method of effecting assignment. The proceeding for assignment will in no way operate to the prejudice of any defence the surety's representatives may have in a suit brought on the bond. 34 C.W.N. 953=1930 G. 594. An order by the District Court fixing the liability of the surety is not called for and not necessary before the Court can assign the bond to the minor or any other guardian of his, appointed by the Court. There is no provision in the Act for the surety being a party to any proceedings in which accounts may be taken and no provision by which the surety can appeal against the order of the District Court

fixing his liability. 135 I.C. 833=1932 A. 177. A certificate of guardianship is not a public or official record within the meaning of sec. 35 and is therefore not admissible in evidence. 53 A. 428=130 I.C. 201=1931 A. 307. What sec. 35 apparently contemplates is that an entry should have been made by an officer whose duty it is to make such an entry after having been satisfied as to its correctness. 53 A. 428=130 I.C. 201=1931 A. 307.

SECS. 35 AND 36.—A suit for accounts by a ward against his late guardian or his representatives if it is proved that his property had gone into their hands is maintainable. 22 Bom.L.R. 633=44 B. 852. See also 18 I. C. 876=17 C.W.N. 695. Ward should not be compelled to file regular suit for satisfying Court that engagement has not been kept up. 1928 M. 545=54 M.L.J. 671. Sec. 35 is perfectly general and can apply to a case where the ward was a minor or to a case where the ward has ceased to be a minor. The section is intended to cover both the cases. There is nothing in sec. 35 making it inapplicable to the case of a ward attaining majority and applying for an assignment of the bond. (42 M. 302; 51 M.L.J. 241, Diss. from). 1928 M. 545=54 M.L.J. 671. A suit brought against the guardian of the property of a minor under sec. 36 is maintainable though the leave of the Court is obtained subsequent to filing. 22 Bom.L.R. 787=44 B. 602.

APPEAL.—See 135 I.C. 833=1932 A.L.J. 47=1932 A. 177; 30 B. 164=7 Bom.L.R. 803.

SEC. 36: SCOPE—SUIT FOR RENDITION OF ACCOUNTS.—The principle underlying sec. 36 is one of universal application and can be applied even to a case where the guardian is not appointed by the Court. The minors are therefore entitled to maintain a suit for rendition of accounts against the legal representative of the guardian. The fact that the minors have entered into a compromise with one of the legal representatives cannot in any way deprive them of the right of bringing a suit for rendition of accounts against the others. 1934 L. 410.

SECS. 36 AND 37.—A minor can sue the legal representative of his deceased guardian for accounts where the guardian had died without rendering accounts, and sec. 41 (3) is no bar to it. 55 P.E. 1918=46 I.C. 457.

37. Nothing in either of the two last foregoing sections shall be construed

General liability of guardian as trustee.

to deprive a ward or his representative of any remedy against his guardian, or the representative of the guardian, which, not being expressly provided in either of those sections, any other beneficiary or his representative would have against his trustee or the representative of the trustee.

#### *Termination of Guardianship.*

Right of survivorship among joint guardians.

38. On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.

Removal of guardian.

39. The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely:—

- (a) for abuse of his trust;
- (b) for continued failure to perform the duties of his trust;
- (c) for incapacity to perform the duties of his trust;
- (d) for ill-treatment, or neglect to take proper care, of his ward;
- (e) for contumacious disregard of any provision of this Act or of any order of the Court;
- (f) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward;

SEC. 39.—The provisions of the Act apply to guardians appointed by will and action can be taken in regard to them under secs. 39, 41 and 45. 8 L. 306=103 I.C. 470=1927 L. 344.

SCOPE OF SECTION.—The Court cannot appoint a guardian of the person of a Hindu minor of a joint family. 57 I.C. 678=11 L.W. 596. It is open to a District Court to remove a guardian for continued failure to perform the duties of his trust, for incapacity to perform those duties and for contumacious disregard of any order of the Court. Failure to keep account of trust property is a failure to perform a very important duty of the trust and the illiteracy which is a bar to the performance of such duty can be looked upon as an incapacity under sec. 39 (c). If a man is illiterate, it is still his duty to furnish account by employing another person to keep accounts. 117 I.C. 782=1930 set. 14. If a guardian has been appointed of the persons and property of the minor sons by their father by means of a will, the Court has no jurisdiction to proceed with the appointment of another guardian until the guardian appointed by the will is removed from guardianship under the provisions of sec. 39 of the Guardians and Wards Act. 41 P.L.R. 12. As to power to remove even testamentary guardians, see 28 Punj.L.R. 127. Appointment of sister's husband as guardian of Mahomedan minor—Effect of the personal law of the minor. See 85 I.C. 624=28 O.C. 172=1925 O. 623. The word "instrument" in sec. 39 must be confined to instruments *ejusdem generis* with a will, and does not cover a compromise decree. 28 I.C. 505=8 L.W. 760 (18 B. 375, Foll.). A will need not and could not be set aside when the testator had no legal power to appoint a

guardian for the property. 40 M. 472=30 M.L.J. 504. Guardian not validly appointed if trespasser, if could be removed. 21 I.C. 848. Guardian may be removed, if there exists bitter relationship between him and his ward. 1925 L. 375; 8 L.L.J. 201. Wishes of minors in a position to exercise their discretion to be consulted. 1925 L. 342. Courts removing guardians must, first of all, be satisfied that there are present one or more of the reasons for the removal of guardians set out in sec. 39, and should expressly state what the reasons are which justify the order removing the guardian. The mere circumstance that the minor is sufficiently old to be able to express a preference for one person over another for his guardian is no reason for removal of a guardian. 165 I.C. 1936 M.W.N. 373=1936 P.L.R. 1936. A guardian appointed by a will may be removed by the Court. 20 I.C. 10=164 P.L.R. 1913. See also 1926 O. 169=2 O.W.N. 796 (F.B.). When the Court removes a person from guardianship, it is its duty to pass the necessary orders for the adequate protection of the minor's estate, especially when it is in a bad state of management. 34 C.W.N. 986. Where objections were taken to accounts filed by a guardian of a minor by his maternal uncle who presented a petition for the removal of the guardian and an inquiry of accounts was held. *Held*, that inquiry could be held at the instance of such person as sec. 39 permitted a Court to act in the matter of removal of a guardian on the application of any person interested. 164 I.C. 282=17 Pat.L.T. 756=1936 P. 447. SEC. 39, (e).—Guardian disobeying order under sec. 34, (c)—Imposition of fine *ultra vires*. 34 P.R. 1912=14 I.C. 789; 2 O.W.N. 796 (F.B.).



(g) for having an interest adverse to the faithful performance of his duties ;  
 (h) for ceasing to reside within the local limits of the jurisdiction of the Court ;

(i) in the case of a guardian of the property, for bankruptcy, or insolvency ;  
 (j) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject :

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed—

(a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or

(b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

40. (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

(2) If the Court finds that there is sufficient reason for the application, it shall discharge him, and if the guardian making the application is the Collector and the Provincial Government approves of his applying to be discharged, the Court shall in any case discharge him.

Cessation of authority of guardian.

41. (1) The powers of a guardian of the person cease—

CL. (h).—An applicant for guardianship must reside within the jurisdiction of the Court to which he makes the application. 36 A. 280=24 I.C. 59. But see also 1925 N. 224=75 I.C. 595. This is an enabling clause. Person outside jurisdiction can also be appointed in a fit and proper case. 1940 Pesh. 14. But see 58 C. 15, *infra*. It is within the discretion of the Court to appoint a man who does not reside within the local limits of its jurisdiction as a guardian or not. There is no provision in the Act prohibiting the appointment of a person as a guardian who does not reside within the local limits of the jurisdiction of the Court. A plain reading of sec. 39 shows that the Court has been given the power to remove a guardian who has ceased to reside within its local limits. The word "may" has been used and not "shall". But the converse proposition is not true. 188 I.C. 555=1940 Pesh. 14. See also 75 I.C. 595=1925 Nag. 224. Under the Guardians and Wards Act, it is not essential that a person who applies for being appointed guardian of the property of a minor should be a resident of the district in which the property is situated. The power of the Court under sec. 39 of the Act to remove a guardian who is not residing in the district within which the property is situated is discretionary and it cannot reasonably be inferred therefrom that the applicant must necessarily be a resident of the district in which the property is situated. 44 P.L.R. 202.

*Obiter*.—Sec. 39 seems to suggest that a Court should not appoint a person who is resident outside its jurisdiction as guardian. 58 C. 15=1930 C. 397. Person residing out of jurisdiction of Court may be appointed guardian. 1933 A.L.J. 1333=1933 A. 780.

CL. (j).—A widow appointed as testamentary guardian does not become legally dis-

qualified by re-marriage to continue to be guardian. 18 I.C. 133.

NOTICE.—Removal of guardian—Notice to show cause essential before removal. 27 I.C. 18=20 C.L.J. 298. Before removing a guardian, he should be given notice setting out for which of the causes mentioned in sec. 39 it is proposed to remove him. 116 I.C. 669 (1)=1925 N. 176.

APPEAL.—There is no appeal from an order made by the District Judge refusing to remove a guardian. 14 I.C. 56=195 P.W.R. 1912 (19 C. 487; 23 C. 201; 20 B. 667; 20 A. 433, Foll.). Order removing guardian is appealable. 1925 O. 290.

SECS. 39 AND 41.—A first cousin, once removed, of a minor comes within the terms of sec. 8 (b) and is thereby entitled to make an application for the appointment of a guardian. The fact that he comes within the terms of sec. 8 is quite enough to make him personally interested within the meaning of sec. 39 and he is, therefore, entitled to file an application for the removal of a guardian. The fact that he is at enmity with the guardian is immaterial. I.L.R. (1939) 2 Cal. 440=185 I. C. 880=12 R.C. 420.

SECS. 39 AND 43.—Relative scope—Testamentary guardian—Removal—Directions and conditions as to discharge of duties—Powers of Court. See 71 M.L.J. 417.

SEC. 40.—Application for removal of guardian dismissed—Subsequent application is barred. 20 A.L.J. 959=49 A. 196=1922 A. 540. See also 136 I.C. 3=1932 L. 306 cited under sec. 41, Cl. (4).

SEC. 41: SCOPE OF SECTION.—Sec. 41 is not confined to the case of guardian appointed by the Court. The word "guardian" in that section refers not merely to a guardian appointed or declared by the Court, but also to other guardians, including guardians appoin-

- (a) by his death, removal or discharge ;
  - (b) by the Court of Wards assuming superintendence of the person of the ward ;
  - (c) by the ward ceasing to be a minor ;
  - (d) in the case of a female ward, by her marriage to a husband who is not unfit to be a guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit ; or
  - (e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.
- (2) The powers of a guardian of the property cease—
- (a) by his death, removal or discharge ;
  - (b) by the Court of Wards assuming superintendence of the property of the ward ; or
  - (c) by the ward ceasing to be a minor ;
- (3) When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward,

ted by instruments. Under sec. 41 (b), the rights of a person who claims to be the legally constituted guardian of a minor come to an end when the Court of Wards assumes superintendence. 150 I.O. 706=1934 O. 392.

APPLICATION OF DISCHARGE ON GROUND OF MAJORITY—EFFECT OF ORDER.—In an application by the guardian for a discharge on the ground of majority, it is not necessary for the Court to declare the minor to have attained majority. The Court, when it accepts the fact that the minor has attained majority, does not make any order under the Act, which would be final and not liable to be contested by suit or otherwise. It is open to the minor to show that he had not attained the age of majority on that date in spite of the orders passed by the Judge. 149 I.C. 781=1934 A.L.J. 318=1934 A. 406 (F.B.).

SEC. 41 (3).—The words "in his possession or control" should be taken in the narrow sense of "in this sense of the guardian having a power of disposition over it and not in the actual possession". It does not mean that if the guardian has converted the Government Promissory Notes of his ward and disposed of the property or proceeds, no order can be made against him under sec. 41. 152 I.C. 1073=38 C.W.N. 438=1934 C. 520. On an application for the discharge of guardian, the Court has power to direct an investigation into accounts filed in Court. See 92 I.C. 98=1926 M. 419. But see 50 M. 80. Sec. 41 does not authorise a Court to order accounts to be rendered after the termination of the guardianship. 49 I.C. 132=29 C.L.J. 44. See also 18 S.L.R. 85=1925 S. 269. As to construction of section, see 10 L. 127=30 P.L.R. 680. Sec. 41 has no application to guardians whose powers had ceased by reason of their wards having attained majority or otherwise before the passing of the Act. 17 B. 566. See also 149 I.C. 781=1934 A. 406 (F.B.). Under sec. 41 (3) the guardian is liable to deliver any property in his possession or control belonging to the ward

or any accounts in his possession or control relating to any past or present property of the ward. But the Court has no power to compel the guardian to pay any sum found due from the guardian after the enquiry. *Per Curiam, J.*—It cannot be said, if the deceased guardian's accounts are wrong, the Court can compel the representative of the guardian to pay into Court any sum found due after an investigation. 130 I.C. 779=1931 L. 68. Where the only object is to protect the minor's property the object can still be served by directing the deceased guardian to furnish solvent security for payment of any amount that may be found due on scrutiny of accounts. It is hard on a guardian to be called upon to deposit a large amount in cash. 1938 N.L.J. 202=1938 Neg. 599. The guardian must without prejudice to his title or to anything he could establish by suit be compelled to give up possession on ceasing to be guardian. 1930 P.L.R. 674 (1). Property in possession or control of guardian, whether correct or not, is to be delivered. 1930 S. 43. Under sec. 41 (3) the guardian is liable to deliver any property in his possession or control belonging to the ward or any account in his possession or control relating to any past or present property of the ward. But the Court has no power to compel the guardian to pay any sum found due from the guardian after the enquiry. *Per Curiam*—It cannot be said, if the deceased guardian's accounts are wrong, the Court can compel the representative of the guardian to pay into Court any sum found due after an investigation. 31 P.L.R. 965=1931 L. 68. See also 10 L. 168. The Court has power to require a *de facto* guardian to deliver the infant's properties to the guardian appointed under the Act. 51 I.C. 236=36 M.L.J. 180. Under sec. 41 (3), a Court cannot compel the guardian of a minor to pay to the minor any sum found due from the guardian after an enquiry into the accounts, and the only order which

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.

it could pass is for the payment of the balance on the accounts exhibited by the guardian. 161 I.C. 493=1936 A.W.R. 100=1936 A.L.J. 36=1936 A. 179. A ward cannot maintain a suit against the widow and minor sons of his deceased guardian. 9 I.C. 591=74 P.W.R. 1911 (22 A. 332, Mal.; 11 Bom.L.R. 190; 7 I.C. 214, Dist.). Meaning of "property belonging to the ward" in sec. 41 (3). 51 I.C. 529=1918 M.W.N. 440. "Any cause" includes death of the minor which terminates the guardianship. 51 I.C. 529. Death of ward—Power to direct guardian to hand over properties to heir. 51 I.C. 529=1918 M.W.N. 440. See also 42 A. 1=52 I.C. 167; 92 I.C. 196=1922 S. 269. Death of ward—Succession disputed—Court should not order guardian to hand over properties to one of the claimants. See 22 L.W. 642=92 I.C. 570. If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under sec. 39 for his removal and the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody. 100 I.C. 807=1927 L. 266. Person other than natural guardian appointed as guardian—Effect—Power of natural guardian, does not revive on removal of guardian so appointed. See 50 C.W.N. 129.

SECS. 41, CLS. (3) AND (4).—When the *quodam* guardian has complied with the directions of the Court under sub-sec. (3), the Court has full discretion in the matter under sub-sec. (4) to discharge him, if it thinks fit. In exercising such discretion the Judge is exercising a jurisdiction vested in him and as such it cannot be interfered with in revision. I.L.R. (1938) Mad. 667=1938 Mad. 347=(1938) 1 M.L.J. 285 (F.B.). Where the ward is not satisfied by the accounts rendered by the guardian, it is the duty of the Court to order an enquiry into the accounts. The Court cannot shirk its duty by suggesting a remedy by way of a separate suit in view of the provisions of sec. 48. 191 I.C. 108=1940 Rang. 246.

CL. (4).—A suit will lie against the guardian's son and a surety to render accounts in the absence of an order of discharge of the guardian. 67 I.C. 935=3 Lah.L.J. 364. Even after discharge of guardian his liability continues for mistakes discovered subsequently. 23 A.L.J. 428=88 I.C. 165=1925 A. 457. To bar a suit by a ward on attaining majority against a guardian for rendition of accounts, the order of discharge under sec. 41 (4) must be in express terms. 25 P. R. 1918=41 I.C. 344 (34 O. 211; 15 C.L.J. 57, Foll.). The proper thing for a Court when the guardian applies for a discharge, is to give a notice to the minor. If the minor

If, however, he has any objections, the Court may look into them in a summary manner, and if it is satisfied *prima facie* that there is some force in the objections, it will refuse to declare the guardian discharged from his liabilities under sec. 41 (4), and direct the minor to obtain redress by means of a suit, and the discharge will be given on the basis of the decision of the regular suit. 161 I.C. 493=1936 A.L.J. 36=1936 A. 179. Where a guardian of property has been appointed, on the minor coming of age, the proper course for a Court is either to refuse a discharge if it appeared that there was sufficient reason to keep open the question of the guardian's liability or to exercise its power under sec. 41 (4) and discharge him if it considered that he has acted properly throughout and that no reasonable claim could be brought against him. I.L.R. (1938) Mad. 667=1938 Mad. 347=(1938) 1 M.L.J. 285 (F.B.). An order discharging a guardian under sec. 41 (4) must be regarded as discharging him from all his liabilities as guardian except in respect of any frauds committed by him which may subsequently be discovered. "Liability" referred to in the clause is not confined to liabilities to which the guardian is made subject by the Act but includes all the liabilities of the guardian under the general law to render an account of his management to the minor. When the guardian has rendered accounts and has been discharged by the Court under S. 41 (4), it is not open to the minor after becoming a major to sue the guardian praying that an account should be taken of the management. The suit, to be maintainable, should be framed as one for falsifying or surcharging the account already rendered by the guardian and not merely for taking an account. 44 L.W. 441=1936 M. 868=71 M.L.J. 658. When an application is made by the mother of a minor under S. 39 for removal of a guardian appointed under the Act and for appointing herself as guardian of the property of the minor, and the Court orders the guardian to be discharged on the ground that he had furnished proper accounts which were checked and found correct by the Court, the discharge must be deemed to have been granted under S. 41 (4) of the Act. 44 L.W. 441=1936 M. 868=71 M.L.J. 658. See also 8 Mys.L.J. 25. Order of discharge of guardian must be express—Guardian cannot set up title of third person. 2 Pat.L.T. 556=61 I.C. 807=6 Pat.L.J. 273. See also 1932 L. 306. Minor attaining majority—Discharge of guardian—Filing accounts in Court—Court has no power to inquire into correctness of accounts—Separate suit is remedy of minor. 50 M. 80=1926 M. 977=51 M.L.J. 241. On this section, see also 26 A.L.J. 290=1928 A. 259.

42. When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.

**TERMINATION OF GUARDIANSHIP—SUBSEQUENT ORDER FOR RESTORATION OF PROPERTY—POWER OF COURT.**—An order for delivery of specific properties, to wit. Government Promissory Notes can be made against the guardian on an application made even after the termination of the guardianship by reason of the ward having attained majority. (5 C. W.N. 207, Dist.) 152 I.C. 1073=38 C.W. N. 438=1934 C. 520.

**PROPERTY OF WARD NOT TAKEN POSSESSION OF BY THE GUARDIAN—ORDER FOR RESTORATION.**—Though it may be the duty of the guardian, as soon as he was appointed as such, to take possession of the ornaments of the ward from whomsoever they were with, and his failure to do so is a great dereliction of duty, where, however, it is proved he had never obtained possession of those ornaments, no order can be made under S. 41 directing him to restore such property. 152 I.C. 1073=38 C.W.N. 438=1934 C. 520.

**INTEREST, RATE OF ON RESTORATION.**—Where the guardian is ordered, to restore certain Government Promissory Notes belonging to the ward, he can only be charged with interest at 3-1/2 per cent., the interest which the ward would have got if those notes had been duly handed over to her. 152 I.C. 1073=38 C. W.N. 438=1934 C. 520.

**SECS. 41 AND 43: GUARDIAN REQUIRED TO CONTINUE PERIODICAL PAYMENTS—APPEALABILITY OF ORDER.**—Where a guardian has been required to continue the fixed periodical payments which the Court required him to make as a condition of being appointed guardian, and it is because he is unwilling to comply with this condition that he refuses to act as guardian, the requisition is not an order under S. 41, but one under S. 43 and as such is appealable. 1935 L. 931.

**SECS. 41 (3) AND 45.**—The power of a Court under S. 41 (3) to direct a guardian on termination of his guardianship to deliver any property belonging to the ward extends to monies belonging to the minor. S. 45 is not inapplicable to a guardian after his removal. In view of the above, it cannot be contended that the accounts filed by a guardian prior to his removal should be deemed to have been passed by the Court. 19 Pat. 398, 485=1938 P.W.N. 509=1938 Pat. 398. There is no provision in the Guardians and Wards Act which authorises the execution of an order passed by the District Judge in a proceeding under that Act, directing an ex-guardian to deposit into Court a certain sum of money. Though the Court has ample powers to enforce obedience of its orders by

proceeding under S. 45 of the Act, the Act nowhere provides that an order may be executed as if it were a decree or an executable order of a Civil Court within the meaning of S. 36, C.P. Code. It is, however, open to the District Judge to proceed under S. 45 or direct the institution of a regular suit against ex-guardian so that the amount which is ultimately found to be realisable from him may be realised from the properties given by him as security under a security bond executed by him in favour of the Court. A guardian or ex-guardian can be directed to bring in the money which is found due from him upon a proper scrutiny of the accounts and not merely of so much of the money as he admits to be due from him, and in case of his failure to do so, he can be proceeded against under S. 45 of the Act to enforce that order. Such an order cannot be executed as if it were a decree of a Civil Court. 21 Pat. 223=1942 P.W.N. 188=A.I.R. 1942 Pat. 422.

**SECS. 41 (3) AND 43: DUTY OF WARD—POWER OF COURT TO DETERMINE TO WHOM GUARDIAN OR REMOVER SHOULD DELIVER PROPERTY.**—When a ward is dead, the Court has jurisdiction under S. 41 (3) to direct the guardian or receiver to hand over the property in accordance with the Court's orders. The Court may direct the filing of an interpleader suit. There is, however, no restriction on a Court's powers to determine to whom the property should be handed over and such determination in no way confers a title on the person to whom the property is given, and the question of title is not concluded by the order. 1944 Nag. 528=1944 Pat. 111=A.I.R. 1944 Nag. 528.

**SECS. 41 (3) AND 45.**—This section comes into operation only where a guardian is properly removed. 27 I.C. 28=20 C.L.J. 298. Object of the section. See 4 I.C. 603. Court has power to appoint a person who has not made an application himself and whose name is not mentioned in an application under this section as guardian. (Ibid.) An order appointing a guardian under S. 42 is appealable under S. 47. 93 I.C. 776=7 S.L.R. 90. Where a guardian of the person and property of a minor has been appointed, the minor should be treated as a minor or infant and would not be able to enter into a contract or to transact any kind of business himself until the age of 21, and when a guardian so appointed has resigned, another guardian should be appointed to the person and property of the minor even though he

## CHAPTER IV.

## SUPPLEMENTAL PROVISIONS.

43. (i) The Court may, on the application of any person interested or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court.

has exceeded the age of 18 years. 162 I.C. 716=1936 L. 142.

SEC. 43.—A guardian disobeying an order of the District Court under the Act can be ordered to give security for his own appearance but cannot be compelled to cause the production of another person. 18 I.C. 922=24 M.L.J. 231. The exercise of powers by District Judges over the guardians appointed by them, should be kept within limits provided by law, and should not be wholly arbitrary, made before necessary enquiries are held in the manner provided by law. Orders which are arbitrary are liable to be set aside. 64 C.L.J. 556=1937 O. 424. S. 43 (4) limits the exercise of the powers to punish a disobedience of orders passed under cls. (1) and (2). 103 I.C. 493. In the case of a minor for whom a personal guardian has been appointed and who undertook not to marry the minor without the Court's permission, the marriage or connivance at marriage with the ward of the Court without the consent of the Court is contempt of Court liable to be severely punished. These powers of the District Judge are however limited to the actual guardian in respect of whom the order is made and cannot be exercised as against persons indirectly committing the breach by assisting the guardian in the act. (42 C. 351, Rel. on.) 31 Bom.L.R. 1120=122 I.C. 140=1929 B. 417. "Regulating the conduct or proceedings of a guardian" cannot be interpreted as an order holding that prior to the date of such order guardian had caused loss to the estate which he should make good. (1926 M. 478, *supra* app.) 121 I.C. 168=1930 S. 43. S. 43 enables a Court to regulate by its order the conduct of persons either appointed or declared by the Court. A person who is appointed executor under a will and who disclaims that he is a guardian of the minor sons of the testator cannot be declared to be a guardian against his will by reason of S. 17 (5) of the Act. S. 43 is therefore inapplicable to him, and does not justify the Court to impose conditions on him in regard to his discharge of duties as guardian. *Obiter*.—Under S. 39 which is wider in its scope than S. 43, the Court may remove a guardian appointed or declared by the Court or a guardian appointed by a will. 44 L.W. 513=1936 M. 843=71 M. L.J. 417. One of the duties of a guardian of a minor girl is to provide a suitable bridegroom. Whatever he does in relation to that is either conduct or proceedings within the meaning of S. 43. Where a Court authorises the guardian to celebrate the marriage of the girl, his act is a regulation of

conduct or proceeding on the part of the guardian. The appellate Court has therefore the right to hear appeal from such an order under the provisions of S. 47 (1) read with S. 43. 1930 A.L.J. 152=121 I. C. 690=1930 A. 66. It is not the function of the District Judge to act as a match-maker for the female ward, much less on the application of the guardian of the property of the ward to select a particular bridegroom and force him upon the minor against the wishes of the minor and her step-mother who is appointed guardian of the person of the minor. The natural guardian or the guardian appointed by Court for the person of the minor should apply to the Court for sanction in granting which the wishes of the minor where the minor is old enough to form an intelligent preference, cannot be ignored. 56 B. 71=130 I.C. 732 (2)=34 Bom.L.R. 83=1932 B. 156. Legislature has neither expressly nor impliedly given power to the Court to record a definite finding as to the exact amount due by the guardian as a result of an enquiry binding upon the guardian and to compel its payment; and if there is a definite finding by a Court as to the amount which the ex-guardian had to pay as the result of the enquiry, to that extent the finding is not warranted by the provisions of the Act and is without jurisdiction. 121 I. C. 168=1930 S. 43. S. 43 read with S. 34 impliedly provide for expenditure in connection with the auditing of the accounts relating to the property of the ward. 11 P. L.T. 349=1930 P. 384 (2). As to power of Court to make order in relation to third parties, see 1934 A. 1043=1934 A.L.J. 1208. Distinction in powers of Court under Secs. 43 and 12 of this Act and O. 39, C. P.C. See 1940 N.L.J. 157=1940 Nag. 203.

APPLICATION FOR INVESTMENT OF MINOR'S MONEY—APPEAL.—An application under S. 43 (1) of the Act can be made only by a person interested in the minor. Where a stranger filed an application under S. 43 of the Act praying that a loan might be ordered to be given out of the minor's funds on a first mortgage of immovable properties and notices were issued to the personal guardian, the outstandings' guardian, and the immovable properties guardian of the minor and though the several guardians opposed the petition the Court ordered the grant of the loan, *held*, that the order was one regulating the conduct or proceedings of the guardian appointed by the Court, as contemplated in S. 4, against which an appeal would lie to the High Court under S. 47 (1) of the Act. *Held, further*, that the petitioner was not a

(2) Where there are more guardians than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit.

(3) Except where it appears that the object of making an order under sub-section (1) or sub-section (2) would be defeated by the delay, the Court shall, before making the order, direct notice of the application therefor or of the intention of the Court to make it, as the case may be, to be given, in a case under sub-section (1), to the guardian or, in a case under sub-section (2), to the guardian who has not made the application.

(4) In case of disobedience to an order made under sub-section (1) or sub-section (2) the order may be enforced in the same manner as an injunction granted under section 492 or 493 of the Code of Civil Procedure, in a case under sub-section (1), as if the ward were the plaintiff and the guardian were the defendant, or, in a case under sub-section (2) as if the guardian who made the application were the plaintiff and the other guardian were the defendant.

(5) Except in a case under sub-section (2), nothing in this section shall apply to a Collector who is, as such, a guardian.

44. If, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, a guardian appointed or declared by the Court removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of S. 26, he shall be liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months.

Penalty for contumacy.

45. (1) In the following cases, namely:—

(a) if a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction under section 12, sub-section (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under S. 25, sub-section (1), or

#### LEG. REF.

<sup>1</sup> See now O. XXXIX, Br. 1 and 2 in the First Schedule to the Code of Civil Procedure (Act V of 1908).

<sup>1</sup> The word "District" was omitted by Act IV of 1926, S. 4.

person interested in the minor and consequently had no *locus standi* to make the application under S. 43 (1). 57 M. 712=1934 M. 207=66 M.L.J. 351. See also 41 Bom.L.R. 757=1939 Bom. 366. On this section, see also 15 C.L.J. 127; 13 I.C. 351; 10 M.L.J. 305; 6 I.C. 862; 16 B. 307=1939 Lah. 118. See also 1932 L. 272, cited under S. 34, *supra*.

Secs. 43 to 45 have no application to cases where interim orders in the form of injunctions restraining persons from causing injury to the persons or property of minors are issued by the Court. 28 M.L.R. 332.

Sec. 45.—The words "recusancy" in S. 45 means something more than mere disobedience of an order under Cl. (d) in S. 34. 49 I.C. 624; 17 A.L.J. 300. On this section, see also 16 M.L.J. 286; 1 I.C. 338=23 Bom.L.R. 190. Section applies also to a guardian who has been removed. 175 I.C. 173=19 Pat.L.T. 485=1938 Pat. 398. Under

S. 45 it is not open to the Court to take disciplinary action against a late guardian for non-compliance with an order issued to him to pay into Court an amount which was not admittedly due from him, but was arrived at by the Court itself on the basis of a report made by the present guardian, notwithstanding the Court's own inquiry into the business of the late guardian. 1938 Pat. 398. Guardian to deposit moneys alleged to be misappropriated—imposition of fine, if and when legal. 25 C.L.J. 149=36 I.C. 286=21 C.W.N. 688. See also 4 P. 262=1925 P. 267=25 A.L.J. 736=38 I.C. 244=1925 A. 735, 7 Pat.L.T. 473. An order imposing a fine under S. 45 for not producing a minor in Court is bad, Courts should not take proceedings, especially of a punitive kind without giving the party concerned notice to show cause against such proceedings. 40 P. L. R. 532. Power of Court to direct a person other than guardian to produce the minor in Court. 1929 C. 27. S. 45 is intended to punish wilful disobedience by the guardian to an order issued to him by the Court which it is within his power to comply with if he is so minded. Cl. (e) places failure by the legal representative of a deceased guardian to de-



(b) if a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under clause (b) of S. 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (c) of that section, or to pay into the Court the balance due from him on those accounts in compliance with a requisition under clause (d) of that section, or

(c) if a person who has ceased to be a guardian, or the representative of such a person, fails to deliver any property or accounts in compliance with a requisition under S. 41, sub-section (3),

the person, guardian or representative, as the case may be, shall be liable, by order of the Court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement or to exhibit the accounts, or to pay the balance, or to deliver the property or accounts, as the case may be.

(2) If a person who has been released from detention on giving an undertaking under sub-section (1) fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and re-committed to the civil jail.

46. (1) The Court may call upon the Collector, or upon any Court subordinate to the Court, for a report on any matter arising

Reports by Collectors and Subordinate Courts.

in any proceeding under this Act and treat the report as evidence.

(2) For the purpose of preparing the report, the Collector or the Judge of the subordinate Court, as the case may be, shall make such inquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a Court by the Code of Civil Procedure.

liver any property or account in his possession on the same footing as failure by the guardian himself to do the same. This clause therefore refers only to wilful non-compliance with what is within the competence of the person ordered to do which he has contumaciously declined and nothing more. 121 I.C. 168=1930 S. 43. Where the Court acting under S. 45, imposed penalty on the guardian for non-compliance of an order to produce the minor without giving him an opportunity to show cause against infliction of the penalty, *held*, the order imposing penalty was obviously untenable. 114 I.C. 333=1929 L. 680. The Court has no authority under S. 45 to demand payment from the guardian of any more than the balance shown due by the guardian's accounts as put in. Such order cannot also be made when no enquiry is made, even assuming that the guardian's accounts are false, as to what the income and the expenditure for each year actually is. 125 I.C. 328=1930 L. 558. An order by the Court directing a guardian to pay unrealised purchase-money from his vendee—Order to pay unrealised money in Court or pay a daily fine—Whether *ultra vires*. 33 I.C. 918=20 O.W.N. 663. Appeal against order of fine. See 23 A.L.J. 736=88 I.C. 844=1915 L. 785. As to security by Court of

guardian's accounts, see 107 I.C. 152=7 P. 144.

SEC. 46.—It is only when the District Court calls upon the Collector to report under S. 46 that it is open to the Court to treat it as evidence. 25 Bom.L.R. 1232=1924 B. 157. On this section, see also 26 B. 716; 7 A.L.J. 321; 23 B. 698.

APPEAL—HIGH COURT—INHERENT POWER.—The High Court, apart from Cl. 15 of the Letters Patent, has inherent jurisdiction to hear an appeal in a matter affecting a Ward of Court. 32 Bom.L.R. 1301. See also 121 I.C. 690. No appeal lies from an order calling on the guardian to pay such balance as the Court may find to be due from him. 34 P.L.R. 549=1933 L. 484=141 I.C. 590. An order entitling ward to recover a sum of money from his guardian is not an order regulating the conduct or proceedings of a guardian or settling a matter in difference, etc., within the meaning of S. 47 (i) of the Guardians and Wards Act, and is, therefore, not open to appeal. 154 I.C. 17=11 O.W. N. 1625=1935 O. 180. Interlocutory order—Refusal of application to be appointed guardian—No appeal lies. See 38 O.W.N. 1083. It is doubtful if an order appointing a guardian is appealable at the instance of the guardian on the ground that the security



Orders appealable.

47. An appeal shall lie to the High Court from an order made by a <sup>1</sup>[\* \*] Court—

(a) under S. 7, appointing or declaring or refusing to appoint or declare a guardian ; or

(b) under S. 9, sub-section (3), returning an application ; or

(c) under S. 25, making or refusing to make an order for the return of a ward to the custody of his guardian ; or,

(d) under S. 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto ; or,

(e) under S. 28 or S. 29, refusing permission to a guardian to do an act referred to in the section ; or

(f) under section 32, defining, restricting or extending the powers of a guardian ; or

(g) under section 39, removing a guardian ; or

(h) under section 40, refusing to discharge a guardian ; or

(i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order ; or,

(j) under section 44 or section 45, imposing a penalty.

48. Save as provided by the last foregoing section and by section 622<sup>2</sup> of

Finality of other orders. the Code of Civil Procedure, an order made under this Act shall be final and shall not be liable to be

contested by suit or otherwise.

49. The costs of any proceeding under this Act, including the costs of main-

Costs.

taining a guardian or other person in the civil jail, shall, subject to any rules made by the High Court

under this Act, be in the discretion of the Court in which the proceeding is had.

#### LEG. REF.

<sup>1</sup> The word "District" was omitted by Act IV of 1926, S. 4.

<sup>2</sup> See now S. 115 of the Code of Civil Procedure (Act V of 1908).

demanding from him by that order is excessive; but in any case revision would lie. 34 P.L.R. 833.

SECS. 47 AND 48: GENERAL.—Orders under the Act are final except where they are challenged in appeal or revision. See 85 I.C. 687=1925 O. 1160; 1925 O. 260. See also 1942 Sind 98; 1942 Lah. 119.

CASES WHERE APPEAL LIES.—An appeal lies only against an order appointing a person, guardian of the property of a minor. 30 M.L.J. 508=34 I.C. 432. But an order approving the security furnished by him and ratifying the original appointment is not appealable. 30 M.L.J. 508. (27 I.C. 921, Foll.) Order sanctioning sale of minor's property is appealable. 1924 N. 269. Whether an order directing the marriage of a minor ward is appealable, see 56 B. 71=137 I.C. 732=34 Bom.L.R. 83=1932 B. 156. Third party—Application for investment of minor's money—Order made against wishes of guardian—Appeal lies. See 57 M. 712=148 I.C. 583=1934 M. 207=66 M.L.J. 351, cited under S. 43, *supra*.

CASES WHERE NO APPEAL LIES.—An order refusing to remove a guardian is final and no appeal lies against it. 18 A.L.J. 624=56 I.C. 208; 1924 M. 327. See also 78 I.C. 138 (Order fixing remuneration of guardian). See also 45 M. 873=45 M.L.J. 481. There

is no appeal against an order of the District Judge refusing to order the person in possession of a minor's property to hand over the property to an appointed guardian and referring the guardian to a separate suit. 40 P.L.R. 1912=13 I.C. 326. An order returning an application for guardianship for presentation to the Court having territorial jurisdiction, is not appealable. 53 I.C. 563=107 P.R. 1919. An order of the District Judge sanctioning a marriage of minor girl while an application for appointing a guardian for her is pending is not appealable. 44 B. 690=57 I.C. 79. Order fixing expense of maintenance and education of minor is not appealable. 1925 N. 141. See also 1938 N.L.J. 195=1 L.R. (1940) Nag. 221=1938 Nag. 495. Application dismissed for non-appearance—Second application if lies—Order dismissing the latter application—Appeal. 18 I.C. 985=17 O.W.N. 429. Third party in possession of minor's property—If he can be compelled to hand it over to the guardian—Order refusing to compel—Not appealable. 40 P.L.R. 1912=13 I.C. 826. No appeal is allowed against an order calling upon a guardian to pay into Court the balance due from him on settlement of his accounts. 55 I.C. 587.

REVISION.—Orders under S. 34 are open to examination by the High Court on the revision side. 55 I.C. 587. See also 78 I.C. 138. It is doubtful if an order appointing a guardian is appealable at the instance of the guardian on the ground that the security demanded from him by that order is exces-

50. (i) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules<sup>1</sup> consistent with this Act—

(a) as to the matters respecting which, and the time at which, reports should be called for from Collectors and subordinate Courts;

(b) as to the allowances to be granted to, and the security to be required from, guardians, and the cases in which such allowances should be granted;

(c) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in sections 28 and 29;

(d) as to the circumstances in which such requisitions as are mentioned in clauses (a), (b), (c) and (d) of section 34 should be made;

(e) as to the preservation of statements and accounts delivered and exhibited by guardians;

(f) as to the inspection of those statements and accounts by person interested;

<sup>2</sup>[(ff) as to the audit of accounts under section 34-A, the class of persons

#### LEG. REF.

<sup>1</sup> For rules made by the Judicial Commissioner, Central Provinces, see *Central Provinces Gazette*, 1908, Part I, p. 765.

<sup>2</sup> Inserted by Act XVII of 1929. See notes under S. 34-A.

For rules made by the Chief Commissioner, North-West Frontier Province, see *Gazette of India*, 1906, Part II, p. 546.

sive; but in any case revision would lie. 34 P.L.R. 333.

REVIEW.—An order for appointing a guardian of a minor under S. 7 is not open to review. 4 Lah.L.J. 274=1922 L. 395 (143 P.R. 1906, Foll.). See also 1924 N. 269 (Order sanctioning sale of minor's property).

RIGHT OF SUIT.—[See also notes under S. 47, *supra*.] There is nothing in the Guardians and Wards Act to prevent a Hindu husband from maintaining a suit in the Civil Court for a declaration that a minor was his lawfully wedding wife. There is nothing in the Act to suggest that the marriage of a minor girl under his custody by the mother of the girl without the approbation of the former is null and void. 133 I.C. 289=1931 A.L.J. 816. An order dismissing an application for guardianship cannot be contested by a regular suit. 33 I.C. 987=24 P.W.R. 1916. S. 48 does not cover the case of a requisition under S. 41 (3) and a separate suit will lie to contest the propriety of the requisition under S. 41 (3). 51 I.C. 236=36 M.L.J. 189. Order of District Judge fixing amount for marriage expense is not open to revision. 92 I.C. 482=1926 A. 301. Whether a valid sanction under S. 31 by a Judge could be assailed in any legal proceedings, see 27 O.C. 284=1925 O. 237. Powers of guardian—Right to institute suit—Delegation of powers. See 128 I.C. 763=1930 A. 875.

Smo. 47 (i).—See 154 I.C. 17=1935 O. 180. The performance of the marriage of the ward is one of the proceedings of a guardian referred to in S. 43, and an order refusing to sanction the marriage of the ward upon the requisition of the personal guardian is

41 Bom.L.R. 757=1939 Bom. 366.

SEC. 48.—It is not open to a plaintiff in order to enforce a debt contracted by a minor to show that a judgment which has the effect of making him a minor (i.e., an order appointing a guardian for the minor and thereby extending the period of minority) was obtained by collusion. S. 48 bars any contest regarding the validity of the judgment appointing a guardian except by the procedure of appeal or revision. Since the judgment falls under S. 43 of the Evidence Act, there is no power to attack that judgment under S. 44 of the Evidence Act. 53 L.W. 352=1941 M.W.N. 237=1941 Mad. 569= (1941) 1 M.L.J. 492. The Court has no authority to lay down a period of limitation different from that prescribed by the Limitation Act and has no power to compel the ward to institute a suit for accounts against the guardian within that period under the threat that failure to sue as aforesaid would result in the discharge of the guardian. 191 I.C. 108=1940 Rang. 246. When a ward dies court's power is not restricted in determining as to whom property should be handed over—Questions of title not concluded by order under S. 48. 1944 N.L.J. 364=1944 Nag. 334.

SEC. 49.—There is no law which entitles a person to start a litigation for the appointment of guardian of a minor and then later on call upon the minor to recoup him of the cost of litigation. S. 49 gives the Court ample powers to order who should bear the cost of the litigation. If he carries on the litigation honestly for the benefit of the minor concerned, it is open to him to ask the Court to allow him the costs from the minor's estate. When he does not do that, a suit by him for recovery of the amount of costs from the minor will in no circumstances be maintainable. 1936 P. 194=16 Pat.L.T. 649.

SEC. 50.—Rules and forms made by the High Court requiring the appointment of guardian to be postponed to the furnishing and approval of security, *if ultra vires*. 34 I.C. 432=30 M.L.J. 2409.

See also 184 I.C. 840=

who should be appointed to audit accounts, and the scales of remuneration to be granted to them ;]

(g) as to the custody of money, and securities for money, belonging to wards ;

(h) as to the securities on which money belonging to wards may be invested ;

(i) as to the education of wards for whom guardians, not being Collectors have been appointed or declared by the Court ; and

(j) generally, for the guidance of the Courts in carrying out the purposes of this Act.

(2) Rules under clauses (a) and (i) of sub-section (1) shall not have effect until they have been approved by the Provincial Government, nor shall any rule under this section have effect until it has been published in the Official Gazette.

51. A guardian appointed by or holding a certificate of administration from a Civil Court under any enactment repealed by this Act shall, save as may be prescribed, be subject to the provisions of this Act, and of the rules made under it, as if he had been appointed or declared by the Court

Applicability of Act to guardians already appointed by Court.

under Chapter II.

52. Amendment of Indian Majority Act. [*Repealed by Repealing Act (I of 1938), S. 2 and Sch.*]

53. [*Amendment of Chapter XXXI of the Code of Civil Procedure.*] *Repealed by the Code of Civil Procedure ( V of 1908), S. 15 and Sch. V.*

#### THE SCHEDULE.

[ENACTMENTS REPEALED. *Repealed by the Repealing Act (I of 1938), S. 2 and Sch.*]